IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 039 of 2020

[HBC Case No. 227 of 2007 & 257 of 2007L]

BETWEEN : **HONEYMOON ISLAND (FIJI) LIMITED**

Appellant

AND : **iTAUKEI LAND TRUST BOARD**

Respondent

Coram : **Dr. Almeida Guneratne, P**
Jitoko, VP
Dayaratne, JA

Counsel : **Mr C. B. Young for the Appellant**
Mr J. Cati for the Respondent

Date of Hearing : **19 July 2023**

Date of Judgment : **28 July 2023**

JUDGMENT

Almeida Guneratne, P

[1] I, unreservedly agree with the principal judgment of His Lordship.

Jitoko, VP

Background

[2] Mociu Island is part of the Mamanuca island group lying alongside the Yasawa group to the west of the country. The Mamanucas (as the group is commonly referred to) is in the district of Malolo, in the province of Nadroga/Navosa. The island is rocky covered with tropical scrubs and trees with white sandy beach on the eastern part of the island, accessible to both boats and seaplanes. It is approximately 2.1448 hectares or about 5.25 acres. The island was native reserve land until 2007 and owned by the iTaukei landowning unit Mataqali Ketenamasi, Yavusa Lawa, of Yaro village in Malolo. The island is ideal for tourism purposes and lies within the tourism belt area where numerous international island resorts such as Malolo Island Resort, Likuliku Lagoon Resort, Musket Cove Resort, Plantation Island Resort, Castaway Island Resort, Mana Island Resort, are located, and also where backpackers and top class residential tourism leases are found.

[3] The history of the early dealings in Mociu Island is fully encapsulated at paragraphs 6, 7 and 8 of the High Court judgment of Stewart J as follows:

> *"6. Use of Mociu Island for tourism goes back at least to 1984, when the 2nd Defendant Oceanic Schooner Company (Fiji) Ltd was incorporated to build and operate a motor/sailing vessel (Whales Tale) to provide one day tours in the Mamanuca Group for tourists. One of the islands in this five island tour was Mociu, which was attractive because it was uninhabited, had all-tide beach access without having to cross the reef, and was pristine, undeveloped and photogenic. Oceanic Schooner brought visitors to the island (which it referred to in its marketing material as 'Honeymoon Island') for 90 minutes on each cruise, before moving on.*
>
> *7. Oceanic Schooner Company (Fiji) Ltd was owned and managed by Mr. William Gock and his business partner Paul Myers as shareholders and directors of the company. The company was not the only operator that used Mociu for tourism activities. The operators of nearby Plantation Island, Malolo Island (Musket Cove), Castaway Island and Mana Island tourist resorts also regularly took guests there for the snorkeling and swimming. It is not clear, during this period from 1984 to the mid-1990s, what*

arrangements (if any) these operators had with the landowners of the island, the Mataqali Ketenamasi of Yaro village.

8. *In the mid-1990s Messrs. Gock and Myers of Oceanic Schooner decided to try to secure exclusive use of Mociu. The company Honeymoon Island was incorporated in December 1995. It approached the landowners and, they say, obtained their blessing to the proposal. They then lodged an application with ILTB to obtain a lease for the island."*

Proceedings

[4] As the issues surrounding this appeal are clear, we need not traverse the pre-2003 dealings on Mocia Island, only the subsequent relevant events.

[5] The appellant, Honeymoon Island Limited (Honeymoon), was granted by the iTLTB (the Board) an Agreement to Lease Mocia Island on 9 May 2003. Four years later, on 7 June, 2007 the Board granted an Agreement to Lease of the same island to Follies International Limited (Follies) and the lease (Native Lease 29018) was subsequently registered on 28 July, 2008.

[6] In the action brought by the appellant (plaintiff) against the Board (the defendant), High Court Civil Action No. HBC 257 of 2007, the appellant sought:

"(1) Damages including consequential loss

(2) Compensation and/or other remedial orders under the Fair Trading Decree 1990 as this Honourable Court may deem just.

(3) For an Order restraining the Defendant whether by its servants or agents howsoever from further dealing with Mociu Island.

