

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 62 of 2022

BETWEEN : COURIER DOCUMENTS PARCELS SERVICES LIMITED
Plaintiff

AND : BIRONDA (FIJI) LIMITED
Defendant

Counsel : Mr V Singh & Ms S Shoheb for the Plaintiff
: Mr. P Kumar & Ms L Sharma for the Defendant

Hearing : 15 November 2024
Submissions : 28 November 2024¹ / 13 December 2024²
Judgment : 11 April 2025

JUDGMENT

- [1] The parties entered into a sale and purchase agreement in August 2017 in respect to the purchase of part of an iTaukei lease. The Plaintiff sought to purchase the same from the Defendant for the amount of \$170,000.
- [2] The parties have since fallen out. Neither party appears to wish to proceed with the sale. The Plaintiff seeks recovery of its deposit of \$90,000. The Defendant seeks costs incurred with developing the land in question, in the amount of \$70,410 plus lease rentals of \$1,500.

¹ Closing Submissions for Plaintiff

² Defendant's Submissions

Background

- [3] The Defendant is a company incorporated in or about 2004. Mr Shanil Naidu (Defendant Witness 1) appears to be the owner of the company although this was not made clear at trial. The Plaintiff is also an incorporated company doing business in Fiji. Mr Rajnil Singh (Plaintiff Witness 1), is a director of the company. It appears that his father is also involved in the Plaintiff company
- [4] An Agreement for Lease was issued by the iTaukei Land Trust Board (**'the Board'**) to the Defendant on 11 May 2017, TLTB No. 4/7/41473, for the property known as Drasa (part of) Subdivision Lot 1 situated in the Tikina of Vitogo and in the Province of Ba and having an area of 1.6135 hectares (**'the property'**). As per the terms, the Defendant was required to arrange a survey of the property within 3 months, pay a premium of \$81,000 and a yearly rent of \$1,000. The term of the commercial lease was 75 years. There were a number of other conditions, of relevance to the present proceeding is clause 2(k) which reads:
- Not to alienate or deal with the land or any part thereof whether by sale, transfer, sub-lease or license or in any other manner whatsoever without the consent in writing of the lessor first had and obtained.*
- [5] The property is located in or close to Lautoka. Mr Naidu stated that he purchased the iTaukei lease in 2017 and intended to build a hotel on the site. He also intended to subdivide part of the land to sell plots. In the first half of 2017, he met Mr Singh and his father who agreed to purchase a plot of land to build a warehouse. They agreed on the price of \$170,000. The Plaintiff paid a deposit of \$90,000 to the Defendant on 8 May 2017.
- [6] A Sale and Purchase Agreement was later prepared by the Defendant's solicitors. It appears that the Agreement was signed and initialled by the Defendant and then sent to the Plaintiff to do the same. The Agreement was signed and initialled by Mr Singh and his father for the Plaintiff. They also made changes to the Agreement. The sale price which was recorded in the original Agreement as \$170,000 plus VAT was amended to

make the sale price inclusive of VAT. This led to changes to clauses 1, 3 and 20(a). Each change was initialled for the Plaintiff. The changes were not countersigned by the Defendant. The Agreement is dated 3 August 2017. It is not clear whether this date was recorded by the Plaintiff or Defendant. In any event, the evidence of Mr Naidu at trial is that he had not seen the amended Agreement prior to the day of trial and not aware the Agreement had been amended. Mr Singh disputed this but the fact remains that the changes made by the Plaintiff to the Agreement have not been counter signed by the Defendant – at least not on the copies of the Agreement produced to the Court.

[7] The relevant terms of the Agreement are as follows:

- i. Clause 1 provides that the Plaintiff is purchasing one acre, '*a little more or less and subject to survey*)' of the property for the sum of \$170,000 plus the lease fees to be paid to the Board.

- ii. Clause 2 was the subject of dispute at trial. It reads:

The Purchaser has deposited FJD\$90,000 (Ninety Thousand Dollars) prior to the execution of this agreement which the Vendor shall be at liberty to use for his development of the sub-division or at his discretion.

