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

CIVIL ACTION No. HBC 100/2012

BETWEEN : **KENTO (FIJI) LIMITED**

Plaintiff

AND : **NAOBEKA INVESTMENT LIMITED**

First Defendant

AND : **ITAUKEI LAND TRUST BOARD**

Second Defendant

AND

CIVIL ACTION No HBC 27/2016

BETWEEN : **KENTO (FIJI) LIMITED**

Plaintiff

AND : **NAOBEKA INVESTMENT LIMITED**

First Defendant

AND : **SOUTH SEAS LIMITED**

Second Defendant

AND : **ITAUKEI LAND TRUST BOARD**

Third Defendant

AND : **MATAQALI NAOBEKA**

Fourth Defendant

Appearance : Mr Moapa for the Plaintiff (in both cases)
Mr Vuataki for the 1st Defendant (in both cases) & for the 4th Deft in HBC 27/16
Ms Seru for the 2nd Defendant in HBC 27/16 (South Seas Ltd)
Mr Mucunabitu for the ILTB (2nd Deft in HBC 100/12 & 3rd Deft In HBC 27/16)

DATE OF HEARING: 26 November 2019

DATE OF JUDGMENT: **10th December 2019**

DECISION

1. This is an application by the plaintiff for consolidation of two sets of proceedings which it has brought against mostly the same parties arising essentially from the same set of background facts. The application is opposed by the defendants other than the ILTB (which is neutral on the issues and took no part in the hearing of these applications. Also to be determined is the application by South Seas Limited, the second defendant in HBC 27/16 and the party with the most at issue in the consolidation discussion, for a stay of the matter in which it is a party until after the other matter (HBC 100/12) has been heard and determined, but counsel for South Seas Ltd accepts that the decision on consolidation will largely also determine the outcome of its application for a stay; there is no point in consolidating the claims if they are not to be heard together, and if there is no consolidation there is certainly no point in trying to decide HBC 27/16 in advance of the earlier action.

2. These matters came before me as a result of rulings made following the adjournment sought by the plaintiff but consented to by the other parties, of a three week trial in HBC 100/12 scheduled to start on 12 November. In the course of discussion about the proposed adjournment, I became aware of a previous application for consolidation, which had been struck out on the basis that it had been made in the wrong matter, and of the application for a stay. I reinstated the application for consolidation, and directed that both these interlocutory matters should be heard on 26 November. At the same time I set down HBC 100/27 for hearing at the end of April 2020. If an order for consolidation is made both matters will be heard on that date, but it will be necessary to also make some procedural orders to ensure that HBC 27/16 is ready for hearing. I am told that South Seas Ltd has not yet provided discovery in that proceeding.

3. I am grateful for the helpful submissions made by counsel on the consolidation issue.

The pleadings

4. The plaintiff (*Kento*) commenced HBC 100/12 on the 9th May 2012. The statement of claim says (in summary of the essential elements):

   i. Kento was sublessee of Malamala Island under an agreement to sublease with Naobeka Investment Limited (*NIL*) for a term of 25 years commencing on 1 August 2007. ILTB was the headlessor, and Nil was head lessee.

   ii. NIL purported to terminate the sublease in March 2012.

   iii. There was no current breach of the sublease by Kento to justify termination, or if there was NIL was estopped by its previous conduct from relying on it, and the purported termination was wrongful.

   iv. If the termination was proper, Kento sought relief against forfeiture.

   v. The actions of NIL were in breach of the terms of the sublease, and caused damages to Kento by frustrating Kento's ability to sell its interest under the sublease for $1.27m (approximately).

5. In its statement of defence in HBC 100/12 NIL:

   I. Denies the validity of the sublease (on the basis that it was not properly executed by Kento, or has automatically come to an end on its terms, was illegal, or was properly terminated by NIL on various grounds).

   II. Denies that relief against forfeiture is appropriate

6. I cannot see a statement of defence by the ILTB on this file, and no statement of defence is included in the bundle of copy pleadings dated 5 February 2018 (presumably signifying that both counsel felt that the matter was ready for trial at that stage).

