

NORTHERN HOTELS LIMITED

A

v.

GORDON C. OLIVER

[SUPREME COURT Madhoji, J.—2 January 1980]

B

Civil Jurisdiction

Crown Lands Act, Land Sales Act, Native Lands Trust Act—purported agreement for lease/option to purchase Hotel premises and lands illegal and void—defendant took possession—no prior consent by authorities to transactions—defendant's entitlement to possession not sustainable because dependant on an illegal transaction.

C

Mrs A. Prasad for the Plaintiff

B. N. Sweetman for defendant

D

Northern Hotels Limited (Plaintiff) as a registered proprietor sought to recover possession of certain hotel premises namely the Korolevu Beach Hotel and land and premises therewith. The defendant is an American citizen and as the learned judge found later a non-resident for the purposes of the Land Sales Act Cap 137. The defendant counter claimed for specific performance of a purported agreement to lease dated 10 October 1979.

E

The directors of the plaintiff were 4 sisters namely Elima Petrie Sykes, Dora Petrie French, Winifred Petrie Irving, Kathleen Petrie Clark and her husband William James Clark. They were also its only shareholders. From time to time alternate directors acted in their stead.

In 1978 the plaintiff leased the hotel property to lessees who however, encountered financial difficulties and indicated an inability to continue. On hearing of this defendant became interested in taking a lease of the hotel property as well as certain airport and nearby with an option to purchase them. This was communicated to Mr Sykes on 12 September 1979 when he tempted to secure the agreement of Mesdames Sykes, Irving and French to the leasing to him of Korolevu airport land from the company, and taking a lease of the hotel, but he met with no success.

F

G

The lessees left the premises, whereupon the defendant immediately saw the Clarks and discussed a draft lease agreement he had prepared headed "Agreement to purchase (with lease/option to purchase)".

The Clarks with some amendments agreed to this document: a proper agreement to lease with option to purchase the hotel property was to be drawn by a Mr Keil, whose firm were solicitors for the plaintiff and also the defendant.

H

On the evening of 9 October 1979 an agenda giving notice a meeting of the directors of the plaintiff next day, with a copy of documents was delivered to Mrs Sykes in Suva. This was the first she had heard of the proposed agreement or what had been

A going on between the Clarks and the defendant. The two directors in Sydney, Mesdames French and Irving were not informed about the proposed leasing of the hotel property and airport land to defendant or of the meeting of the board of directors. Mrs Sykes telephoned them after receiving the agenda and copies of the documents on the evening of the 9 October 1979.

B Thereupon Mrs Irving asked Mr Sykes to appear on her behalf at the meeting, oppose the leases and seek a postponement of decisions on them.

Mr Keil had for sometime been the alternate director and acted for Mrs French. On 10 October 1979 he sent a telegram to Sydney to Mrs French stating he was unable to continue as an alternate director.

C At the meeting there were present as directors the Clarks, Mrs Sykes and also Mr Sykes who attended as attorney for Mrs Irving. He claimed to be acting under a power of attorney for her. He moved that the meeting be postponed, Mrs Sykes supported him, the Clarks opposed him. The meeting then proceeded to vote on the Airport lease/and lease/option to purchase the hotel property by the defendant. The voting continued the same.

D That afternoon the 2 agreements to lease were executed, signed by the Clarks for the plaintiff and by the defendant. Mr Keil prepared caveats to protect the defendant's interest. The defendant took possession of the premises on or about 11 or 12 October 1979. Thereafter he carried out extensive repairs or maintenance to the building. The learned trial judge found out that at no time before or after defendant were in possession was the question of consent to the Crown the Native Land Trust Board or the Minister for Lands under the Land Sales Act discussed and that such consents have never been obtained. On 25 October 1979 a solicitor E Mr Marquardt-Gray was retained by Mrs French and Mrs Irving on behalf of plaintiff.

On 26 October 1979 a meeting of the board of directors of plaintiff was held, present being Mr and Mrs Clark, Mesdames Sykes, Irving and French. It was resolved, on the advice of Mr Marquardt-Gray that defendant be informed that the agreements of 10 October 1979 F were of no validity and the defendant was in illegal occupation. Mr Keil was advised by Mr Marquardt-Gray that defendant was in illegal occupation.

G Upon being asked to vacate, the defendant indicated he relied on the earlier alleged agreement. Further correspondence and meetings took place. The plaintiff took action for possession of the property the subject of the said lease set out in Schedule 1 to the Agreement of 10 October 1979.

It was noted that the lands and premises and in occupation by the defendant owned by the plaintiff included 2 Native leases totalling approximately 10 acres, a Crown lease which was a Protected lease of 1 acre 9.7 perches and a Native leases containing 10 acres and 1 roods, 11 perches of native land.