- iii. The balance of \$80,000 was to be paid upon settlement.³ The property was sold on an '*as and where is basis*'.⁴
- iv. There are default clauses for both parties. Clause 16 provides the vendor (Defendant) with remedies in the event that the purchaser (Plaintiff) defaults on payment or with its other obligations under the Agreement. The purchaser (Plaintiff) has remedies against the Defendant under clause 17 in the event that the vendor defaults with its contractual obligations.

³ Cl 3.

⁴ Cl 8.

v. Clause 19 was also the subject of dispute. It reads:

The Purchaser shall bear sale and purchase agreement, transfer, solicitors fees, including all stamp duty, registration fees, and survey and separation of title costs and other disbursements in respect of this agreement. However, all costs for discharge of and transfer of any mortgage or other charge shall be paid for by and the responsibility of the Vendor.

- [8] The Plaintiff's case is straightforward. Mr. Singh stated in evidence that following the signing of the Sale and Purchase Agreement, the Plaintiff awaited execution of the survey and transfer documents by the Defendant. This was not forthcoming after 4-5 years and, therefore, the Plaintiff brought these proceedings in 2022 to recover its deposit of \$90,000.
- [9] The Defendant's position is that the obligation was on the Plaintiff to organise the survey as per clause 19 of the Agreement (as well as communications with Mr Singh), and that Mr Singh came up with excuse after excuse for not doing so (despite reminders and follow ups by Mr Naidu). The parties had a meeting on 13 March 2018 at which time the Plaintiff confirmed its commitment to the purchase. An email from Mr. Naidu to Mr Singh on 14 March 2018 confirms the fact of the meeting. It appears that the Plaintiff agreed to make a further payment of \$40,000. Mr Naidu also reminded Mr Singh in the email, '*don't forget surveyor as we discussed yesterday*'. Mr. Naidu stated in evidence that even after this meeting the Plaintiff did not organise the survey and, as such, and with verbal agreement from Mr Singh, the Defendant took steps to develop the property, organising landfill and other developments. He has produced receipts incurred by the Defendant between March 2018 and February 2019 for excavator works, concrete culverts, and land fill. The total amount of the receipts is \$78,010. Mr Naidu stated that he made every effort to make the sale happen.

Pleadings

- [10] The Plaintiff filed a Writ of Summons on 16 February 2022. It pleads that the Defendant failed to take steps to obtain the necessary regulatory approvals and transfer of the

property to the Plaintiff and, therefore, the Plaintiff seeks recovery of its deposit of \$90,000 plus interest from 3 August 2017 until the payment is made.

- [11] The Defendant filed his own defence, pleading that the Plaintiff had agreed verbally to undertake and bear the cost of surveying and subdivision of the property. The Plaintiff did not do so and, therefore, the Defendant undertook some subdivision works incurring costs for construction of drainage and driveway and backfilling of land in the amount of \$70,410. It says the Plaintiff is liable for these costs.⁵ The Defendant seeks recovery of these costs plus land lease rental costs for 5 years in the amount of \$1,500.

Evidence at trial

- [12] The evidence of the witnesses is already, largely, summarised. The Plaintiff called two witnesses, being Mr Ranjil Singh and Mr Kevueli Koroduadua, the latter a Landscape Officer with TLTB. Mr. Singh denied that the Plaintiff had agreed to pay the cost of subdivision of the property or the survey. He stated that this was the responsibility of the Defendant.⁶ Mr. Singh stated that he simply offered to provide a contact for a surveyor to Mr Naidu. It was Mr. Singh's expectation that in return for payment of \$170,000, the Defendant would organise all the paperwork for the transfer of 1 acre of the property to the Plaintiff.
- [13] Mr. Koroduadua stated that the Agreement for Lease to the Defendant was still extant, but that no survey had yet been undertaken (in breach of the Agreement for Lease). He stated that there was no application by the Defendant on TLTB's file to subdivide the property or seek the Board's consent to transfer part of the property to the Plaintiff. Mr Koroduadua stated that these matters could not be considered by TLTB unless, and until, the Defendant had undertaken a survey of the property.
- [14] Mr. Naidu lives in Australia. In about 2003, he was invited to invest in Fiji. He set up the Defendant company and purchased freehold land in Sigatoka, building a hotel with a bar and restaurant. The hotel is still operating. In 2017, he purchased the property that is the subject of this proceeding.

