IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 27 of 2016
(Consolidated with HBC 100 of 2012)

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

PLAINTIFF

A N D : **NAOBEKA INVESTMENT LIMITED** a limited liability company having its registered office at P O Box 1719, Nadi.

FIRST DEFENDANT

A N D : **SOUTH SEAS LIMITED** a limited liability company having its registered office at P O Box 718, Nadi.

SECOND DEFENDANT

A N D : **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.

THIRD DEFENDANT

A N D : **ILIASERI VARO, JOELI VATUNITU AND MANOA DRIUVAKAMAKA GADAI**

FOURTH DEFENDANTS

Appearances: Mr. E. Maopa for the Plaintiff
Mr. J. Apted for the first and second Defendants
Mr. Cati for the third Defendant
Date of Hearing: 28 July 2022
Date of Ruling: 02 March 2023

RULING

INTRODUCTION

1. In my ruling dated 21 February 2022 (see **Kento (Fiji) Ltd v Naobeka Investment Ltd** [2022] FJHC 125; HBC027.2016 (21 February 2022) I ruled:

   (a) that Kento (Fiji) Limited (**"KFL"**) failed to provide sufficient information to inform Naobeka Investments Limited (**"NIL"**) and South Seas Cruises Limited (**"SSCL"**) of the case they have to meet to enable them to take steps to respond?
   (b) given KFL's failure to provide further and better particulars as ordered by Stuart J, there is every likelihood that NIL and SSCL would face a trial by ambush if this matter proceeded to trial

(c) I did not find NIL's and SSCL's request for further and better particulars as being an oppressive or an unreasonable burden upon KFL.

2. At paragraphs 71 to 81 of the above Ruling, I noted and endorsed *inter alia* the submission which highlighted KFL's appalling conduct in the way it handled the request for Further and Better Particulars by NIL's and SSCL's solicitors. At this point, I say that KFL's conduct was contumacious and contumelious.

3. Those observations and findings expose KFL to a range of heavy sanctions. Amongst the least of these, in my view, would be an Order for heavy costs, and a fresh exercise of discretion in favor of giving KFL a final opportunity to remedy its shortcomings. The most drastic sanction, and certainly one which SSCL urges this Court to impose, would be to strike out KFL's action against NIL and SSCL and still order costs. The law books are abound with good authority to support a striking out of a pleading where the party has displayed such a level of contumacious and contumelious breach of the kind which happened in this case.

4. I must say that, the striking out option has always been foremost in my mind because, in my view, and as Mr. Apted had gone to great lengths to emphasize, there is already a strong case to strike out the claim on account of the fact that:

(i) the Order (of Stuart J) which KFL breached was an Unless Order.
(ii) the consequences of a breach of that Unless Order was a striking out of KFL's claim.
(iii) Stuart J's Unless Order was granted against a history and a pattern of stubborn and willful disobedience – by KFL – of previous directions on Further and Better Particulars.
(iv) even after the Unless Order was made, KFL maintained a scornful and arrogant attitude which was most evident in the evasive manner in which it responded to the particulars sought.

5. However, even though there was already a strong case to strike out the claim on account of KFL's contumelious and contumacious breach of Stuart J's unless orders, I opted to err on the side of caution and decided that I would defer any pronouncement on the sanction until I have heard SSCL's Order 33 rule 3 application – which is now before me.

6. Admittedly, I took that stand because I was not quite comfortable with the thought of having to strike out a claim in excess of FJD $11 million which was already at discovery stage. I felt I needed another good enough reason before I took such a drastic step.

7. Admittedly also, the reason why I was not comfortable as such, was because I was reviewing the file with "fresh eyes", having just inherited it from Stuart J who had left the bench. Hence, going into the Order 33 Rule 3 hearing, the questions which were always in the back of my mind were - whether there are any facts/evidence which would mitigate against the striking out order which I was already entertaining as an option from the earlier proceedings, or, whether the facts/evidence would simply add, yet another cause, to strike out KFL's claim against SSL.