7. An application was made by Kento in HBC 100/12 in March 2015 under O.20, r.5 and O.15, r.6 of the High Court Rules seeking leave to file an amended statement of claim joining four additional defendants, including South Seas Ltd and individual members of the Mataqali Naobeka. That application was opposed by the defendants, and came before the Court on 22 June 2015. In a decision dated 9 October 2015 the Master declined leave to file the amended statement of claim, and to join the additional parties. In the course of argument the Master was invited by counsel for NIL opposing the proposed amendment and joinder, to strike out the affidavit filed by the plaintiff in support of the application because it had been sworn overseas before someone who - it was argued - was not one of those referred to in O.41, r.12 HCR whose administration of the affidavit would be accepted in the High Court. The Master accepted that submission, and expressed his reasons for declining the application to amend in the following terms (pp17 & 18 of the decision):

8. *In view of the approach I have adopted, I do not think that there is any need for me to express my views on the substantive arguments of the parties.*

Conclusion

For the reason which I have endeavoured to explain, I venture to say beyond peradventure that the mandatory requirements of O.41, r.12 of the High Court Rules 1988 and the legal consequences that flow from non-compliance defeat the Plaintiff's application to amend the Statement of Claim.
Accordingly, there is no alternate but to strike out the supporting Affidavit and dismiss the Summons.

9. Following this decision Kento issued a new Writ of Summons in HBC 27/16 on 16 February 2016. In addition to NIL and ILTB the new writ named South Seas Limited (SSL) and the Mataqali Naobeka (via three named individuals) as additional defendants. In its statement of claim Kento alleged (in summary of the essential elements):

i. Kento was sublessee of Malamala Island under an agreement to sublease with Naobeka Investment Limited (*NIL*) for a term of 25 years commencing on 1 August 2007. ILTB was the headlessor, and Nil was head lessee.

ii. NIL purported to terminate the sublease in 2011 and 2012 on the basis of alleged breaches of the sublease by the plaintiff.

iii. Kento issued proceedings in HBC 100/12 challenging the purported termination.

iv. Despite the alleged unlawfulness of the purported termination NIL in 2015 purported to issue another sublease over Malamala Island to SSL.

v. The sublease to SSL was knowingly encouraged, counselled, assisted and caused by the intervention of SSL, ILTB and the Mataqali Naobeka in a manner that constituted unlawful interference with the contract between Kento and NIL.

vi. The actions of the defendants in terminating the sublease, or procuring that termination has caused the plaintiff loss.

10. Although the court file has statements of defence by SSL and ILTB, and replies (dated 7 February 2019) by the plaintiff to the statements of defence and counterclaim of NIL and the statement of defence of Mataqali Naobeka, I cannot see copies of the statements of defence and counterclaim by NIL and the Mataqali on the court file for HBC 27/16, and there is no record of those documents being filed (they were ordered by Mackie J on 23 October 2018 to be filed within 21 days). The solicitor acting for those parties may wish to look into this apparent omission. For the purposes of this judgement I assume that all aspects of Kento's claim are contested as vigorously by NIL and the Mataqali as they are by SSL and ILTB, and there appears - reading between the lines - to be a counterclaim by NIL that asserts the invalidity of the sublicense.

11. In passing I should say that the use of words and phrases such as 'misguided', 'blatant denial', 'strongly assert' or 'vehemently deny' have no place in a statement of claim or defence, the purpose of which is to identify the issues arising in the proceedings. How passionately, optimistically, half-heartedly, hopelessly or disingenuously an assertion is made or denied is of no assistance whatsoever to the court or anyone else in carrying out this purpose. Nor is it the function of a statement of defence to ask questions such as '*how is a sublease legally enforceable or recognizable by law when its commencement is contrary to statute*?' or '*what is the plaintiff alleging in its claim?*' If a party seeks clarification of what is alleged against it, there is a procedure for obtaining it under the High Court Rules. Both sets of proceedings have been characterised by parties taking every technical or procedural point open to them, with the result that a great deal of time has been wasted, and expense has been incurred on all sides without progressing to an examination of the merits of the claims. The aphorism 'people in glass houses shouldn't throw stones' seem s apt.