H The lease the hotel property and adjoining land were all affected by the provisions of the Crown Lands Act, the Native Land Trust Act and the Land Sales Act respectively so as to require, in not dissimilar terms that there should be consent to the lease agreements—dated 10 October 1979—for there to be validity of the defendant's purported lease. It was noted there were no such consents.

The defendant pleaded that the agreement was subject to implied terms in that it was subject to the necessary consents being obtained: that the parties would join in seeking such consents and the agreement remained inoperative until consents were obtained. A

The learned trial judge found that the purported agreement to lease was illegal and void pursuant to the Native Land Trust Act S.12. Crown Lands Act S.13 and Land Sales Act (Cap. 137) S.6—i.e. as to each separate category of land. B

The last section prohibited a non-resident (as the defendant was) from making a contract to purchase or lease land without prior consent of the Minister unless the land did not exceed one acre in area.

The Judge found that the plaintiff also was a party to the purported agreement to lease which was illegal and void, yet it was entitled to recover possession of its land without recourse to the agreement on the strength of its title; whereas the defendant could not rely on the purported Agreement to justify his remaining on possession i.e. because of its illegality. C

The Judge noted the plaintiff has obtained the necessary consent to institute the proceedings already. D

Held: Judgment was entered for the plaintiff.

The defendant was ordered to deliver up possession of all the said land and property forth with to the plaintiff.

Defendant's counter claim was dismissed. E

Case referred to:

Chalmer's v. Pardoe (1963) I W.L.R. 677

Phalad v. Sukhraj 24 F.L.R. 170

St. John Shipping Corporation v. Joseph Rank Limited (1957) I QB 267 F

Amar Singh v. Kulubya (1964) A.C. 142

Logessa v. Pachamma (Fiji Court of Appeal No. 59 of 1979).

MADHOJI, J.

Judgment

In outline the facts and background to this case as I find them are as follows: G

The plaintiff, Northern Hotels Limited, is and has been at all material times, the registered proprietor of all the freehold lands, Native Leases and Crown leases referred to in paragraph 2 of the Amended Statement of Claim and described in the first schedule thereto and also in the Agreement to Lease (Ex. 20) Schedule One on which are erected certain premises known as the Korolevu Beach Hotel (hereinafter called the Hotel property). H

The directors of Northern Hotels Limited at all material times were four sisters, namely Elima Petrie Sykes, Dora Petrie French, Winifred Petrie Irving and Kathleen Petrie Clark together with William James Clark, the husband of the last

A named. These directors were the only shareholders in the Company. From time to time alternate directors acted for those directors who were abroad. This is shown by the evidence and Exhibits 84 and 85.

B Sometime in 1978 the plaintiff leased the Hotel property to Mr and Mrs O'Dwyer. It is clear from his letters to the Directors of Northern Hotels Limited (Ex. 29) dated 29th June, 1979 and Ex. 19 dated 26th September, 1979 that after operating the Hotel for some time he was in serious financial difficulties during 1979. In his letter of 29th September, 1979 he says he is unable to carry on as lessee of the Hotel property because he is unable to meet his financial commitments. He asked for certain clauses in his agreement to be waived but agreed to continue until a successor took over the Hotel from him.

C The defendant, Mr Oliver, an American citizen in Fiji, under a permit (see Ex. 17) was at this time working on the Hyatt Regency Hotel not very far from Korolevu Beach Hotel. He had met and had discussions with Mr O'Dwyer and the Clarks and was aware of the O'Dwyer's financial difficulties. He became interested in taking a lease of the Hotel property as well as of the airport land nearby with an option to purchase them. The report of David Ragg of Fiji Property Centre attached to an agenda for a Board of Directors meeting (Ex. 17A) which appears not to have been held, shows Mr Oliver's interest in taking a lease of the Hotel property with an option to purchase it. In the penultimate paragraph of his report Mr Ragg says "In essence Mr Oliver's offer is being presented on the assumption that before 1st December, 1979 the current lessee will relinquish his lease in which case Oliver's lease/option to buy could then be considered should Northern Hotels so desire". The evidence of Mr Oliver and Mrs Sykes shows Mr Oliver's knowledge that O'Dwyer was not going to "survive" long as lessee and his interest in taking the Hotel on lease with an option to purchase. In his meeting with Mr Sykes on 12th September, 1979 when he attempted to secure the agreement of Mrs Sykes, Mrs Irving and Mrs French to the leasing to him of Korolevu Airport land from the Company, he raised the question of his taking a lease of the Hotel but met with no success.