(4) For a declaration that the agreement dated 9 May 2003 between the plaintiff and the defendant over Mociu Island is valid and binding on the defendant.

(5) For an order for specific performance of the agreement dated 9 May 2003 between the plaintiff and the Defendant over Mociu Island

.

(6) Such further or other relief as this Honourable Court deems just"

[7] Follies (plaintiff) had also filed its Writ of Summons against Honeymoon (1st defendant) Oceanic (2nd defendant) and the Board (3rd defendant) HBC 225 of 2007, seeking:

> *"(a) A Declaration that the First Defendant has no legal right or interest over the island.*
>
> *(b) Damages including Punitive Exemplary and General Damages against the First and Second Defendants to be paid to the Plaintiff.*
>
> *(c) A Declaration that the Third Defendant unlawfully took possession of the Island in breach of the Lease Agreement and section 105 of the Property Law Act Chapter 130.*
>
> *(d) A Declaration that the plaintiff holds a Valid Lease in relation the island*
>
> *(e) Damages including Punitive Exemplary and General Damage against the Third Defendant*
>
> *(f) Indemnity costs against all the Defendants*
>
> *(g) Pre-judgment interest …."*

[8] Honeymoon filed its defence to this action and in addition filed a counterclaim for damages, including consequential loss based on paragraphs 15 – 17 of their defence as follows:

> *"15. The Plaintiff conspired with an officer or officers of the iTaukei Land Trust Board and/or other parties with the intent to causing loss and damage to the 1st Defendant and/or to the 2nd Defendant by preventing the 1st Defendant and/or the 2nd Defendant from entering and using Mociu Island pursuant to its Lease Agreement dated 9 May 2003 by including iTaukei Land Trust Board to unlawfully cancel or terminate the 1st Defendant's said lease.*
>
> *16. At all material times, the Plaintiff well know of the 1st Defendant's Lease (dated 9 May 2003) over Mociu Island but wrongly induced and prosecured the iTaukei Land Trust Board to take unlawful steps to cancel or terminate the 1st Defendant's said lease.*
>
> *17. By reason of the Plaintiff's action as set out in paragraphs 15 and 16 the iTaukei Trust Board purported to cancel or terminate the 1st Defendant's said lease and the 1st and 2nd Defendants suffered loss and damages, including consequential loss"*

[9] The Court made the Order of Consolidation of HBC 225 of 2007 and HBC 257 of 2007 on 26 July 2012.

Court Judgment

[10] In respect of the proceedings **Follies International Ltd v Honeymoon Is (Fiji) Ltd & Ors** CA No. HBC 225 of 2007, the Court dismissed both the claim by the plaintiff and the counterclaims by the 1st defendant HIL and Oceanic Schooner Company (Fiji) Ltd, HIL and Oceanic Schooner Company (Fiji) Ltd, the second defendant. The Court also discharged Caveat No. 819720, registered by HIL against the title of Mociu Island.

[11] In respect of **Honeymoon Island (Fiji) Ltd v iTaukei Land Trust Board** CA HBC 257 of 2007, the Court dismissed the claims by the plaintiff against the defendant counter claims by the defendant against the plaintiff.

Appeal

[12] Appeal is only in respect of the latter case and Counsel at paragraph 3.2 and 3.3 sets out its two (2) grounds of appeal as follows:

> *"3.2* ***Ground 1***
>
> *The judge erred in law in failing to discharge his duty to assess damages in favour of the Appellant against the Respondent when His Lordship had held at paragraph 96 of his judgment that the Respondent*
>
> > *"was in breach of its lease agreement with Honeymoon Island when it denied the existence of the lease and agreed in June 2007 to give a new lease to Follies.*
>
> *3.3* ***Ground 2***
>
> *The Judge erred in law in not awarding damages to the Appellant when he acknowledged at paragraph 97 of his judgment that*
> *"Normally such a breach would entitle Honeymoon Island to damages for any loss caused,"*

but then ignoring and/or not addressing the submission of the Appellant that judgment should be entered against the Respondent for the sum of $5million being the uncontested value of the island as per paragraph 13 (g) of the written submissions to the Judge on 26 February 2020 which was a written valuation by Denarau Real Estate Market Appraisal dated 17 July 2007 of the Island tendered as the Appellant's Exibit 33."

