

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

Civil Appeal No. 03 of 2014  
(Magistrate's Court Case No. 114 of 2012)

**BETWEEN** : **ANIL DEO** formerly of Raviravi, Ba, but now of 11/113 Wallace Road,  
Papatoetoe, Auckland, New Zealand.

**Appellant** (Original Defendant)

**AND** : **SALWENDRA KALI NAIDU** of Rarawai, Ba, Legal Clerk.

**Respondent** (Original Plaintiff)

Counsel : Mr. Aman Dayal for the Appellant

Mr. Saimoni Nacolawa for the Respondent

# **R U L I N G**

## **INTRODUCTION**

- [1]. This is an appeal from an interlocutory decision of the Magistrate's Court sitting in Ba dated 28 January 2014. In that ruling, the Learned Magistrate had dismissed an application by the defendant (now appellant) to strike out the claim and to dismiss an interim injunction which he had granted earlier. The injunction *inter alia*, restrained the defendant (now appellant) from selling the property in question.
- [2]. The property in question is a piece of Crown Lease situated in Raviravi in Ba and described as Crown Lease No. 9453. The property was the subject matter of a sale and purchase agreement dated 17 May 2010 between Salwendra Kali Naidu ("**Naidu**", now respondent) as purchaser, and, Anil Deo ("**Deo**", now appellant) as vendor. The consideration was \$50,000. Pursuant to that agreement, Naidu had made a payment of \$10,000 to Deo and also cleared an outstanding mortgage debt on the property of \$2,468.27 sometime in May 2010.
- [3]. The mode and scheme of payment is set out in clause 4((i) to (vi) of the agreement.
- [4]. Naidu had filed a civil claim at the Ba Magistrates Court 09 August 2012 seeking an order for specific performance against Deo, obviously, when it appeared to him that Deo was recanting on their agreement. At some point, Deo filed an application to strike out the claim. The main ground for that application is that the agreement was illegal because the Director of Lands had not consented to it and, accordingly, it ought to be dismissed.

## MAGISTRATES' RULING

- [5]. The Learned Magistrate's written ruling was handed down on 28 January 2014. In his ruling, the Learned Magistrate acknowledged that any agreement concerning any dealing of State Land that had not been consented to by the Director of Lands would offend section 13 of the State Lands Act and is therefore null and void. It is clear from his reasoning that he accepted that such an agreement is unenforceable.
- [6]. Having noted that, the Learned Magistrate then observed that, the evidence before him was that, Naidu had in fact lodged an application for consent with the Director of Lands. However, the relevant file had mysteriously disappeared and the disappearance of that file has become the subject of an ongoing FICAC investigation.
- [7]. The Learned Magistrate took the fact of the missing file into account to reach the conclusion that there was no clear evidence before him that the Director of Lands had refused consent or had given consent to the dealing between Naidu and Deo.
- [8]. At paragraph 15 of his ruling, the Learned Magistrate said:

...there is no clear evidence that no consent had been given by the Director for the Agreement. With [the file's] disappearance, many speculation are possible one of which is that consent may indeed have been given, evidence of which cannot surface for the above plain reasons. Above all the Respondent on 7 June 2010...had through the Sugar Cane Grower's Council sent 3 copies of the Agreement, application for consent for the same together with \$33.75 being its requisite fees seeking the Directors consent to the said Agreement.

(my emphasis)

- [9]. In that regard, the Learned Magistrate held that the issue of whether or not the Director of Lands had consented or not was a triable issue and – accordingly, dismissed the appellant/defendant's application to strike out the claim.

...this court is minded....that the subject file in its disappearance not being contested to by the Applicant...that the triable issues so far evident in this matter should be better heard and determined in the substantive matter and to include the said criminal investigation and/or its result thereof, if any.

## GROUND OF APPEAL

- [10]. The grounds of appeal were filed on 25 February 2014. There were six grounds of appeal altogether but I think they all revolve around the main issue as stated in ground number one, which I reproduce verbatim herein below:

1. *The Learned Magistrate erred in law in holding that the grounds for specific performance had some merits when the agreement upon which specific performance was sought was illegal pursuant to the Crown Lands Act.*

## OBSERVATIONS

[11]. I observe that there is nothing in the agreement in question that stipulates that it (agreement) is being made subject to the consent of the Director of Lands.

I also observe from the records that the argument of both counsels before the Learned Magistrate was rather narrow in focus. The main issue before the Learned Magistrate – which arose from the way both counsel argued the matter - was whether or not the Director of Lands had consented to the dealing between Naidu and Deo, and if not, whether or not an order for specific performance can be made by the court.

[12]. As I have stated, on my reading of the Learned Magistrate's Ruling, it appears that he was well apprised of how and where the law sits with regards to the legal question.