F Suddenly in the early hours of 30th September, 1979 the O'Dwyers left the Hotel without informing anyone that they were leaving or making any arrangements for a successor to take over the Hotel. After receiving information that the O'Dwyers had left, Mr Oliver immediately saw the Clarks that very day and discussed a draft lease agreement (Ex. 55) dated 30th September, 1979 which Mr Oliver had prepared that day—it is headed "Agreement to Purchase (With Lease/Option to purchase) the Korolevu Beach Hotel by Gordon C. Oliver" and contains the terms and conditions of this proposed agreement. The Clarks found this agreement acceptable with some modifications and it was agreed that a proper agreement to lease with option to Mr Oliver to purchase the Hotel property be drawn up by Mr Keil of Mitchell Keil and Associates who were solicitors for Northern Hotels Limited and also for Mr Oliver. Mr Keil in due course prepared the documents in respect of the Hotel property and also the Airport land. Mr Oliver and the Clarks came to Suva and after discussions approved the agreements after making some amendments. A meeting of the Board of Directors was set by the Clarks for 1 p.m. on 10th October, 1979 at the Northern Hotels office in Air Pacific House in Suva to approve the proposed lease agreements.

H However, it was not until the evening of 9th October, 1979 that the agenda (Ex. 49) giving notice and purpose of this meeting together with a copy of the proposed lease agreements for the Hotel and the airport was delivered to Mrs Sykes at her

home in Suva. According to Mr Oliver he caused the envelope to be delivered to her at the request of Mr Keil. This is the first intimation Mrs Sykes had of the proposed agreements and what was going on between the Clarks and Mr Oliver. A

The two directors in Sydney Mrs French and Mrs Irving were not informed about the proposed leases of the Hotel property and airport land to Mr Oliver or of the meeting of the Board of Directors fixed for 10th October, 1970 although Mrs Clark had telephoned them soon after the O'Dywers left to inform them of the O'Dywers departure. The first intimation they had of the 10th October meeting and these proposed leases was when Mrs Sykes telephoned them after receiving the agenda and copies of the documents on the evening of 9th October, 1979. As a result Mrs Irving asked Mr Sykes, to whom she had given a power of attorney (Ex. 50) in 1977, to appear on her behalf and represent her at a meeting and to oppose the proposed leases and to have decisions on them postponed to give her time to consider the matters on the agenda. B

Paragraph 7 of this Power of Attorney was as follows: C

"To exercise all powers, rights and authorities which I have or shall be entitled to exercise as a director or shareholder in any company incorporated in Fiji and conferred on me by the Articles of Association of that company or otherwise or as a director or shareholder in any other company incorporated or carrying on business in Fiji or elsewhere."

I am satisfied from the evidence of Mrs Sykes, Mrs Irving and Mr Clark that Mr Sykes had attended meetings of the Northern Hotels Limited Board of Directors in the past as attorney for Mrs Irving. Extracts from the minutes of previous meetings (Ex. 84 and 85) show that Mr Sykes attended these meetings as "Alternate Director" for Mrs Irving on some occasions and as "Attorney" for Mrs Irving on other occasions. I am also satisfied from Mrs Irving's evidence that this power of attorney had never been revoked by her although Mr Sykes had ceased to attend Board Meetings in this capacity for some time. D E

Mr Keil, a solicitor in the firm of Mitchell Keil and Associates, had for some time been the alternate director and attended Board Meetings for and on behalf of Mrs French who lived in Sydney, Australia. As I have noted he acted as solicitor for Northern Hotels Limited as well as for Mr Oliver and he had prepared the lease documents for the Hotel property and the Airport land to Mr Oliver. He says he prepared the lease documents as instructed but says he only became aware on 9.10.79 that a meeting was to be held on 10.10.79 to consider the leases to Mr Oliver. He admits he had seen the agenda for this meeting. He did not at any time send a copy of the lease documents to Mrs French for whom he was alternate director or inform her of the meeting to be held on 10.10.79. However, at 10.50 a.m. on the morning of 10.10.79 the following telegram was despatched by him to Mrs French in Sydney: F G

"Please be advised that I am unable to continue as your alternate director on Northern Hotels Board.