[13] I will first deal with Ground 2 of the appeal.

[14] The submission for compensation of $5million to be paid to NIL by the Board for loss of the use of Mociu Island is first raised by the appellant on 26 February 2020 in its submission to the court. It stated as follows:

> *"(g) If the court will not grant an order (as sought in the pleadings) directing the Registrar of Titles to cancel Native Lease 29108 then iTLTB must compensate for the value of the island which it had leased to Honeymoon and the undisputed value of the Island in the sum of $5million as per Denarau Real Estate Market Appraisal dated 17 July 2007 (Honeymoon Exhibit 33 signed by Leona Heeley who also happens to be a director of Follies (see p.21 of Transcript of proceedings for Thursday 21 June 2018)"*

[15] Exhibit 33 dated 17 July 2007 referred to in the appellant's submission, is a Market Appraisal authored by one Leona Heeley, a Director of Denarau Real Estate company, and the Court was also informed, she was also a company director of Follies, the plaintiff in HBC 225 of 2007. The Appraisal reads:

"Market Appraisal
for
Follies International Limited

<u>Mociu Island, Fiji Islands</u>

Denarau Real Estate has been involved in the listing of sale for private islands in the Mamanuca and the Yasawa Group of Islands, Fiji and has been asked to given an opinion of the current market value of Mociu Island being the asses of Follies International Limited.

In the writers view that Mociu Island would conservatively be valued at FJD$5,000,000.00 and that this company holds enquiry at this date and interest in the island.

The owners do not wish to sell at this time, however if this island was to be placed on the open market it would be easily sold due to its lovely white sandy beach and beauty along with being about 35 minutes boat ride from Port Denarau.

Yours sincerely,
(signed)
Leone Heeley
Director
Dated 17/7/07"

[16] Mr Gock, in examination-in-chief, was asked by Counsel of his interpretation of the Appraisal:

"*Q:* *Now can you look at document 33 please.*
Exhibit 33; can you identify what's the purpose of that document –it's a Denarau Real Estate Valuation by Leona Heeley correct?
A: *That's correct, my Lord.*

Q: *And what does it basically say?*
A: *It states that the value of Mociu Island is the amount of $5million.*

Q: *And who is Leona Heeley?*
A: *She is the Director of Denarau Real Estate; She is also a Director of Follies International Limited.*

Q: *And the real estate: it says Denarau Real Estate Valuation; was there a company called Denarau Real Estate?*
A: *Yes my Lord.*
Q: *How do you know this?*
A: *They were situated beside my office at Denarau.*

Q: *Denarau Marine area?*
A: *That's correct my Lord."*

The Validity of the Claim

[17] The $5million claim made by the appellant is based on *"the uncontested value of the island"* as compensation for the loss of the lease to Follies. But as Counsel for the respondent pointed out, the submission on the loss of $5million were not made during the

oral submissions of all the Counsel before the High Court on 20 February, 2020, and in particular, in the Counsel for the appellant's address as transcribed and appearing from pages 1612 to 1657 of the Court Record. This Court especially notes in this regard that questions asked by the court on what particulars or types of damages the appellant was seeking, could not be particularised by the counsel.

[18] This Court notes that the estimate of $5million is made by someone, who firstly from the evidence gathered, is not a qualified valuer, but merely a director of a real estate business involved in land development for tourism purposes.

[19] It would seem that the estimate of $5million she put on Mociu Island was for her company's own purpose given that her company, Follies was going to get the lease of the island. It could hardly be said that it represented an independent valuation given by a qualified valuer. As the author of the Appraisal was not called to produce and explain the report, there was no way it could be verified, or, as Counsel for the appellant had correctly submitted the valuation must be subject to proper methodology of assessment of comparable figures from similar cases. This could not be done given the way the Appraisal was produced into court and the absence of the author to be examined on her report.

[20] In any event, the claim for the $5million reflects the appellant's own assessment of damages FIL suffered as compensation for the loss of the use of the island through the Board's failure to follow through with the Agreement to Lease.