8. I have heard the submissions and read the affidavits I was referred to by counsel. In my view, the evidence and facts placed before me in the Order 33 Rule 3 application – and the conclusions to be

drawn from these, have only added yet another cause to strike out/dismiss KFL's claim against NIL and SSCL. My reasons follow.

SOME BACKGROUND

9. The *i*-TLTB granted a lease (**"Head Lease"**) over Malamala Island to NIL on 22 August 2007 for a term of ninety-nine (99) years with effect from 01 July 2007. NIL then purportedly entered into an arrangement to sublease Malamala Island to KFL.

10. A copy of the sublease which KFL relies on is annexed to an Affidavit sworn by Michael Clowes on 08 May 2012 marked MC1. The commencement date for the said sublease is stated to be 01 August 2007 for a term of twenty-five (25) years. The document however is signed by one Director only. This Director has affixed KFL's company seal on the document. Notably, the date and month of execution are not stated, although the year is typed in as **"2008".**

11. KFL's case against all the defendants is premised on the assumption that the sublease it obtained from NIL's Head Lease, was a valid one. There is no claim for equitable damages, nor is there any claim on any other equitable ground.

12. Hence, against NIL, KFL's claim is premised on an allegation that KFL had breached the sublease in question when NIL unlawfully terminated it (sublease) and when NIL then subleased the island to SSCL.

13. Against SSCL and *i*-TLTB, KFL alleges that they unlawfully interfered with KFL's contractual relations with NIL under the sublease – when they induced NIL to terminate the sublease and to offer SSCL a sublease in lieu. While this cause of action is tort-based, to succeed, KFL must first establish that there was a valid enforceable sublease existing, before establishing that SSCL and *i*-TLTB unlawfully interfered with it by inducing NIL to terminate it.

14. Against that scenario, KFL claims damages against NIL for breach of the sublease agreement and against SSCL and *i*-TLTB for unlawfully interfering with KFL's contractual relations with NIL.

15. KFL claims special damages of $11.5 million dollars against all defendants. That sum is made up as follows:

    (a) $10 million dollars for loss of business operations
    (b) $1.5 million dollars for monies allegedly expended by Mr. Clowes in obtaining the head-lease and the KFL sub-lease.
    (c) aggravated damages
    (d) general damages
    (e) 5% interest and costs

16. As I have said, KFL's claim against all the defendants' is premised on the presumption that it had a valid sub-lease with NIL. The question of whether or not KFL in fact had a valid sublease with NIL – is the very issue to be determined in the Order 33 Rule 3 application which is now before me.

THE APPLICATION

17. As I have said, the application now before me is made under **Order 33 Rule 3** of the **High Court Rules 1988**. Order 33 Rule 3 provides:

> 3. The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

18. Both counsel had agreed that the issues in this Order 33 Rule 3 proceeding could be determined from the affidavits. The particular questions to be determined are as follows:

1. When did the Plaintiff execute the alleged agreements for the sublease of Malamala Island pleaded at paragraph 20 of the Amended Consolidated Statement of Claim filed on 15 December 2020?
2. When did KFL go into possession of Malamala Island under the alleged sublease of Malamala Island?
3. Whether the alleged sub-lease document was validly executed by KFL?
4. Whether NIL ever obtained the prior consent of *i*-TLTB to the alleged sub-lease, and if so when?
5. Whether KFL's alleged sublease (and upon which KFL's claims in the action are based) was null and void under sections 7 and 12 of the *i*-Taukei Land Trust Act 1940 because the consent of the *i*-TLTB was not obtained prior to the entry into the alleged sublease and/or prior to KFL going into possession under the alleged sublease?
6. Whether KFL was at all relevant times a "foreign investor" under the Foreign Investment Act 1999?
7. If so, whether the activities of KFL in entering into the alleged sub-lease and/or entering into possession of Malamala Island constituted the carrying on of business in a "restricted activity" under the Foreign Investment Act 1999.
8. Whether KFL was required to hold a Foreign Investment Certificate under section 4 of the Foreign Investment Act 1999 in order to enter into alleged sublease and/or to go into possession of Malamala Island, and if so, whether it held the requisite Foreign Investment Certificate?
9. If not, whether by entering into the alleged sublease and/or by going into possession of Malamala Island, the alleged sublease was void for illegality under section 16 of the Foreign Investment Act 1999?