F. G. Keil"

This telegram was sent by ordinary rate by his directions. In his telegram he did not mention that a Board Meeting to consider Mr Oliver's leases was to be held that same day at 1 p.m.—i.e. only 2 hours and 10 minutes after his telegram was despatched from Suva. He says he decided to resign only that morning but there is evidence from Mr Clark and Mr Oliver that Mr Keil had told them earlier that he intended to resign as alternate director for Mrs French. Mr Keil must have known H

A that a very valuable asset of Northern Hotels Limited in which Mrs French was a shareholder and director was involved in the lease documents he had prepared giving Mr Oliver the option to purchase these properties yet, from the time he received instructions to prepare lease documents to the time of the meeting on 10.10.79 he refrained from informing Mrs French of what was happening. If he had wished to allow time to Mrs French to make alternative arrangements to be represented at the Board Meeting on 10.10.79 he could have telephoned her after receiving instructions to prepare the documents or at the latest after he was informed on the 9.10.79 of the date and time of the meeting. However, all he did was just to send her an ordinary rate telegram 2 hours 10 minutes before the time appointed for the Board Meeting giving Mrs French virtually no time to arrange to be represented at it.

B The meeting of the Board of Directors was held at 1 p.m. on 10.10.79 as is mentioned in the minutes of the meeting Ex. 49. Mr Keil did not attend at all. The Clarks and Mrs Sykes attended as directors. However, Mr Sykes also attended as attorney for Mrs Irving. His right to a vote was challenged and the minutes say "it was decided that legal opinion be sought on this." Mr Sykes told the meeting that Mrs Irving had phoned him and asked him to attend the meeting on her behalf under the power of attorney which had never been revoked. Mr Sykes moved that the meeting be postponed and Mrs Sykes supported him. The Clarks opposed postponement. The meeting then proceeded to vote on the Airport lease and lease/option to purchase the Hotel property to Mr Oliver. The voting on these two items was the same. Mr and Mrs Clark supporting it and Mr and Mrs Sykes opposing it.

D That same afternoon after the meeting, the two agreements to lease were executed and Ex. 20 is the Agreement in respect of the Hotel Property.

E It is signed by the Clarks for Northern Hotels Limited and bears the company's seal and by the defendant Mr Oliver. On the same day, that is 10.10.79, immediately after the execution of Ex.20, Mr Keil prepared caveats (Ex. 56) to protect Mr Oliver's interest in the land comprised in the agreement to lease Ex. 20. The caveats were sworn by Mr Oliver that afternoon and registered by Mr Keil at 9 a.m. the next morning. On 11.10.79 Mr Keil on instructions from Mr and Mrs Clark, wrote the following letter to Mrs Sykes (Ex. 3).

F "We have been consulted by Mr and Mrs Clark with respect to the above meeting and have advised that in our opinion, as no proper notice was given for Mr Sykes to act as alternate director for Mrs Irving whether direct or under power of attorney, he had not standing as alternate director at that meeting. That the decisions on the matters before the Board were properly made notwithstanding that the decisions were by majority and not unanimous of the persons present and entitled to vote."

G It is clear that Mr and Mrs Clark had acted on similar advice from Mr Keil when they executed the Lease Agreements on 10.10.79. It is also clear from notes in pencil made by Mr Keil on Ex. 83 (Marquardt-Gray and Company's letter on behalf of Mrs Sykes written in reply to Mr Keil's letter Ex. 3) that Mr Keil's advice was based on information given to him that Mr Sykes had never acted as alternate director for Mrs Irving under this power of attorney. However, as the evidence shows, Mr Sykes had acted as alternate director for Mrs Irving in the past. Mrs Sykes in her reply to Mr H Keil dated 11.10.79 (Ex. 52) informed Mr Keil of the fact.

On 26th October, 1979 a meeting of the Board of Directors, at which Mrs Sykes, Mr and Mrs Clark, Mrs French and Mrs Irving were present, was again convened (Ex. 49). A resolution was passed that, on the advice of Mr Marquardt-Gray, Mr Oliver be informed that the two agreements executed as a result of the meeting on 10.10.79 had no validity and that Mr Oliver was in illegal occupation of the premises. By his letter of 25.10.79 Mr Marquardt-Gray informed Mr Keil in reply to Mr Keil's letter of 11.10.79 that in his opinion, both agreements were invalid for the reasons stated in it and that the agreements having no legal validity, Mr Oliver was in illegal occupation of the properties and that he must vacate them failing which legal action would be taken.

On 2.11.79 as a result of a further Board Meeting on 29.10.79 Mr Marquardt-Gray wrote a further letter to Mr Oliver (Ex. 4) informing him that the agreements had no legal validity on the grounds stated in the letter and inviting Mr Oliver to renegotiate the agreements failing which he was informed that legal proceedings to evict him would be instituted.

In reply Mr Oliver wrote back to Mr Marquardt-Gray (Ex. 5) on 9.11.79 and the first three paragraphs of his letter are as follows:

"This is in response to your letter of November 2, 1979.

A. The under signed holds signed contracts with Northern Hotels Limited that bear the corporate seal of Northern Hotels Limited.

B Your request that I commence negotiations is unconscionable and irrelevant, since I possess a legally binding contract with Northern Hotels Limited.