Res Judicata & abuse of process

12. One preliminary matter that I need to deal with is the submission on behalf of the second defendant that Master (as he then was) Nanayakkara's dismissal in 2015 of the plaintiff's application to add defendants and amend the statement of claim in HBC 100/12 precludes consideration of the application for consolidation. Counsel argued that the prior decision amounts to *res judicata*, or that making an application for consolidation following the unsuccessful attempt to amend the proceedings, amounts to an abuse of process. In light of the reasons given by the Master for deciding the application as he did (set out in paragraph 7 above) I am completely unpersuaded by this submission. The Master did not reject the application on its merits. I have read the judgment carefully, and it is very clear that the Master did not reach the point of weighing up the arguments in favour of and against application. He rejected the application on the basis of his conclusion on the preliminary point raised by the defendants (see my comment in paragraph 10 above) that the affidavit in support on behalf of the plaintiff was not properly sworn.

13. The answer therefore to the *res judicata* argument is that the issue has not already been considered and decided. The question then is, was it an abuse of process to raise the same issue in a different way, having failed in the earlier application. In answering this question we need to bear in mind the purpose behind the application of this principle. This is articulated in what is known as the rule in Henderson, explained by Sir Thomas Bingham MR in **Barrow v Bankside Members Agency Ltd** [1996] 1 All ER 981:

> *The rule in **Henderson v Henderson** (1843) 3 Hare 100, [1843-60] 1 All ER 387 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject of course to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or differences which they could have put forward for decision on the first occasion, but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the*

desirability in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do.

14. The principles behind the doctrine of res judicata, the rule in **Henderson v Henderson**, cause of action estoppel, and the exercise of the power under O.18, r.18 to strike out proceedings for abuse of process (at least in connection with issues such as the finality of proceedings) are the same. They are all expressions of the policy outlined in the final sentence of the passage quoted above. In applying these principles to a particular situation the court must keep in mind the objective of this policy is ensure that justice is not administered unjustly. Against the need to protect participants in a dispute from successive suits about essentially the same issues, is the need to ensure that participants have a proper opportunity to have their disputes heard and decided. To accommodate this dichotomy it is clear that the court's power under O.18, r.18 is *not mandatory but permissive, and confers a discretionary jurisdiction to exercise having regard to the quality and all the circumstances relating to the offending plea/matter*[1]. It is also apparent that the courts will more readily apply this principle when a matter has already been heard and decided on its merits, than in cases where what is sought to be prevented is a party's attempt to litigate something that could and should have been, but was not included in previous litigation between the same parties.

15. The criteria for establishing res judicata show how important it is to the application of this principle that the issue that is said to have been decided was determined on a substantive basis. The following is a list of the ingredients that must be established[2]:

i. that the alleged judicial decision was what in law is deemed such.
ii. that the particular judicial decision relied upon was in fact pronounced, as alleged.
iii. that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf.
iv. that the judicial decision was 'final'
v. that the judicial decision was or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppels is raised.
vi. that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppels is raised, or their privies, or that the decision as conclusive in rem.

16. In **Nagan Engineering (Fiji) Ltd v Raj** [2010] FJHC 47 then Master Tuilevuka following a thorough review of the law, reached the following conclusion on the issue of whether a court decision in an interlocutory application could found an application for issue estoppel. His works seem equally applicable here:

[57] My reading of the above is as follows. An interlocutory finding or decision is prima facie, not "final". However, if in the proceedings on

[1] **Carl Zeiss Stifftung v Rayner & Keeler Ltd (No 3)** [1970] Ch 506
[2] Spencer Bower & Turner **The Doctrine of Res Judicata** 2nd Ed. 1969 pp. 18 & 19

the interlocutory application, the issue was explicitly raised, and the parties had put forward all facts and arguments - relevant- to the resolution of the issue, and the issue was fully considered on its merits, then the principle of res judicata may be applied