AFFIDAVITS

19. SSCL'S application is supported by an affidavit of Sakiusa Raivoce sworn on 24 January 2021. The plaintiff has not filed any specific affidavit to oppose the application. However, they rely on an affidavit of Michael Clowes sworn on 08 May 2012.

Raivoce's Affidavit

20. Raivoce is a director and chairman of SSCL's Board of Directors. He draws attention to paragraph 20 of the KFL's Amended Statement of Claim where KFL has pleaded that the sublease in question was entered into in or about 2007 for a term of 25 years from 1 August 2007.

21. In its Amended Statement of Defence filed on 18 August 2020, SSCL raises various issues in paragraph 20. These relate to the validity of the sublease which is at the heart of KFL's claim(s).

22. If KFL's sublease is held to be invalid for one reason or another, KFL's claims against SSCL (and against the other defendants) should also be dismissed.

23. The following are the reasons pleaded in SSCL's Statement of Defence as to why KFL's Writ of Summons and Statement of Claim should be struck out.

Issue	**Reason(s)**
Was sublease validly **executed**?	SSCL contends in paragraph 20 (b) of its Amended Statement of Defence that the Sub-Lease was not validly executed. KFL has produced a copy of the sublease it relies on. This is annexed to an affidavit of Michael Clowes sworn on 8 May 2012 and filed herein. KFL also discovered this same lease during discoveries. The said sublease is undated. Also, it is executed under seal by only one director, and not two and does not appear to have been stamped. This lease should have been dated. Also, at the time the sublease was purportedly entered into, the law then required two signatures to witness the affixing of the company seal. The sublease document is also for a term of twenty-five years from 1 August 2007.
Was the **prior consent** of i-TLTB obtained before the sublease was entered into?	SSCL contends in paragraph 20 (c) (i) and (ii) that *i*-TLTB's prior consent was not obtained – as required by law – prior to the execution of the sublease. The relevant law in question is to be found in sections 7 and 12 of the *i*-Taukei Land Trust Act 1940. The effect of both sections is to forbid any lessee (NIL) from subleasing his/her/its lease (Head Lease) without the consent of *i*-TLTB first head and obtained. Any sub-lease entered into without he prior consent of *i*-TLTB is null and void. In Clowes' affidavit of 08 May 2012, he annexes an *i*-TLTB consent document which is dated **20 October 2008**. It is this same consent which KFL has ever discovered. Clearly, KFL relies on this consent. Notably, the said consent to KFL pertains to a sublease for a term of twenty-five years from 15 August 2007. On top of that, KFL actually went into possession of Malamala Island before *i*-TLTB's purported consent

Did KFL hold a **Foreign Investment Certificate** in respect of its day-cruise business to Malamala Island?	KFL breached the law in not having a valid Foreign Investment Certificate in respect of its sublease and day cruise operations in Fiji. A Foreign Investment Certificate is required because: (a) Clowes came to Fiji from Australia and was not a citizen of Fiji (b) he came here for the purposes of operating a day cruise business to Malamala Island. (c) he is a shareholder in KFL (d) operating a day cruise business is a restricted activity under the Foreign Investment Act 1999. Furthermore, KFL went into possession of Malamala Island without a Foreign Investment Certificate.