[13]. It appears though from his reasoning that, in the particular circumstances of this case, given the mysterious disappearance of the file from the Lands Department, and the ongoing FICAC investigations, the Learned Magistrate considered it an issue of fact, and a triable issue, whether or not the Director of Lands had in fact consented to the dealing in question. Accordingly, he would hold that, pending determination of the issue of whether or not the Director of Lands did in fact consent – the claim for specific performance cannot be summarily dismissed on an assumption that the Director of Lands had refused consent.

*Short of the Director's consent therefore to the agreement the Respondent thus far has shown that its grounds for specific performance has some merit.*

*Given the above this court is minded to, like its earlier position, in concluding that the subject file in its disappearance not being contested to by the Applicant will continue to find that the triable issues so far evident in this matter should be better heard and determined in the substantive matter and to include the said criminal investigation and/or its result thereof, if any.*

[14]. It would appear to me that the grounds of appeal is premised on the assumption that the Director of Lands had refused to consent to the dealing in question whereas the Learned Magistrate had refused to make that assumption in the peculiar circumstances.

[15]. Based on what was argued before him and the material before him, I think the Learned Magistrate did the correct thing. There was nothing before him to suggest that consent had been given, nor was there anything to suggest that the consent had

been refused. There was evidence before him though that Deo had sought consent by having lodged an application to the Director of Lands. T

[16]. In my view, if the only issue before the learned Magistrate was whether or not the Director of Lands had consented to the agreement, then the Learned Magistrate would have been correct to have postponed the determination of the issue to trial, given the peculiar circumstances. It is, after all, a matter to be ascertained from the relevant Lands Department file, which, ultimately is, a question of evidence.

[17]. However, as I have said above, the manner in which both counsel argued the point before the learned Magistrate was rather narrow in focus. Both failed to focus on the fact, which I picked up during the hearing before me, that:

- (i) Naidu had been in occupation of the said property prior to the sale and purchase agreement and well before he applied for consent.
- (ii) there was nothing in the sale and purchase agreement that said that the agreement was subject to the consent of the Director of Lands.

#### **PERFORMANCE OF AN AGREEMENT/CONTRACT PRIOR TO DIRECTOR OF LANDS' CONSENT**

[18]. In argument before me, Mr. Nacolawa conceded that Naidu had moved onto the property pursuant to the sale and purchase agreement. This point determines this whole appeal, in my view.

[19]. Section 13 provides as follows:-

“Whenever in any lease under this Act there has been inserted the following clause:-

This lease is a protected lease under the provisions of the Crown Lands Act (hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or the written consent of the Director of Lands, shall any such lease be dealt with by any Court of law or under the process of any Court of Law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such a lease.

Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void”

[20]. It appears to be well settled in Fiji that section 13 is not necessarily infringed when two parties enter into a contract subject to the Director of Lands' consent. Such a contract, if it remains unperformed pending the necessary consent, is “**inchoate**”<sup>1</sup> in

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<sup>1</sup> see Chalmers v Pardoe [1963] 3 All E.R. 552 and Jai Kissun Singh v Sumintra (1970) 16 F.L.R. 165.

that sense (see Fiji Supreme Court decision in Giuseppe Reggiero –v- Nabuyoski Kashiwa Civil Appeal No. CBV0005 of 1997S).

- [21]. It is law in Fiji that section 13 is infringed if, without the prior consent of the Director of Lands, action in performance of an agreement is taken. Such contrary action, coupled with the agreement itself, constitutes a “**prohibited dealing**” (see Giuseppe Reggiero).

*Provisions such as section 13(1) are not construed so as to prevent the making of a contract by the lessee to alienate subject to the written consent of the Director of Lands first had and obtained. When a contract is so made there are binding contractual obligations on the parties, or such of the parties as is appropriate, to take all reasonable steps to obtain the Director’s consent. In the absence of an express time limit, such steps must be taken within a reasonable time. If such steps are not taken within a reasonable time, the party not in default may rescind the contract and recover any payment he has made under the contract. If the Director’s consent (or the consent of the Minister on appeal under section 13(3) of the State Lands Act) is not obtained within a reasonable time, the contract will be at an end and monies paid under it may likewise be recovered. The foregoing is a brief statement of fairly elementary law; for present purposes it need not be expanded, except in one respect as follows.*

*In Chalmers v Pardoe [1963] 3 All E.R. 552 the appellant had an arrangement with a lessee of land under the Native Land Trust Ordinance (Cap. 104) which in section 12(1) contained provisions materially similar to those of section 13(1) of the State Lands Act. Under the arrangement the appellant could build on part of the lessee’s land provided that the appellant obtained the consent of the Native Land Trust Board. He put up six buildings on the land but did not obtain the Board’s consent. He claimed an equitable charge or lien on the land for the cost of the buildings. The Privy Council held that, treating the arrangement as one for a licence to occupy coupled with possession, when this purpose was carried into effect by the erection of buildings a ‘dealing’ with the land took place without prior consent and therefore unlawfully. Hence equity would not lend its aid to the appellant by granting him a charge or lien. Their Lordships accepted that it would be an absurdity to say that a mere agreement to deal with land would be contrary to section 12, for there must necessarily be prior agreement in all such cases, and otherwise there would be nothing for which to seek the Board’s consent. In Chalmers v Pardoe, however, there was not merely agreement, but, on one side, full performance; and the Board found itself with six new buildings on the land without having the opportunity of considering beforehand whether this was desirable. See the passage in the judgment delivered by Sir Terence Donovan at page 557 of the report we have cited.*