17. I am sure, with respect, that (now) Justice Tuilevuka, if asked to review his words in the circumstances of the current case, would agree with me that in saying that *the issue [must have been] fully considered on its merits* he meant *fully considered* ***and decided*** *on its merits.* It is for this reason in particular that the submission for SSL fails; Because of the decision he made (on the basis of the defendant's submission) to strike out the affidavit in support, Master Nanayakkara did not – as his decision makes clear – go on to consider and decide Kento's application to amend the statement of claim on its merits. Accordingly I am satisfied that Kento is not precluded now from pursuing its application for consolidation, notwithstanding the similarity of the grounds for amendment/addition of parties, and those for consolidation. To accede to SSL's argument on this issue would also mean, for example, that a plaintiff whose claim (or a defendant whose defence) has been struck out for a technical non-compliance with the rules would not be entitled to file a new statement of claim because they had had an opportunity to get it right the first time, and should have taken it. Instead the principle emphasises the importance of doing justice to all parties who have recourse to the Courts.

Criteria for and arguments for and against consolidation

18. Order 4. Rule 2 provides:

> *Where two or more causes or matters are pending, then, if it appears to the Court-*
> *(a) that some common question of law or fact arises in both or all of them, or*
> *(b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or*
> *(c) that for some other reason it is desirable to make an order under this rule,*
>
> *the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.*

19. It is obvious that the plaintiff's claims in both sets of proceedings depend upon the validity of the sublease, and although I have not seen the defence and counterclaim filed by NIL or by the Mataqali (which are not on the Court file – see paragraph 9 above), I assume that – as do the pleadings of ILTB - those pleadings challenge the alleged validity of the sublease on the same basis as in HBC 100/12. It is also obvious that any involvement, or any lack of involvement, of SSL in the purported termination of the Kento sublease, and the circumstances in which the sublease to SSL was issued by NIL will be relevant to the application by Kento for relief against forfeiture. When I queried this issue with counsel for SSL she professed to have full confidence in the ability of the defendants in HBC 100/12 to deal with all issues that

might arise. I am not sure though that that resolves the matter. There is also the issue of witnesses from SSL giving evidence (in all the circumstances of these cases it would be quite unsatisfactory to require the plaintiff to subpoena and call any SSL witnesses, who could not be expected to co-operate in presenting all or any evidence that might be relevant). This factor alone is enough in my view to justify the consolidation of the two matters, and having carefully read his decision of 9 October 2015 I am quite sure that Master Nanayakkara would have reached the same conclusion on the amendment application had that not been derailed by the issue with the plaintiff's affidavit.

20. There is also the issue of discovery. I would expect SSL to have in its possession and power documents that are relevant both to the issues raised by Kento against SSL in HBC 27/16, but also to the matter of relief against forfeiture raised in HBC 100/12. But third party discovery has not been sought in the earlier action, and seldom works particularly well, and SSL has not yet provided discovery in HBC 27/16.

21. Finally, in looking at the arguments In favour of consolidation is the very issue raised by the defendants in opposing the application for consolidation – the question of issue estoppel, or the risk that if the matters are heard separately (and if SSL's request for a stay is granted, with that matter being heard and decided only after a decision has issued in HBC 100/12) the same issues about the validity and continuity of the Kento sublease will come to be heard and decided again, with the addition of another party to the mix, and the danger of a different outcome from another judge. The absence of SSL from involvement in determination of these issues will mean that if Kento's lease is upheld in the first hearing, SSL will seek to challenge that finding in the second, but if the Kento lease is not upheld in the first action, Kento will presumably want to retry the issue in the second, and the defendants will all argue issue estoppel, res judicata etc again.

22. The main concerns of SSL in opposing the proposal for consolidation seem to be
    i. the cost that SSL will be put to if it is obliged to take part in the consolidated hearing.
    ii. The weakness – as SSL sees it – of Kento's case against SSL, particularly having regard to the fact that SSL has a registered lease.
    iii. The plaintiff's delay in making this application.