Clowes' Affidavit

24. KFL has not filed any specific affidavit to oppose SSCL's Order 33 application. However, it appears to rely a lot on an affidavit of Michael Clowes sworn on 08 May 2012 in HBC 100 of 2012. I note the following key points from Clowes' affidavit:

Relevant Fact	Date	Paragraph in Clowes Affidavit	Annexure
Date of Sublease	Date and month not entered but year "2008" is set out	5	MC1
Term of Sublease	Twenty-five (25) years from 15 August 2007	5	MC1
Commencement Date of Sublease	01 August 2007	5	MC1
i-TLTB Consent to the Sublease	NIL applied for consent -16 April 2008 Date of Consent – 10 October 2008	5	MC3
Date of Commencement of Business on Malamala Notices of Termination by NIL	03 August 2007	42	

FINDINGS

When did KFL execute the alleged agreements for sub-lease of Malamala Island?

25. The Head Lease to NIL was registered on the **22 August 2007**. As a matter of law, a sublease is carved out of a Head Lease. A *fortiori* that the sublease in question could only have been validly executed at any point from 22 August 2007.

26. I agree that the date of execution of the sublease is most crucial in this case. It must be juxtaposed against (i) the date the *i*-TLTB granted consent and (ii) the date KFL moved into possession.

27. There are actually two slightly different subleases before me. The first is the one which is annexed to the affidavit of Michael Clowes and marked **"MC1"**. The commencement date on this sublease is **01 August 2007**. It is executed by three directors of NIL with company seal annexed, before M.A Sahu Khan (Solicitor). However, it is executed by only one director of KFL with company seal annexed – also before M.A Sahu Khan (Solicitor). The document is not dated. However, the year **"2008"** is typed in. For convenience, I will henceforth refer to this as the **"2008 sublease"**.

28. The second is the one which is annexed to the affidavit of Sakiusa Raivoce. According to Raivoce, this version was produced by NIL during discovery. It is dated 10 September 2007 (**"2007 sublease"**). It was fully and completely executed by both KFL and NIL before Antonio Bale (lawyer). This sublease also bears the commencement date of **01 August 2008** and a term of twenty-five years.

29. As I have said, the two subleases vary slightly in their provisions. The 2008 version, which had only one director of KFL signing with seal affixed – was more beneficial in its terms to the landowners/NIL. The 2007 version – which was fully executed by both parties, is less beneficial to the landowners/ NIL.

30. At paragraph 20 of the Amended Statement of Claim, KFL pleads that the sublease in question was entered into **"in or about 2007 for a term of 25 years from 1 August 2007".** This is admitted by SSCL in its defence.

31. Mr. Apted suggests that the mere existence of the 2008 version which is materially different from the 2007 version, and the fact that the 2008 document is incomplete in the sense that KFL had not fully executed it (see below for discussion on this point) is because it is a version which NIL had tried to enter into for the benefit of the landowners. However, its terms which benefitted the members of Naobeka tremendously – were not acceptable to KFL. That is why the document was not dated and why it was never fully executed by KFL. At the very least, one can safely say that *consensus ad idem* is clear and unequivocal in the 2007 sublease, but is absent in the 2008 document (see discussion below).

32. Accordingly, I find that the parties did enter into the sublease on **10 September 2007**. It was duly executed by all parties, and duly attested to. It had a **term of twenty-five years commencing 01 August 2007**.

When did KFL go into possession of the Island under the sublease?

33. At paragraph 21 of its amended statement of claim and further amended statement of claim, KFL pleads that it (KFL) began operations on Malamala Island on **03 August 2007**. Prior to beginning operations on Malamala Island, KFL had spent three months refurbishing the day trip facilities and cleaning up on the island. Clowes deposes at paragraph 42 of his affidavit that KFL **"began operations on Malamala Island on 03 August 2007 after spending three months refurbishing the day trip facilities and cleaning up on the island"**.

34. The 2007 (and also the 2008) sublease states that the commencement date was 01 August 2007. It follows that KFL was accountable to pay rent from 01 August 2007.

35. Mr. Apted submits that, if KFL began operations on Malamala Island on 03 August 2007, but the commencement date on the lease was 01 August 2007, and if KFL had spent three months prior to beginning operations – cleaning, clearing, and preparing the island – then KFL would have actually gone into possession from either **01 or 03 May 2007**.