C Any disputes between shareholders of Northern Hotels is not my concern, and any further suggestions as to the validity of the agreements by the Northern Hotels shareholders levelled at me, will be construed by me as aggravation, and will quickly result in legal action on my part."

D. "I have passed your letter to my Fiji Legal Counsel Mitchell Keil and Associates....."

If you desire any further communication or action, then please consult directly with Mitchell Keil and Associates."

On 21.1.80 Mr Marquardt-Gray again wrote a letter (Ex. 6) to Mr Oliver stating that the agreement Ex. 20 was illegal and void on the grounds stated in the letter and requiring Mr Oliver to vacate the Hotel property within 14 days and that appropriate proceedings would be taken in the Supreme Court without further notice should he fail to vacate the premises as required. In the meantime, on 15.10.79 Mrs French and Mrs Irving had sent the following telegram to Mr Keil:

"Understand Board Meeting held without agenda notice to us as directors and shareholders at which lease of Korolevu Airport and lease of Korolevu Hotel with option to purchase passed stop. As real estate involved we instruct you as solicitor Northern Hotel suspend action until we are properly represented"

In reply Mr Keil cabled back to them the same day as follows:

"Re telegram we have ceased to act as solicitors for Northern Hotels"

As to the Hotel property, on 12.10.79, that is two days after the execution of the agreement to lease Ex. 20, Mrs Clark, signing as Director, Northern Hotels Limited,

sent circular memorandum to all employees of Korolevu Beach Hotel, the last paragraph of which reads:

- A "Effective this date Northern Hotels Limited has executed an agreement for Lease and Purchase of the Korolevu Beach Hotel to Gordon C. Oliver (Co. Developer Hotel/Owner of New Hyatt Regency). Application for employment should therefore be made to the new management."

I find and there is no dispute, and it is admitted by the defendant Mr Oliver, that he entered into and took possession of the Hotel property either on the 11th or 12th October after the lease agreement was executed.

- B The defence in paragraphs 2 to 5 of the statement of defence, admits that the plaintiff is the registered proprietor of the titles to the lands itemised in the first schedule to the Statement of Claim and that on or about 10.10.79 Mr Oliver "on the authority and consent and on terms agreed with the plaintiff took possession of the said land and premises" and that "pursuant to the terms agreed with the plaintiff" he carried out "certain maintenance and repairs to the said premises."

Mrs Clark in her evidence says possession of the Hotel was given to Mr Oliver on 11.10.79 when she returned to Korolevu after signing the lease agreement.

- C Mr Oliver says he was asked by Mr and Mrs Clark to take immediate possession of the Hotel after the lease agreement was executed and he took possession on 11th or 12th October 1979 and since that time to the present he has been in possession of the property and has been operating the Hotel. He described in detail the substantial repairs, maintenance, and building work he has carried out on the property including the buildings and bures since entering into possession.

- D It is clear from the evidence and I find that at no time either during the negotiations for the lease agreement Ex. 20 or at the time of its execution or before or after Mr Oliver entered into possession of the property was the question of consent of the Crown, the Native Land Trust Board or the Minister of Lands under the Land Sales Act discussed raised or adverted to either by Mr Keil, the Clarks or Mr Oliver. Mr Oliver said in his evidence that his attention was not drawn to any requirement for consent on 10.10.79 and there was no discussion for the need for such consent. I also find that the such consent has not since been obtained. The fact that such consents have not been obtained are also admitted in the pleadings.

- E On 10.12.79 the Director of Lands, in response to a query by Marquardt-Gray and Company, informed him that his records showed that consent to lease agreement (Ex. 20) in respect of Crown Lease 4198 thereon had not been obtained. On 11.12.79 the Native Land Trust Board informed Marquardt-Gray and Company, that such consent had not been obtained in respect of the Native Leases in Ex. 20.

- F It was not until February/March 1980, (see Ex. 43, 45, 46) that Sir John Falvey wrote to the Director of Lands and the Native Land Trust Board asking on behalf of Mr Oliver for the required consents under the Crown Lands Act, Native Land Trust Act and Land Sales Act. However no such consent was then or has at any time since then been given.

An examination of the agreement to lease Ex. 20 shows that it contains the following recital:

".....and whereas the Owner has agreed to lease to and grant an option to purchase to the Company the said Hotel more particularly described in the first schedule hereto together with out buildings and Owner's trade and other fixtures fittings, furniture, plant and equipment specifically described in the second schedule hereto (hereinafter referred to collectively as the "said premises").

However, the agreement has a first schedule but there is no second schedule attached. Mr Oliver admits that such a schedule was never prepared and agreed upon and I find as fact from the evidence before me that such a schedule was not at any stage prepared or agreed to by the parties to the agreement.