23. I agree that that costs are a legitimate concern, particularly if – as counsel for SSL predicts will happen – the termination of the plaintiff's lease is upheld, relief against forfeiture is refused, or the claim against SSL is unsuccessful. But if that is the result, SSL can be compensated with through costs (even, if thought appropriate, indemnity costs) depending on the outcome of the claims, and the actual findings of the court. On my understanding of the issues to be resolved I am not persuaded that being obliged to incur costs in defending its position vis a vis Kento is so unjust to SSL that consolidation should be refused in a case where it otherwise seems appropriate.

24. One way in which the impact of costs on SSL, and the other parties, might be mitigated is if any issue of damages is deferred until after a decision is made on the liability issue, including a determination as to the continuity or otherwise of the Kento lease. I have raised this matter briefly with counsel, and subject of course to the

parties having their say on the issue I am willing to consider a split trial with issues of damages (which are likely to be complex if the Kento lease is upheld, and unnecessary if it is not) only being dealt with following on the decision on the other matters. Counsel can address me on this issue when the matter comes up for mention on 20 January.

25. With regard to SSL's status as registered lease holder, SSL relies on sections 39 and 40 of the Land Transfer Act 1971, and refers to the difficulties Kento faces in persuading a court that SSL's position as leaseholder is in jeopardy. Counsel for SSL points out that Kento has not made allegations of fraud against SSL and refers the court to the series of well-known cases dealing with indefeasibility resulting from registration, starting with **Asset Co v Mere Roihi** [1905] AC 176, **Waimiha Sawmilling Co v Waione Timber Co** [1926] AC 101, and the Fiji Court of Appeal decision in **Total (Fiji) Ltd v Auto World Trading (Fiji) Ltd** [2018] FJCA 249. She also points out that Kento has not pleaded fraud (to which I would respond that reliance by SSL on its registered lease is mentioned only in passing in its statement of defence, and may need to be pleaded more clearly if SSL seeks to make something out of the absence of a pleading of fraud).

26. This issue is clearly going to be a hurdle for Kento in its claim. But the existence of SSL's lease is an issue only with regard to Kento's application for relief against forfeiture, and in that respect, the fact that SSL's lease is now registered will not add greatly to Kento's burden. If the Court is satisfied that SSL is an entirely blameless party in the attempted cancellation of the Kento lease by NIL then relief is likely to be refused regardless of whether the SSL lease is registered or not. Only if notice short of fraud is established against SSL is the fact of registration likely to be significant in the decision on whether relief is granted, or whether SSL may keep its lease. But these outcomes are dependent on evidence, and it is far from obvious at this stage that the cases will be decided in this way. Even if they are, that does not eliminate the possibility that SSL will be found to have sufficient involvement to make it liable for damages for any wrongdoing that Kento is able to establish.

27. On the issue of delay I have some sympathy for SSL's complaint that the plaintiff has not made this application for consolidation as soon as it might have done. But against this is the fact that the intention to seek consolidation was flagged by the plaintiff at an early stage, and that the defendants have not pointed to any disadvantage or prejudice to them arising from the delay in making and pursuing the application. In the end factors such as delay, like technical issues such as the proper swearing of affidavits, must unless they cause prejudice to a party, take second place to the substantive issues – in this case whether the proper conduct of the proceedings in the interests of justice require the cases to be heard together.

Conclusion

28. For the reasons given I am satisfied that the proceedings in HBC 100/12 and 27/16 should be consolidated and heard together, and I so order.

29. Costs of these applications are reserved pending the outcome of the claims.

30. The consolidated file is adjourned to 20 January 2020 at 10.30 am for mention for discussion about outstanding issues including SSL's compliance with the order for discovery (which seems to be long overdue), issues related to the hearing scheduled for April, and further discussion about deferring any consideration as to damages until after the liability issues are resolved.

HIGH COURT OF FIJI
LAUTOKA

A.G. Stuart
Judge

At Lautoka this 10th day of December 2019

SOLICITORS:

Mr Moapa for the Plaintiff (in both cases)
Mr Vuataki for the 1st Defendant (in both cases) & for the 4th Deft in HBC 27/16
Ms Seru for the 2nd Defendant in HBC 27/16 (South Seas Ltd)
Mr Mucunabitu for the ILTB (2nd Deft in HBC 100/12 & 3rd Deft In HBC 27/16)