IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 100 of 2012

BETWEEN : **KENTO (FIJI) LIMITED** a limited liability company having its registered office at PO Box 124, Nadi.

Plaintiff

AND : **NAOBEKA INVESTMENT LIMITED** a limited liability company having its registered office at PO Box 1719, Nadi.

1st Defendant

AND : **iTAUKEI LAND TRUST BOARD** formerly known as NATIVE LAND TRUST BOARD, a statutory body registered under the provisions of the Native Land Trust Act having its head office at Suva, Fiji.

2nd Defendant

: **REGISTRAR OF TITLES** of Suvavou House, Suva.

3rd Defendant

RULING

INTRODUCTION

[1]. Naobeka Investment Limited (**"NIL"**) is a company formed by the traditional landowners of Malamala Island. The island is situated off the Nadi coast. I gather that it is a popular spot for day cruises for tourists on Denarau Island and nearby resorts. In that regard, the island is of immense interest to tour operators who see the servicing of that day cruise and associated activities on the island - as a viable and competitive business.

[2]. NIL holds a 99-year lease over the island commencing 01 July 2007. On 01 August 2007, NIL purportedly subleased the island to Kento (Fiji) Limited (**"KFL"**) for a period of 25 years. It is common ground between the parties that, not long after KFL acquired the sub-lease, it then entered into negotiations with Rosie Holiday Tours for the sale of the sub-lease to KFL. The KFL-Rosie deal, had it gone through, would have been worth

over FJD$1.5 million dollars. The price Rosie was prepared to pay was just a little above that figure. However, the deal fell through. The reason why that deal fell through, as far as I can gather, was because NIL took the decision to re-enter the sub-lease in 2012. This happened because of some alleged breaches of the sub-lease by KFL. It appears to me that KFL has not operated any business on the island since 2011 -2012. Whether that is due to the fact of the purported re-entry of the sub-lease by NIL, or whether it is due to the fact of the alleged breaches of the sub-lease by KFL, which triggered the re-entry of the sub-lease in the first place, is not clear to me. In any event, as it turns out, after NIL re-entered the sub-lease, it then entered into negotiations with another company, namely South Sea Cruises, to sublease the island in question.

APPLICATION BEFORE ME

[3]. Before me now is KFL's application to stop the above deal from happening. KFL's application was filed *ex-parte* on 08 July 2014 seeking the following Orders:

(i) that NIL (its servants and agents) be restrained from issuing or granting a sublease of the island (known as Malamala Island in Tikina of Nadi, Province of Ba comprising an area of 2.4260 hectares and the surrounding reefs and waters) to South Sea Cruises or to any other company or person or otherwise dealing with the same.

(ii) that iTLTB be restrained from granting any consent or otherwise taking any action to validate the issuing or granting of a sublease or proposed sublease or other dealing in respect of the island.

(iii) that NIL and iTLTB be restrained from going onto, taking tourists or other persons onto the island or otherwise taking possession of the said island.

(iv) that the Registrar of Titles be restrained from registering or otherwise taking any action to validate the issuing or granting of a sublease or proposed sublease or other dealing in respect of the island.

[4]. The application was made pursuant to Order 29 Rule 1(2) of the High Court Rules 1988. Order 29 Rule 1(2) states as follows:

> 1.-(2)Where the applicant is the Plaintiff and the case is one of urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made ex parte on affidavit but except as aforesaid such application must be made by Notice of Motion or Summons.

SUPPORTING AFFIDAVIT

[5]. The application is supported by an affidavit of Michael Clowes, who is one of two directors of KFL, the other being Clowes' wife. Clowes' affidavit was sworn in Brisbane on 03 July 2014. Clowes deposes as follows from paragraph 4:

> 3. .....
> 4. Briefly, Malamala Island.... is traditionally owned by mataqali Naobeka legally represented by their trustees, the first defendant company. The island is a favourite spot for day trips for tourists visiting Fiji as well as locals. Sometime in 2005, I was approached by the then head of the landowning unit to help them resolve a dispute over the island which had been ongoing for some years, including court cases in this Court filed in 2003. In return, for my wife and I to take over the running of day trips to the island. The end result was that on in August 2007, the traditional landowners entered into a headlease over Malamala with the first defendant for a 99 years term commencing on 1 July 2007 and the first defendant issuing a sublease to our company, the plaintiff, for a term of 25 years commencing from 1 August 2007. So there is still some 18 years of the sublease remaining. After waiting all those years and spending some $1.7m, the plaintiff finally commenced operations on 3 August 2007. Despite the effects on tourism in Fiji by the world recession, the coup in 2006, the devastating floods in 2009 and various attempts by some minority rebel members of the landowners to sabotage the business, the plaintiff's operations continued. On 28 July 2011 the first defendant executed a consent for the transfer of the plaintiff's sub-lease to Rosie Signs Ltd trading as Rosie Holidays in consideration for which the first defendant was to receive 20% of the sale proceeds of the sub-lease as is the legal requirement for such transactions. The second defendant subsequently reneged on this agreement so the plaintiff continued to operate day trips under the sub-lease. On 9 March 2012, the first defendant issued to the plaintiff an eviction notice under s 105 of the Property Law Act for alleged breaches of the sublease terms. The notice was defective so it was withdrawn and further notices were issued. The plaintiff challenged the validity of these notices and filed this Writ on 9 May 2012 together with an application for interim relief. Negotiations between the landowners, the first defendant and the second defendant took place which ultimately resulted in a deed of settlement being executed between the first defendant and the plaintiff on 21 May 2013 under which the first defendant was

to receive 50% of the sub-lease sale proceeds, that is $800,000. The first defendant again reneged on this deed of settlement. The dispute then remained unresolved.

5. Whilst the plaintiff's application for interim injunction remained unheard, the first defendant filed an application to have the plaintiff's action struck out. The applications came before the Master who decided with the agreement of counsel to hear the first defendant's application first. By Rulings dated 16 October 2013 and 25 February 2014, Masters Rajasinghe and Ajmeer dismissed the first defendant's strike out application. The matter was then adjourned to 17 April 2014 for further attempts at settlement. The matter did not settle so at the mention on 17 April 2014, counsel for the plaintiff asked the Master to relist the plaintiff's application for interim injunction for hearing. The Master then transferred the matter to the Deputy Registrar for it to be put before the Judge in Chambers. The hearing of the plaintiff's application is still pending and is not likely to take place until late this year or early next year 2015 as the time table for filing of further affidavits and other documents has not been set.
6. However, whilst awaiting the hearing, I have received certain information from Fiji that the first defendant, the landowners and the second defendant have taken steps to issue a sublease of Malamala Island to a company known locally as South Sea Cruises.
7. On 20th June 2014 I received a text message from Nimirote Seasea of Namotomoto village in Nadi and a member of mataqali Naobeka. I telephoned Nimirote after receiving this message and he told me that the directors of the First Defendant had held a meeting of the landowners on the previous night.
   During this meeting the Directors of the First Defendant advised the mataqali members present that they had agreed to a sub-lease of Malamala Island with South Sea Cruises and that the lease had the consent of the iTLTB, the second defendant.
8. Nimirote further stated that the mataqali was informed that South Sea Cruises would be cleaning up the island and preparing to start operations in a few weeks and that a new boat was being brought in to take passengers to Malamala and Tokoriki.
9. On 1st July 2014 I spoke to Maikali Nawaqavonovono also of mataqali Naobeka and he advised me that he'd been informed by relatives within the mataqali that money from South Sea Cruises would be distributed to mataqali members on Thursday 3rd July 2014.
10. I have been informed by the plaintiff's counsel that the effect of the two court rulings so far is that there are serious issues in this case which should be determined at a full hearing in open court. I am also informed that the plaintiff has good prospects of success at trial.
11. I am gravely concerned that the plaintiff's investment would be severely harmed if the defendants are allowed to continue with this new sublease whilst my case remains undecided. The first defendant has no assets other than its headlease over Malamala. Likewise, the mataqali Naobeka. Neither does the First Defendant have a bank account which is why payments of rent and other monies made to date have been directed by the first defendant and its solicitors to be made to the mataqali's veilomani club which operates a bank account. Neither has the First Defendant filed any tax returns since the commencement of the sublease and head-lease, to my knowledge.

12. **<u>The Plaintiff's solicitors in Australia are holding the sum of A$80,000 in their trust account as security for payment of any and all alleged monies owing by the plaintiff to either or the first and second defendants.</u>** (my emphasis)
13. The plaintiff's counsel and solicitors in Fiji have emailed the first defendant's counsel and solicitors but they have not responded as to whether these allegations are true or not. A copy of the emails is annexed hereto as ANNEXURE 1.
14. The Plaintiff's counsel and solicitors also emailed the CEO of the second Defendant from which a response was received from their in-house counsel. The response to the specific question of whether a sublease had been issued to South Sea Cruises and consented to by the second defendant was rather evasive and mischievous. A copy of the respective emails is annexed hereto as ANNEXURE 2.
15. It is abundantly obvious that the defendants are determined to proceed with the proposed new sublease to South Seas Cruises regardless unless this Honourable Court puts a stop to it by way of interim injunction pending final determination of this case.
16. I humbly ask that this Honourable Court grant such an injunction immediately to prevent the plaintiff from suffering serious damage or mischief