Mr Oliver subsequent to his entering into possession sent cheques for rent payment for the Hotel was returned. Ex. 25 returning a cheque sent as rent for the Hotel was returned with a note that Mr Oliver had no right title or interest in the Hotel and that he continued in occupation as a trespasser. Mr Oliver still remains in possession of the property and the plaintiff, Northern Hotels Limited, as registered proprietor and the plaintiff, Northern Hotels Limited, as registered proprietor seeks to recover possession of the Hotel property, land and premises at Korolevu and the defendant counterclaims for specific performance of the said agreement to lease Ex. 20 dated 10.10.79.

The plaintiff by paragraph 7 of its reply filed on 19.2.82 abandoned all claims except its claim for possession of the said land.

I am satisfied and find that the plaintiff is the registered proprietor of all the said land. (Ex. 7-13). As I have already found the defendant is in possession of the said land and that prior to this action the plaintiff demanded possession back from the defendant.

The plaintiff having established a prima facie right to possession of the said land, the onus is on the defendant to establish a lawful right or title under which he is entitled to remain in possession.

The defendant relies upon the said agreement to lease Ex. 20 to set up a right or title to possession and seeks specific performance of this agreement. In support to this claim to specific performance he contends that this agreement was subject to the implied terms pleaded in paragraph 10 of the Amended counterclaim which in substance are that the agreement was subject to the necessary consents being obtained, that the parties would join in seeking such consents, and that the agreement remained inoperative and inchoate until such consents were obtained notwithstanding the defendant's entry into possession. Paragraphs 15-17 of the Amended counterclaim allege, in substance, that even if the agreement is illegal in respect of the Native Leases and Crown Leases, it is severable and valid as to the freehold land.

The defendant withdrew paragraphs 18-20 of the Amended counter-claim. There was clear evidence from the defendant that the Company when formed subsequently was controlled by himself and his wife, both non-residents for the purposes of the Land Sales Act Cap. 137. (1978 Edn.)

The plaintiff, by paragraph 4 of its defence to the Amended Counterclaim filed on 18.12.82, contends that the said agreement is illegal under the Land Sales Act, the Crown Lands Act and the Native Land Trust Act. The plaintiff has withdrawn paragraph 4(d) and 5 relating to the Liquor Act and the Land Transfer Act. By paragraph 6 it pleads section 59 of the Indemnity Guarantee and Bailment Act Cap. 232. The plaintiff also pleads that the said agreement was entered into without the authority of the plaintiff or of its directors

I have already found that the defendant entered into possession of the said land on the 11th or 12th October after execution of the said agreement to lease Ex. 20 on 10th October, 1979 and that he has continued in possession up to the present time and has carried out substantial repairs and renovations to the premises on the said land, and that consents under the Land Sales Act, the Crown Lands Act and the Native Land Trust Act were never obtained in respect of the said agreement to lease.

Clause 1 of the said agreement to lease provides that the Owner "doth hereby let" the premises to Mr Oliver, the defendant, for a term of 5 years commencing on 10.10.79 i.e. the day of agreement was executed.

Under clause 2(a) the rent is payable as from the date of commencement of the term namely from 10.10.79. The tenants covenants to pay rates and taxes (clause 3(2)) to repair (clause 3(3)) to keep the premises open as a hotel during lawful hours (clause 3(8)) to maintain insurance policies in force (clause 3(13)). All took effect, according to the agreement from the commencement of the term on 10.10.79. Under (clause 3(5)) the Owner is given a right to enter to view the condition of the premises and under (clause 3(14)) the tenant is to occupy use and keep the premises during the term. There is no clause or provision in the agreement to the effect that it is subject to the requisite consents being obtained or is to remain inoperative pending such consents being obtained. It makes no mention of the necessity of any consent.

Schedule 1 to the agreement to lease Ex. 20 shows that the property, the subject of the agreement to lease included Native Lease No. 8314 containing 2 acres 3 roods and Native Lease No. 9458 containing 7 acres 2 roods 11 perches—a total of 10 acres 1 rood 11 perches of native land.

Section 12(1) of the Native Land Trust Act provides:

".....it shall not be lawful for any lessee under this Act to alienate or deal with any land comprised in his lease....."

As I have stated earlier, it is clear from the pleadings, the evidence and the exhibits that the Board's consent to the said agreement to lease was neither "first had and obtained" nor has it ever been obtained.

As we have seen the agreement to lease Ex. 20 clearly constitutes an agreement for an immediate lease of the land included in Schedule 1 thereto operative and commencing on 10.10.79 the date of execution and commencement of the 5 year term with the tenant having an immediate right to possession of all the land and property comprised in it with the rent payable from the commencement of the term on 10.10.79, and an immediate right to repair, alter and improve the land buildings and property situate on the land, the subject of the said agreement.