36. While actual possession may have begun on either 1 or 03 May 2007, exclusive possession was actually given from 01 August 2007. This was the commencement date stated on the lease document. This is also be the date from which KFL's rental dues would have been calculated. Hence, when KFL and NIL executed the 2007 sublease on 10 September 2007, KFL had been in actual possession of the island from 03 May 2007, and in exclusive possession of the island from 01 August 2007. It was already operating its day cruise business from 03 August 2007.

37. I agree with the suggestion that KFL went into actual possession of the island from early May 2007. Based on Clowes' own admission, I place that date at 03 May 2007. However, KFL went into exclusive possession from 01 August 2007 which was the date of commencement of the lease. Of course, as I have said above, KFL would later execute the sublease with NIL on 10 September 2007.

38. There is authority 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".

39. Whilst the former will offend the policy of section 13 of the State Lands Act (as per Supreme Court of Fiji in **Guiseppe Reggiero –v- Nabuyoski Kashiwa** Civil Appeal No. CBV0005 of 1997S), the latter do not necessarily have the same effect:

> "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.**

40. This means that the time when KFL went into actual possession from 03 May 2007 to carry out all preparatory work, may not be reckoned with as performance of the sublease. I therefore, find that KFL performed the sublease from 01 August 2007 which was the date when the sublease commenced.

Was the 2008 Sublease Validly Executed?

41. Mr. Apted, again accentuates the fact that the 2008 sublease was signed by one officer only of KFL who affixes the company seal on the document. This, despite the fact that the Articles of Association of KFL stipulates that two officers are required to affix the company seal to any document.

42. Mr. Maopa argues that one person may bind a company. Mr. Apted replies that, in law, there are two ways by which a company may be bound by a contract or a document.

43. The first way is through the act of an agent who either has actual authority or ostensible authority. The actions of the agent will not require the affixing of the company seal because the agent is not an officer of the company and is not authorized to affix the company seal. In other words, the legal basis by which the company is bound by the act of an agent is purely through the common law of agency – and of course – contract.

44. The second way by which a company may be bound by a contract or document is through the affixation of the company seal to the document. The affixation of the company seal to a contract or document, signifies that it is the company itself, as a juridical person, which is entering into the contract or which is committing itself to a document. Where the company itself is involved, then the company's articles of association must be complied with. For example, if the articles of association prescribes that the authentication of a document by the company must be by the company's seal and signed by two officers – then that provision must be complied with. In that regard, the legal basis by which the company is bound is purely through Corporations Law (company's articles of association), contract law and any relevant legislative provision (e.g., Companies Act). In this case, KFL's articles of association prescribe(s) that the company seal can only be validly affixed to a document if two officers witness it.

45. Mr. Apted relies on **Northside Developments Pty. Ltd. v. Registrar-General** (1990) 170 CLR 146. This is an Australian case where the High Court of Australia makes clear the distinction between acts of a company where the company itself is acting as a corporate juridical person – and those other acts done by agents of the company and binding the company thereto. In any instance where the company's seal is affixed to a document or instrument, it is the Company itself which is acting. And in order for it to be a valid act of the Company, the requirements of the articles in relation to the accompanying signatures - must be complied with. As Mason J said at 392:

> "The affixing of the seal to an instrument makes the instrument that of the company itself; the affixing of the seal is in that sense a corporate at, having effect similar to a signature by an individual …Thus it may be said that a contract executed under the common seal evidences the assent of the corporation itself and such a contract is to be distinguished from one made by a director or officer on behalf of the company, that being a contract made by an agent on behalf of the company as principal."

46. Section 40 of the old Companies Act provides that a document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorized officer of the company, and need not be under its common seal.

47. I agree with the submission that the 2008 sublease was not validly executed and, for that reason, as I have said above, there was no consensus ad idem on this document.

Was i-TLTB Prior Consent Obtained before Sublease Executed?