PICKWICK HEARING

[6]. When the application was placed before me on 09 July 2014, I directed that KFL serve all the defendants the application and supporting affidavit and, because I was told that there was urgency in the matter, I then adjourned the matter to 10 July 2014 to be called at 9.00 a.m. so I can deal with the matter on a Pickwick basis (i.e. to assist the court on submissions usually on points of law but without filing evidence, see **<u>Pickwick International Inc (GB) Ltd v Multiple Sound Distributors Ltd and Another</u>**; 1972 (3) AER 384-385).

[7]. The following day, on 10 July 2014, Mr. Maopa appeared for KFL, Mr. Vuataki for NIL, Mr. Nayare for *i*TLTB and Mrs. Lee for the Registrar of Titles.

[8]. I then proceeded to hear Mr. Maopa's submissions and before hearing other counsel on evidence in affidavits already filed in this case and on points of law, all of whom objected vehemently to KFL's application.

ANALYSIS

[9]. The principles for granting an injunction are set out in the case of **American Cyanamid v Ethicon**. I need not go over these again.

[10]. My reasons for refusing to grant the interim injunction sought are as follows:

(i) there is insufficient undertaking as to damages by KFL. All that is stated at paragraph 12 of Clowes' affidavit is:

> The Plaintiff's solicitors in Australia are holding the sum of A$80,000 in their trust account as security for payment of any and all alleged monies owing by the plaintiff to either or the first and second defendants.

(ii) the above undertaking is hardly enough, for at least three reasons.

(iii) First, it is not clear from paragraph 12 of Clowes' affidavit whether the A$80,000 being held in the plaintiff's solicitors' trust account in Australia belongs to KFL or to Clowes. For the record, I did request counsel to file a supplementary affidavit to clarify that issue – but none was ever filed. I did comment in Court that it would have been ideal for the plaintiff's solicitors in Australia to have proper authentication (e.g. a properly certified statement of account). In any event, the identity of KFL's Australian solicitor is not disclosed.

(iv) Second, and I guess this adds to the first point, there is a receiving order in Fiji against Clowes. This was pointed out to me by Mr. Vuataki who drew the Court's attention to the affidavit of Iliaseri Varo sworn on 17 May 2012 and filed on 18 May 2012 which annexes a letter dated 09 August 2011 from the Office of the Official

Receiver in Fiji to that effect. I note that Clowes has not addressed this issue in any or the affidavits he has filed in this case.

(v) If that money in Australia in fact belongs to Clowes, then, morally perhaps, Clowes should be applying it to clear his Fiji debts with a view to setting aside the Receiving Order against him in Fiji.

(vi) The significance of that is this: what guarantee is there that he will, assuming the money belongs to him, readily apply that money to satisfy any judgement or Order of this Court against him, if he cannot even apply it to settle his long standing existing debts in Fiji, for which the existing Receiving Order was made.

(vii) Further to the above, I might add that, as pointed out by Mr. Vuataki, the (17 May 2012) Affidavit of Iliaseri Varo contains information that two Fiji companies namely Sunsail Proprietary Limited and Sudea Cruises Limited, both of which had successively operated the Denarau- Malamala Island day cruise service, and both of which Clowes was a major director-shareholder, were both wound up by Order of the High Court in Fiji.

(viii) Third, (I took into account the submissions of all defendants' counsel on this point) the AUS$80,000 is hardly enough to compensate the iTLTB and/or the first defendant company in damages, considering that it is entering into a lease worth over FJD$1 million dollars.

(ix) The plaintiff company could still be compensated in damages for any loss it alleges.

COMMENTS

[11]. The above were the main reasons why I refused the interim injunction. But in addition to the above, I also took into account the following submissions by the defendants' counsel: firstly, Mr. Vuataki advised the court that the plaintiff company had not obtained a Foreign Investment Certificate to operate any business on the island. From documents filed in this case, it appears this is correct and conceded to by the plaintiff. The plaintiff appears to treat this rather matter of factly in submissions filed for and on behalf of the plaintiff company on 05 September 2013 pursuant to the striking out application that was then pending before the Master's Court:

> ...the Foreign Investment Act 1999 is ....a regulatory Act. It makes provision for fines for non-compliance (s 11), variations in the certificate (s 12), cancellation of the certificates for non-compliance (s 13) and appeals to the Minister..........
> Counsel for the First Defendant has not pointed to any provision in this Act like s 12 of the *i*Taukei Land Trust Act which make void arrangements which do not comply with the Foreign Investment Act because there is none.
> The second point I want to make is that the question of illegality, again, cannot be determined as a preliminary point even on the affidavits because the allegation is hotly disputed. I invite Your Lordship to read Mr. Clowes' affidavit and you will find ample evidence that Mr. Clowes made every effort to comply with the Foreign Investment Act. The matter must go to trial.