As I have found earlier, Mr and Mrs Clark asked the defendant to take immediate possession of the premises and that he took possession on 11th or 12th October and that he has been in possession of all the land, the subject of the agreement and has operated the Korolevu Beach Hotel since then to the present day. I

have no doubt and find that he took such possession and continued with such possession, pursuant to the rights given him, under the said agreement. His possession arises as a result of and is referable to the said agreement and nothing else. A

So, in this case there has been not only agreement to lease Ex. 20 but possession and performance of the agreement and carrying it into effect without the requisite consent as in the case of *Chalmers v. Pardoe* (1963) 1 WLR 677 where it was said (p 684/5). B

"But even treating the matter simply as one where a licence to occupy, coupled with possession was given, all for the purpose, as *Chalmers and Pardoe* well knew, of erecting a dwelling house and accessory buildings it seems to their Lordships that when this purpose was carried into effect a "dealing" with the land took place.

.....and since the prior consent of the Board was not obtained it follows that under the terms of section 12..... this dealing with the land was unlawful. It is true that in *Harnam Singh v Bawa Singh* the Court of Appeal said that it would be an absurdity to say that a mere agreement to deal with land would contravene section 12 for there must necessarily be some prior agreement in all such cases. Otherwise there would be nothing for which to seek the Board's consent. But in the present case, there was not merely agreement, but, on one side, full performance.....the dealing was accordingly unlawful and that in such circumstances equity cannot lend its aid to *Chalmers*". C D

In *Phalad v Sukhraj* 24 F.L.R. 170. The appellant had obtained full and complete possession of Native Land, without obtaining consent, under a sale and purchase agreement. The agreement provided by clause 23 that it was subject to the consent of the Native Land Trust Board. In his judgement Henry J. A. says at page 5: E

"In the absence of a condition such as that set out in clause 23, it is clear that the transaction would be one that would come within section 12 because an unconditional agreement would pass the property in equity to the appellant as purchaser....."

The position is however, affected by the existence of the condition in clause 23 which prevents specific performance until its terms have been fulfilled." F

At page 8 he says:

"The cases already cited show that the courts have held that the mere making of a contract is not necessarily prohibited by section 12. It is the effect of the contract which must be examined to see whether there has been a breach of section 12.....For myself, I have no doubt but that the true construction of the said agreement and the substantial implementation of such agreement for sale and purchase, under which possession is completely parted with to the purchaser and immediate mutual rights and liabilities are created in respect of such exclusive possession, is a breach of section 12 if done before consent is obtained." G

At page 9 he says:

"If before consent acts are done pending the granting of consent which come within the prohibited transactions, then the section has been breached, and later consent cannot make lawful that which was earlier unlawful and H

A void.....the acts of the parties in entering into and implementing an agreement for sale and purchase before the granting of consent were done in contravention of section 12 and the said agreement was at all times null and void. The making of the agreement conditional upon.....consent being granted does not assist appellant because section 12 does not permit the conditional doing of the acts prohibited by section 12."

B In view of the facts and the above authorities, I find that the agreement to Lease Ex. 20 is illegal and void under section 12 of the Native Land Trust Act.

Schedule 1 to the said agreement to lease Ex. 20 shows that it includes Crown Lease No. 4198 being a foreshore lease containing 1 acre, 9.7 perches. This Crown Lease was and is a protected lease (Ex. 7).

C Section 13(i) of the Crown Lands Act so far as is relevant provides in respect of a protected Crown Lease:

"it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever.....without the written consent of the Director of Lands first had and obtained.....any sale, transfer, sublease, assignment, mortgage, or other alienation or dealing effected without such consent shall be null and void."

D It is admitted on the pleadings and the evidence establishes and I find that the director's consent was not "first had and obtained" nor has such consent been obtained since. My findings regarding the defendant entering into possession and his performance of the agreement to lease Ex. 20 apply to his Crown Lease. The decisions on the effect of section 13 of the Crown Lands Act show that it is akin to that of section 12 of the Native Land Trust Act *Logessa v Pachamma* Fiji Court of Appeal Civil Appeal No. 59 of 1979 at page 16). In this case, where a protected Crown Lease was concerned, clause 4 of the agreement provided that possession would be given to the purchaser a week after the agreement without such consent having been obtained. The purchaser went into possession, built a house on it and cultivated the land before obtaining the consent of the Director of Lands. It was held that this was a clear breach of section 13.

F I therefore find that the said agreement is illegal, null and void under section 13 of the Crown Land Act.