[21] Counsel submitted that *"since there was no alternative evidence of the value of the Honeymoon Island except for the Denarau Real Estate Market Appraisal, the loss to the Appellant is the value of the island being $5million."*

[22] The appellant finds support to this claim to the Court's observation at the beginning of paragraph 97 of its judgment when it said:

> *"97. Normally such a breach would entitle Honeymoon Island to damages for any loss caused. I have no doubt that Honeymoon Island did occur some damage…"*

[23] With respect, this Court reads the observation above as connected to, and in furtherance of, its pronouncements on the legal duties and responsibilities of both the parties as they relate directly or indirectly, to the loss of use of the island by their shared failures to bring about a binding lease agreement of Mociu Island.

[24] The compensation cannot surely be based on the fee simple or freehold ownership value of the Island, which is what the $5million estimated value represents. At the very most, the appellant, was only entitled, if at all, to the loss of use of the island for the duration of the terms of the lease. These losses it must prove under Ground 1 of the appeal.

[25] In my view, the claim for $5million in damages, based on the fee simple value of Mociu Island is unsustainable in law and is hereby dismissed.

Ground 1

[26] This ground is firmly premised on the court's finding at paragraphs 96 and 97 of its judgment when it said:

> *"96. However, as I have found, there was an agreement to lease, and the law and the contract meant that Honeymoon Island was entitled to notice of default before that lease could be determined by any breach on its part. The notice was not given, the lease agreement was not terminated, and so iTLTB was in breach of its lease agreement with Honeymoon Island when it denied the existence of the lease, and agreed in June 2007 to give a new lease to Follies.*
>
> *97. Normally such a breach would entitle Honeymoon Island to damages for any loss caused. I have no doubt that Honeymoon Island did occur some damage…."*

[27] The court then proceeded to explain the reasons why the appellant, in bearing some of the responsibilities, included the non-observance and breaches of the agreement to lease conditions, should not, expect to be awarded the quantum of damages it is seeking.

[28] Counsel for the appellant argued that once the Court had conclude that the respondent *"was in breach of its lease agreement with Honeymoon Island when it denied the existence of the lease and agreed in June 2007 to give a new lease to Follies,"* it followed that it was obliged to discharge its duty to assess damages in favour of the appellant. Instead, the court cast doubt but did not put the appropriate weight to the evidence of Gock, as illustrated in the evidence of the reduction of passenger numbers between 2006 and 2007. At his examination-in-chief, at page 1242 Vol.5 of the record, Mr Gock explained as follows:

> *"Q: And can you tell this court whether the loss or the damages; how you would like to describe it; that the injunction granted by Justice Gwen Phillips cause to the Oceanic Schooners.*
> *A: There was a huge amount of drop in number wise; passengers' number wise, My Lord.*
>
> *Q: And when you say drop, can you just be more particular in that regard, please?*
> *A: From August to December in 2006, we carried about 3,700 passengers My Lord; and after the injunction was issued in 2007, the same period between August and December; we carried 800 people less, My Lord, compared to 2006.*
>
> *Q: Okay. Now Mr. Gock, to your personal knowledge, who is using Honeymoon Island Limited today; also known as Mociu Island?*
> *A: Majority of the Mamanuca Island Resorts are using it, My Lord.*
>
> *Q: When you say majority of the Mamanuca Island Resorts, who are they-can you just identify that to Your Lordship?*
> *A: Plantation Island Resort, Musket Cove Island Resort, Malolo Island Resort, Likuliku Island Resort, Castaway Island Resort, and Mana Island Resort."*

[29] Upon cross-examination, Mr Gock, at pages 1291 to 1293 of Vol.5 of the record, said:

> *"Q: Very well. You gave evidence also yesterday comparing your bookings or your passenger numbers between August to December 2006, and August to December 2007; did you not?*
> *A; That's correct, My Lord.*
>
> *Q: And you said that approximately in the second year, 2007 you numbers were down by approximately 800.*
> *A: That's correct, My Lord.*
>
> *Q: Are we to take it as 800 over a 3 month period?*
> *A: 5 months period, my Lord.*
>
> *Q: Was it not the case though Mr. Gock, that we had a coup in December 2006 and in the year 2007, visitor arrivals were way down in 2006.*
> *A: Could you repeat the question please?*
>
> *Q: Do you remember we had the coup on December 5th, 2006?*
> *A: Yes My Lord*
>
> *Q: As a result of the coup, the tourist industry, as usual suffered immediately.*
> *A: That's correct, my Lord*
>
> *Q: When coups happen, people cancel their holidays, don't they?*
> *A: That's correct, My Lord*
>
> *Q: And it takes a long time for tourist confidence to grow again, doesn't it?*
> *A: That's correct, My Lord.*
>
> *Q: Because not just do the tourists see exaggerated pictures on television in Australia and New Zealand, they do see that, don't they?*
> *A: That's correct, My Lord*
>
> *Q: And they become frightened of coming, don't they?*
> *A: That's correct, My Lord.*
>
> *Q: Travel agents also don't want to book passengers to Fiji because they might become liable if something happens to the guests here, correct?*
> *A: That's correct, My Lord.*
> *Q: They also don't wasn't people to come here and then in the middle of the holiday, they have to organize their evacuation, that's correct, isn't it?*

A: That's correct, My Lord.

Q: So the tourist industry does not pick up for a few years, does it?
A: That's correct, My Lord

Q: So when you say that numbers were down between August and December 2007, down over August and December 2006; couldn't it?
A: That could be correct, My Lord

Q: It's also the case, isn't it; that in the year after the coup, resort properties have to reduce their rates to draw tourists who would not usually otherwise come to the islands; isn't that the case – they are a poorer variety of tourists who hare taking advantage of the low fares and low accommodation rates, correct

In order for a judge to make a finding (that he did not "accept that those losses have continued at the same level") in that manner he must have some evidence to make that comment."

[30] The court in assessing the loss to the appellant due to reduction in passenger numbers between 2006 to 2007, after conceding that in the circumstances, it was bound to incur some damage, added at paragraphs 97 and 98 of the judgment:

"97…But I have commented earlier in this judgment on the adequacy of Honeymoon Island's proof of the damage it suffered and for the reasons given I do not accept that its losses can be measured in the simplistic way that it proposes, with the reduction of passenger numbers between 2006 and 2007 attributed entirely to the loss of Mociu Island from the tour itinerary. Nor do I accept that those losses have continued at the same level, or indeed at all, from 2007 to now. As I have also observed, Honeymoon Island is not entitled to claim its losses, without giving credit for the costs it would have incurred in generating the income that it claims to have lost. On the basis that anything paid by Honeymoon Island towards rent was repaid by iTLTB in 2007, any losses that it was able to prove would have been offset, at least in part, by approximately $60,000 plus interest payable to iTLTB for rent for the period from 2003 to 2007.

98…Taking all these factors into account, I am not satisfied that Honeymoon Island is entitled to any further compensation for losses that might have arisen from iTLTB's breach of the lease agreement, other than to be relieved of the obligation under the agreement to pay rent and any other outgoings."

[31] These finding reached by the Court, are challenged by the appellant on the ground that there was no or inadequate evidence for it to draw such a conclusion from it. In addition, Counsel argued that Mr Gock's evidence was hardly challenged by the respondent.

[32] In my view, it is very clear from the cross-examination of Mr Gock by Counsel for Follies, that there was a definite drop in passenger numbers between 2006 to 2007, not only because of legal impediments such as injunctions that were in place, but more importantly, the political upheaval and uncertainty in the tourist market caused by the coup of 2005.