[12]. Why Mr. Clowes' *"every effort to comply with the Foreign Investment Act"* has remained unfruitful years later to this day, and why his company would even be attempting to dispose of the sub-lease, which, in itself, may be a *business activity* within the terms of the Foreign Investment Act, and requiring a Foreign Investment Certificate, when held up to light against the fact of the Receiving Order against him, and the Winding Up Orders against every other company he has been involved in, gives me an uneasy feeling about him and his company. There is a letter dated 16 May 2012

by Nigel Skeggs the Managing Director of Port Denarau Marina which confirms that one of these companies, which had chartered a vessel belonging to the Marina for the Denarau-Malamala Island Day Cruise service, owes the Marina some $146, 971.95. Certainly, these are things which raise questions about Clowes' and KFL's "commercial morality", which may in turn go to their "bona fides" in the whole affair, which can be sometimes decisive in tipping the scale in an application such as the present.

[13]. Secondly, the fact that the plaintiff company is no longer operating a business on the island in question influenced my decision. Whether or not NIL's purported re-entry of the lease was valid or not is best reserved for trial. If it turns out that it was not validly carried out, then I am of the view that damages would be an adequate remedy for KFL, considering that it had clearly shown an intention to dispose of its interest (whatever the legality of it) over the island to Rosie tours.

[14]. Thirdly, there are many compliance issues in this case surrounding the KFL's sublease, which, in addition to the above, might raise questions about its commercial morality so to speak. An affidavit of Adrian Sofiled filed for and on behalf of KFL on 11 May 2012 deposes inter alia as follows:

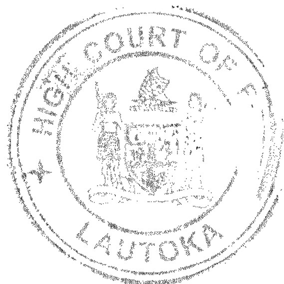
> I was approached by the Plaintiff Company's directors and or managers, Trish and Mike to attend a joint meeting on the 2nd of September 2011 with representatives of the 2nd Defendant and with representatives of Rosie Holidays who had an agreement to buy the Plaintiff's sublease on Malamala island.
> I attended the said meeting to address any issues regarding the approvals of Town and Country Planning that was pending on the Plaintiff's building constructed at Malamala Island. The meeting was held at TLTB Boardroom in Namaka, Nadi. Solomoni Nata of TLTB chaired the meeting, Tony Whitton from Rosie Holidays was present together with Trish of Plaintiff with Plaintiff's Solicitor Faiz Khan……
> ………..
> The meeting I attended was very amicable. **I remember that a number of non-compliance to the Plaintiff's sub-lease with the 1st Defendant was mentioned but it was clearly agreed that the incoming purchaser of the sub-lease, Rosie, would take**

over and rectify the breaches. It was also discussed that the 1st Defendant had given consent for sale on that basis.
According to the agreement reached I never acted any further on getting approvals for the buildings constructed on Malamala Island (my emphasis).

[15]. The above, to me, appears to be an honest account of someone to at the time, had attended the said meeting as agent of KFL – and whose account appears to confirm that KFL had indeed breached its sublease with NIL. I am aware of the respective decisions of the learned Masters Ajmeer and Rajasinghe in which they refused the application of the iTLTB to strike out the plaintiff's claim. I would have reached the same decision as the two learned Masters if those applications had been put before me. The plaintiff, in my view, has a reasonable cause of action to pursue a claim for damages against the iTLTB. That is all I would have said. But when it comes to the question of whether an interim injunction should be granted to restrain the first, second, and third defendants from issuing or granting a sublease and/or from granting the necessary regulatory consent for the said sublease and/or from registering the said sublease - I am guided by different considerations.

CONCLUSION

[16]. For all the above reasons, when I stand back and look at the overall justice of the case, the balance of convenience favours not granting the injunction as damages would be an adequate compensation for the plaintiff. Application dismissed. No order as to costs.



Anare Tuilevuka
JUDGE
24 July 2014