48. Section 12 of the i-Taukei Lands Trust Act provides in its relevant part:

> **12.** - (1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to .... deal with the land comprised in his lease or any part thereof ... by ... sublease .... without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any ... sublease .... effected without such consent shall be null and void:

49. Section 12 is clear that the consent of the *i*-TLTB must be "first had and obtained" before any lessee under the Act could deal with his lease or part thereof by sublease. Otherwise, the sublease shall be null and void.

50. It is noted that KFL did not plead consent in its second amended statement of claim – although it did in its original claim.

51. At paragraph 5 of his affidavit, Clowes annexes a copy of the i-TLTB consent. I note that this is the same consent which Raivoce annexes to his affidavit and the only one which was ever been discovered by KFL and which Mr. Maopa relies on in his submissions. From the document, one can see that:

    (a) the application for consent was actually made on **16 April 2008**.
    (b) the consent was granted on **10 October 2008**.
    (c) the consent refers to a sublease with a term of twenty-five (25) years with effect from **15 August 2007**.

52. If one takes the 2007 version, then it is clear that KFL and NIL executed the said sublease on 10 September 2007 which was seven months before the application for consent was made on 16 April 2008.

53. If one were to take the 2008 version, for which there is no date of execution, and which was not completed by KFL, and for which the commencement date is also 01 August 2007 - the document would still offend section 12. I say that because the date when KFL went into exclusive possession (on the 2007 or 2008 sublease) – was from 01 August 2007. This was eight (8) months or so prior to the date when consent was even applied for – and fourteen months or so before consent was granted on 10 October 2008.

54. The fact that the entry into exclusive possession preceded the time when consent was applied for (and granted), only establishes that consent was NOT first had and obtained as required by section 12.

And section 12, is a legislative provision which forbids the formation or performance of a contract prior to the obtaining of the stipulated regulatory consent.

55. In **Gonzalez v Akhtar** [2004] FJSC 2; CBV00011.2002S (21 May 2004), the Fiji Supreme Court said:

> 117 Where a statute expressly prohibits the sale of land or goods, or entering into a contract without a licence, such contracts are normally regarded as illegal and unenforceable. See generally **George v Greater Adelaide Land Development Co Ltd** [1929] HCA 40; (1929) 43 CLR 91 at 103, **Adelaide Development Co Pty Ltd v Pohlner** [1933] HCA 13; (1933) 49 CLR 25, and **Bradshaw v Gilberts (Australasian) Agency (Vic) Pty Ltd** [1952] HCA 58; (1952) 86 CLR 209 at 218. Legislation that prohibits the formation or performance of particular contracts must be distinguished from legislation that precludes the enforcement of specific contracts, or provides that they are invalid or void. Such contracts are not necessarily illegal, and the rules that apply to illegal contracts do not apply to them.

56. Section 12 expressly forbids any lessee of native land to sublease the land without the consent of the i-TLTB first had and obtained. That, to me, is a clear and unequivocal prohibition against the entry into, and *a fortiori*, against the performance of, any contract or dealing involving i-taukei land, without the prior consent of the i-TLTB.

57. If, supposing, the sublease had been worded to be subject to the consent, it may be sustainable if only in as far as it obliges a party to obtain the consent. However, it is a different story if, as happened in this case, the sublease was actually performed by the giving and acceptance of exclusive possession well before the consent was even sought – let alone – granted.

58. There is some authority in Fiji that a contract (inchoate) may still be entered into by two parties, and still be valid (only to the extent of binding the party so obliged under the agreement - to obtain consent), if the contract expressly provides that their agreement is subject to the regulatory consent under section 13 of the State Lands Act (similar in wording to section 12) and so long as there has been no performance before the consent is obtained. Admittedly, the rights arising out of the contract before consent is obtained, will not include an equitable proprietary interest in any land (let alone a legal interest) which is the subject of the contract, although the innocent party's entitlement will only be limited to recovering any monies paid or expenses incurred- if consent is not obtained (see Fiji Supreme Court decision in **Guiseppe Reggiero –v- Nabuvoski Kashiwa Civil Appeal No. CBV0005 of 1997S**; **Sheela Wati v Krishna Dalip Limar & FSC** Civil Action No. HBC 78 of 2004L as per Inoke J).