⁵ This is not consistent with clauses 2 & 8 of the Sale & Purchase Agreement.

⁶ However, clause 19 expressly places responsibility for the survey costs on the purchaser (not the vendor).

Decision

- [15] Neither party seeks specific performance of the Sale and Purchase Agreement. Both claim that the other party has acted in breach of the Agreement and seek damages. The Plaintiff seeks reimbursement of its deposit of \$90,000 plus interest. The Defendant seeks reimbursement of the costs of developing the property in the amount of \$70,410 plus land lease rental costs of \$1,500.
- [16] The case for each party is premised on the 2017 Sale and Purchase Agreement being valid and enforceable. I have, however, come to the conclusion that the Agreement is invalid.
- [17] Pursuant to s 12 of the iTaukei Land Trust Act 1940, the parties were required to obtain the consent of the Board to any transfer or sublease of the property. Section 12(1) reads:

Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his or her lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever 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 sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void ...⁷

- [18] I considered this provision and its equivalent under s 13 of the State Lands Act 1945 in *Mani v Kumar* [2024] FJHC 640 (11 October 2024). I set out in that decision a number of passages from the Supreme Court decision in *Inspired Destinations (INC) Limited v Graham and others* [2022] FJSC 50 (28 October 2022) and identified the following principles, which I had taken from the Supreme Court's decision, at [33]:⁸

⁷ My emphasis.

⁸ Footnotes not included.

- i. *Parties may enter into a written agreement to sell a crown lease or an iTaukei lease without having already obtained the requisite consent. However, the agreement should make provision for obtaining the requisite consent before the property is transferred. Ideally, the terms of the agreement ought to set out which party has the responsibility of making the application for consent and identify when that application is to be made.*
- ii. *The critical question, in the event that the requisite consent has not been obtained, is whether there had been an alienation of or dealing with the land that comes within the relevant provision.*
- iii. *Whether or not there was an illegal alienation of or a dealing with the land will turn on the facts of each case and, in large measure, the terms of the written agreement. Mere access to or possession of the land may not amount to an illegal alienation of or a dealing with the land. For example, a licence to farm land was not considered a dealing with the land yet being allowed on the land to build houses was not permitted as it was considered to be akin to a lease. In *Inspired Destinations (INC) Ltd* access to the land to run the existing resort was considered by the Supreme Court not to be an illegal alienation of or a dealing with the land under s 12.*
- iv. *Keith J raised a further issue. Where a particular use of the land, or term of the agreement, constitutes an illegal alienation of or a dealing with the land, this may not of itself invalidate the whole agreement but may render only part of it invalid. The Supreme Court did not elaborate on the matter as the question did not arise in that case.*

[19] Whilst it is permissible for parties to enter into a written agreement to sell a Crown lease or an iTaukei lease without already having obtained the necessary legislative consent, the agreement should nevertheless make provision for the parties obtaining the consent before the property is transferred. It must be expressly anticipated by the parties entering into the agreement that the sale is subject to obtaining consent. There is no such provision in the Sale and Purchase Agreement dated 3 August 2017. It does not

appear that the parties turned their minds at all to this legislative requirement when the Agreement was prepared. Mr Koroduadua confirmed that neither party has taken any step to apply to the Board for consent.

- [20] In light of the failure by the parties to make any provision in the Agreement for seeking the Board's consent, in my view the Agreement is null and void.
- [21] There is, however, a further reason that the Agreement is invalid. The Agreement has not been signed as accepted by both parties. Each party has signed a different version of the Agreement but not the same version. The Plaintiff made changes to the original Agreement but the Defendant has not countersigned these changes.
- [22] As the Agreement is null and void, neither party is able to enforce the same against the other. The Plaintiff is, however, entitled to reimbursement of its deposit of \$90,000 but not to interest on the payment or costs.

Orders

- [23] My orders are as follows:

1. The Sale and Purchase Agreement dated 3 August 2017 is null and void.
2. The Plaintiff is entitled to reimbursement of its deposit of \$90,000 which the Defendant is to pay within 30 days.
3. There will be no order as to costs.




D.K.L Tuigereqere
JUDGE

Solicitors:

Parshotam Lawyers for the Plaintiff

Kumar Legal for the Defendant