[33] Even if the respondent had not tendered any evidence or dearth of information to support the position that there was a drop in passenger numbers between 2006 and 2007, this court is satisfied that the court below was quite within its powers to exercise its discretion to evaluate and to reach a certain conclusion from the facts before it, unless the evaluation can be demonstrated to be perverse. Lord Nenberger in Re B (AChild) [2013] UKSC 33, at p53 observed:

> *"…where a trial judge has reached a conclusion, on the primary facts, it is only in a rare case, such as where the conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellant tribunal will interfere with it."*

[34] Similarly in **Langsam v Beachcroft LLP** [2012] EWCA, Arden L J said, at page 72:

> *"…where any finding includes any evaluation of facts, an appellant court must take into account that the judge has reached a multi-factoral judgement which takes into account his assessment of many facts. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach."*

Agreement for a Lease vs. Lease Agreement

[35] All through these proceedings the terms *"Agreement for a Lease"* or *"Agreement to Lease"* have been used interchangeably with the terms *"Lease"* or *Lease Agreement,"* as if they are one and the same.

[36] Under section 105 (5) of the Property Law Act 1971, the term is defined thus:

> *"lease" includes an original or derivative sublease; also an agreement for a lease where the lessee has become entitled to have his or her lease granted"*

[37] A *"lease"* or *"lease agreement"* is a document that is either duly stamped and registered with the Registrar of Titles, or is where the lessee is entitled to have his or her lease granted. In the case of the latter, the lessee has done all he or she is required to do by law, except the receipt of the registered lease. Either confer an indefeasible title.

[38] An *"Agreement for a Lease"* or an *"Agreement to Lease"* on the other hand, whilst recognizing some rights on a would-be lessee, (does not of itself bestow the leasehold title to the property, until and unless, all the requirements set out under the lease, including its Schedules, are fulfilled. So while the Agreement for a Lease may be a perfectly valid contract between the lessor and lessee, the Lease or Lease Agreement that confers the indefeasibility of the title does not in the case of the former, follow, until all the lease conditions are met.

[39] In this case it is clear from the judgment, that the court was referring to the Agreement to Lease not Lease Agreement or Lease, that constituted a contract conferring certain rights on the appellant, and conversely, duties, on the respondent, when it reached its conclusion at paragraph 96 of the judgment and cited at paragraph 26 above.

[40] The contract between the appellant and the respondent under the Agreement and the respondent under the Agreement to Lease was determined when the Agreement for Lease was issued to Follies in 7 June 2007.

[41] The losses claimed by the appellant in my view, must be measured and subject to the duration of the parties Agreement to Lease from 26 May 2003 and terminate at the date of the issuance of the Follies Agreement for Lease.

Whether Award of Damages is Compelling

[42] There is no doubt, as the High Court found, that the main fault in this matter lies with the respondent. Had its officials acted professionally and reacted in accordance with their statutory responsibilities promptly, these proceedings would have not taken 16 years of litigation. There is much to answer for into the mystery of the missing Stamped Agreement to Lease as well as why the payment of the stamp duties was made directly to the office of the Commissioner of Stamp Duties, instead of payment through the Board as is the normal procedure.

[43] At the same time, the Court is very mindful of the appellant's failings in not complying with its obligation, especially its non-compliance to meet the requirements as set out in the Schedules to the Agreement to Lease, from the failure to engage a registered surveyor within six (6) months from the dated of the Agreement to Lease, to defaults in payment of rent for each calendar year, when due.

[44] Any loss that would have been suffered by the appellant between the period 26 May 2003 to 7 June 2007 must necessarily be offset by annual rent that would have been payable to the respondent, plus interest and other fees due.

[45] In the end, although the Appellant could be said to have suffered some financial loss, not an iota of real evidence was placed before the Court, plus the fact that the basis of claiming damages under Ground 2 also being misconceived (viz: *"value of the land"* as distinguished from *"value of use of the land").*

[46] For the aforesaid reasons the Court has no alternative but to award nominal damages only.

Dayaratne JA

[47] I have read the judgment in draft of Jitoko VP and concur with his reasons and conclusions.

[48] **Orders**

1. *Appeal is dismissed.*

2. *Appellant is however entitled to an award of nominal damages in a sum of $500.00.*

3. *On a balance, the Court makes no order as to Costs.*

.....
Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL
FIJI

.....
Hon. Justice Filimone Jitoko
VICE PRESIDENT, COURT OF APPEAL

.....
Hon. Justice Viraj Dayaratne
JUSTICE OF APPEAL

Solicitors
Young & Associates for the Appellant
iTLTB for the Respondent