59. Aside from that, it is noteworthy that the consent in question relates to an arrangement which purportedly commenced from **15 August 2007**. That said, the sublease which KFL's claim is premised on - commences from **01 August 2007**. It would appear then that the consent which KFL relies on does not coincide with the sublease which KFL relies on (whether it be the 2007 or the 2008 sublease).

60. The consent is actually expressed to have retrospective effect as follows:

> "The consent of the Native Land Trust Board is hereby granted to the sublease described in Schedule B above in respect of the land described in Schedule A above. THIS CONSENT IS GRANTED ONLY IN RESPECT OF THE TRANSACTION DESCRIBED AND ON THE LAND REFERRED TO, IF THERE IS ANY VARIATION WHATSOEVER THEN THIS CONSENT IS VOID AND OF NO EFFECT".

61. Schedule B on the Consent describes the applicable sublease to which the consent applies – as follows:

> "Term 25 years from **15th day of August 2007** …"

62. I accept the submission that consent is granted only on the transaction stated thereon the document. Any variation renders the consent void and of no effect. Therefore, the consent which KFL relies on is either invalid *vis a vis* the sublease which KFL relies on – or - was granted for a different sublease and does not relate to either the 2007 or the 2008 sublease.

63. Mr. Apted argues that the difference in the date between the commencement date of the 2007/2008 sublease – and the transaction referred to in the consent – should cast a doubt as to the certainty of the term of the sublease, which is an essential term of any sublease. He urges this court to make a finding that neither the 2007 nor the 2008 sublease was ever consented to by the i-TLTB.

64. The point is, even if the consent relates to the 2007 or the 2008 sublease, the sublease would still be illegal – as I have said above – on account of the fact that KFL had moved into exclusive possession in August 2007 well before the consent was even applied for. In this case, Clowes himself admits in his affidavit that he took possession of Malamala Island in 2007 – pursuant to the sublease arrangement - when he began operating his business.

65. Mr. Maopa submitted in Court that i-TLTB had granted consent retrospectively. I do not think the *i*-TLTB can grant consent retrospectively when section 12 categorically states that consent must be "first had and obtained". Unless the Act gives the i-TLTB that discretion, it cannot grant the consent retrospectively. I find that the i-TLTB's consent was not first had and obtained. The sublease was entered into between the parties and the consent was applied for – and obtained later.

66. I find that there was no i-TLTB consent granted on the 2007 sublease or the 2008 sublease for the reason stated above – that is - the consent which is annexed to Clowes affidavit sworn on 08 May 2012 relates to a different transaction. If I am wrong on that, such that the consent which is annexed to Clowes affidavit relates to the 2007 sublease or the 2008 sublease, then the consent was irregular as it was granted retrospectively on 20 October 2008 to a transaction that purportedly was effective from 01 August 2007. In other words, the consent was not first had and obtained in terms of section 12 of the i-Taukei Lands Trust Act.

Whether KFL'S Sub-Lease Was Null & Void Under Sections 7 and 12 of the i-Taukei Land Trust Act 1940 because the Consent of i-TLTB Was Not Obtained Prior to the Entry into the Alleged Sub-Lease and/or Prior to KFL going into Possession under the Alleged Sub-Lease?

67. I answer both these in the affirmative for reasons stated above.

Foreign Investment Certificate Prior

68. As to the other issues pertaining to the Foreign Investment Certificate, I prefer not to deal with them because there is no firm evidence before me to confirm Clowes' resident and/or immigration status at all relevant times.