*Jai Kissan Singh v. Sumintra (1970) 16 F.L.R. 165 is an essentially similar case.*

*We think that these authorities show that the relevant section is infringed if, without the prior consent of the Director of Lands or the Board, as the case may be, action contrary to the policy of the section is taken in performance of an agreement. Such contrary action, coupled with the agreement itself, constitutes a prohibited ‘dealing’. Denning v Edwardes [1961] A.C. 245, cited by Gould V.-P. in Jai Kissan Singh at 169-70, is another Privy Council decision supporting, in our view, the proposition that we have stated.*

*In the two authorities last mentioned the word ‘inchoate’ is used to describe an agreement which remains unperformed pending the necessary consent. That word should*

*not be understood as suggesting that there is not a binding agreement, albeit subject to the consent.*

[22]. In this case, the fact that Naidu had moved into occupation, pursuant to the agreement and started cultivation and other improvements on the lands without the prior consent of the Director of Lands, constitutes a performance of the agreement, without the prior consent of the Director of Lands. This fact alone turns the whole arrangement into a prohibited dealing in the sense contemplated in **Giuseppe Reggiero**.

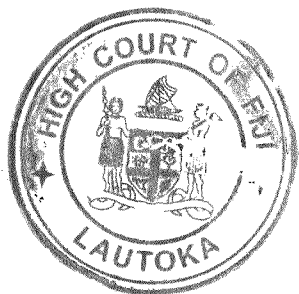
[23]. Having said that, I am mindful of the words of caution by the Supreme Court of Fiji that actions taken in performance of an agreement must be distinguished from actions which are merely “**preparatory to performance of the contract**” or actions of “**part performance**” under “**a binding but necessarily conditional contract**”. Whilst the former will offend the policy of section 13, the latter do not necessarily have the same effect (see **Giuseppe Reggiero** (supra) below):

“In the history of this case the issue of illegality has been allowed undeserved prominence. There was no illegality in paying the 10 million yen, which would be recoverable if provisional registration was not obtained in reasonable time. If there was any illegality on the part of the vendor in using part of this sum to secure an extension of his option - and certainly we do not say that there was, the question not having been argued before us - the purchaser was not implicated in it. As we have already indicated, the parties are to be treated as having contemplated a legal course of proceeding, rather than an illegal. Such steps as were taken by the vendor, or on his instructions, towards obtaining the approval of the Director of Lands and planning and subdivisional approval were, so far as they went, part performance of the vendor’s obligations to take all reasonable steps to achieve a lawful transfer for the purposes of the development intended by the purchaser. None of them violated the policy of section 13(1) of the State Lands Act. There was no illegality which could prevent the purchaser from recovering his payment. The same applies to whatever clearing of the land the vendor had carried out, although, as the Court of Appeal said, there was no evidence of when any was done.”

The Court of Appeal reached the same result by saying that the vendor’s acts were preparatory to performance of the contract and not in implementation of it. They spoke of the agreement as still inoperative and inchoate. As already explained, we consider that the preferable analysis or mode of expression is that they were acts in part performance of the vendor’s obligations under a binding but necessarily conditional contract.

## CONCLUSION

- [24]. Considering the concession made on behalf of the Respondent/Plaintiff, it would be pointless to have to refer the case back to the Magistrates Court in Ba for determination of the issue of whether or not the Director of Lands had consented to the dealing in question.
- [25]. Even if the Director of Lands turns out to have consented, the fact remains that Naidu did perform the Agreement by moving into occupation. That fact is established by his conceding that he did move into occupation, pursuant to the purported agreement, prior to lodging an application for consent.
- [26]. In addition, but quite separate from the foregoing, the fact alone that the agreement was entered into without any clause therein stipulating that the agreement was subject to the consent of the Director of Lands, would, by itself, render the agreement between the parties an illegal dealing and therefore void under section 13.
- [27]. But then again, even if such a clause had been there in the agreement, it would be rather limited in its effect because it could not possibly validate any illegal performance of the agreement.
- [28]. Accordingly, I will allow the appeal on the ground that the parties, by their arrangement which allowed Naidu to go into occupation pursuant to the agreement, before obtaining the Director of Lands consent on the agreement, had engaged in conduct which amounts to a prohibited dealing contrary to section 13. Costs to the appellant which I summarily assess at \$500-00 (five hundred dollars).



Anare Tuilevuka  
**JUDGE**  
22 May 2015