COMMENTS

69. I note for the record that, at the hearing of the Order 33 Rule 3 application, Mr. Maopa raised the point that the very document which is at the heart of the plaintiff's case, which is the *i*-TLTB consent, has never been discovered by the *i*-TLTB. He submits that the Order for discovery was made by Mr. Justice Nanayakkara on 18 November 2020. Mr. Cati responded that the Order in question was simply an Order on Summons for Directions rather than an Order for Specific Discovery as Mr. Maopa makes it appear. The *i*-TLTB had always had its relevant files open for discovery. However, KFL never really made any serious attempt at discovery all these years. Furthermore, the Order in question was made in HBC 100 of 2012 (**"2012 action"**) before it was consolidated with HBC 27 of 2016 (**"2016 action"**). At some point before consolidation, KFL had managed to get *i*-TLTB struck off as a defendant in the 2012 action. However, later, the *i*-TLTB was named a defendant when the 2016 matter was filed. I observe that KFL has always relied on the consent which I have noted above. It does not allege that there is one specific other consent which the i-TLTB has not discovered – let alone – whether there is yet another specific sublease which the iTLTB has not discovered. One would think that after all these years – and with so many requests for Further & Better Particulars from SSCL, that KFL would have had a clear case theory by now supported by clear evidence. Sadly – that is not the impression one gets.

70. Having said that, the findings which I make above in paragraphs 25 to 68 are final findings. They are not interlocutory findings. Accordingly, any earlier interlocutory comment or remark which might have been made on any of the subjects mentioned above, does not attract the doctrine of *res judicata*.

71. KFL's claim against NIL is premised entirely on a common law claim for breach of contract. Against SSCL and *i*-TLTB, the claim is based on the tort of unlawful interference with contractual relations.

72. Notably, while the facts alleged in the Amended Statement of Claim and in paragraphs 7 to 102 of Clowes' affidavit might, in theory, support a claim for equitable damages, KFL's Amended Statement of Claim does not plead any equitable relief. The entire case is pleaded on the assumption that there was a valid sublease.

73. In as far as the sublease over Malamala is concerned, the evidence suggests a pattern of "doing things" perfunctorily on the part of KFL.

74. First, it went into possession of the island before a sublease was even executed. Then it purported to execute a sublease – with one Director signing only and affixing the company seal. Then it tried to obtain the consent of *i*-TLTB– which was granted retrospectively. Of course, Mr. Apted would submit that all this, while KFL was engaged in a restricted business activity, and without a valid Foreign Investment Certificate issued by the Fiji Trade and Investment Board.

75. Against that background, it is hard to imagine how KFL might have a valid legal sublease. Regrettably, for KFL at least, there is no claim for equitable damages pleaded. In the circumstances of this case, that might be all that KFL should have pursued – but mainly (if not only) against NIL . It is hard to think how KFL could have an equitable proprietary interest over Malamala Island.

76. There has been no indication by KFL of any intention to apply to seek leave to amend its claim – yet again- to plead a cause of action based on equity. In the premise, I am left with no option but to strike out the statement of claim against all the defendants – based on the findings above.

77. When one juxtaposes KFL's rather evasive conduct in the manner in which it responded to KFL's request for further and better particulars, and the incoherence in the facts which it relies on in its case theory as revealed by the documents in this Order 33 Rule 3 application – it seems clear that its case was always hanging by a thread so to speak – from the moment it filed its Writ of Summons and Statement of Claim.

CONCLUSION

78. I strike out the consolidated statements of claim in HBC 27 of 2016 and HBC 100 of 2012 for the following (two separate and independent) reasons:

    (i) firstly, on account of KFL's contumacious and contumelious breach of Mr. Justice Stuart's unless orders dated 10 September 2021.

    (ii) on account of my findings above, on SSCL's Order 33 Rule 3 application.

79. I make no Order as to Costs at this point but I shall leave it open to the Defendants to apply to the Master for costs – on whatever basis - if not agreed.

HIGH COURT OF FIJI
LAUTOKA

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Anare Tuilevuka
JUDGE
Lautoka

02 March 2023