According to schedule 1 to the said agreement to lease Ex. 20 it includes 9 freehold titles, comprising in all 23 acres, 1 rood, 24.8 perches. I am satisfied from the evidence that as to CT. 3808, referred to in schedule 1, only that part of it located south of Queens Road is included in the lease agreement. This is not disputed.

G Section 6(i) of the Land Sales Act Cap 137 provides:

"No non-resident.....shall without the prior consent in writing of the minister.....make any contract to purchase or take or lease any land."

H Provided that nothing contained in this subsection shall operate to require such consent or prevent a non-resident from making any such contract if the land together with any other land in Fiji of such non-resident does not exceed in the aggregate an area of one acre."

Section 17 provides that any person who wilfully contravenes the provisions of the Act shall be guilty of an offence.

Section 2 of the Act defines a non-resident.

It is clear from the evidence that the defendant, Mr Oliver, was at the material time a non-resident for the purposes of the Act. He has admitted he is not a citizen of Fiji. Ex. 27 is summary of his Immigration file and shows he entered Fiji in 1978. This is supported by his own evidence where he says after March 1978 he began residing in Fiji and applied for a permit to work in Fiji that year. Under the Act, he was a non-resident at the material time when he entered into the agreement to lease Ex. 20 as he did not meet the requirements of being a "resident" under the Act, at such time. Ex. 20 is clearly a "dealing" within the definition of that word in the Act.

It is also clear from the evidence that prior consent in writing of the minister was not obtained to the making of the contract evidenced by Ex. 20 Exhibits 46 and 47 and the evidence of Mr Singh from the Lands Department establishes this.

I am therefore satisfied and find that all the ingredients of section 6(1) of the Land Sales Act have been established, namely that the defendant, Mr Oliver, is a non-resident, that without the prior consent in writing, he has made a contract to take a lease of land described in schedule 1 to the said agreement to lease. Not only that, he has made a contract which by its terms is operative from the day it was made. Further, in pursuance of it he entered into possession of the land and assumed all the obligations under it, has attempted to pay rent under it, has operated the Hotel on the land from then to the present time and has carried out substantial repairs, renovations and improvements on the land.

The prohibition in the Act is against the making of a contract without "prior consent."

The decisions on the cases under the Native Land Trust Act and Crown Lands Act show that the words "without prior consent" are interpreted to mean what they say.

In this case, as I mentioned, not only was an immediately operative contract made but it was also fully implemented by the defendant without any consent prior or otherwise being obtained. Such a contract is prohibited by the Act and is illegal and void. The legal principles applicable in such cases are explained by Devlin J. in *St. John Shipping Corporation v Joseph Rank Limited* (1957) 1 QB 267 at 283:

".....the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the interest of the parties is: if the statute prohibits the contract it is unenforceable whether the parties meant to break the law or not."

In the circumstances, the agreement for lease Ex. 20 is wholly illegal and void under the Native Land Trust Act, the Crown Lands Act and the Land Sales Act in respect of all the land comprised in it. The question of severability, therefore does not arise. However, even assuming that the agreement is for example, not illegal under the Land Sales Act, I am of the opinion that the agreement to lease is not capable of severance and that if it is void and illegal in respect of the Native Land and Crown Land it is wholly void as the property is let as a whole at a single rent with the covenants applying to the whole property leased, and severance would entail apportioning the rent between the various titles and thus making a new contract for the parties. It is impossible in the case of this agreement to satisfy the "blue pencil" rule where the court must be able to sever the illegal promise by cutting words out of the agreement.

The defendant has pleaded the implied terms set out in paragraph 10 of his amended counterclaim. I have found the agreement to be illegal and void under all three acts, the question of implied terms does not arise. In any case the implied terms pleaded do not assist the defendant because, as I have found, when the agreement to lease was performed by entry into possession and the acts done on the property since possession without necessary consents being first had and obtained, it became illegal and void. Even if these implied terms were express terms of the agreement it would become illegal and void upon performance without consent being obtained. For this reason the implied term pleaded in paragraph 10(a), which is conceded by the plaintiff, does not assist the defendant. As to the implied term pleaded in paragraph 10(b) that the agreement would remain inoperative and inchoate until consents were obtained notwithstanding defendant's entry into possession and performance of the agreement is not only inconsistent with the express terms of the agreement which provides for the lease to commence on the date of execution but must be rejected.....because the agreement became illegal and void when it was performed by entry into possession and performance. The agreement cannot be said to be inoperative and inchoate in the circumstances of this case. As to paragraph 10(c) I have already found that the entry into possession by the defendant was as tenant pursuant to the agreement and not in any other capacity. As to the implied term pleaded in paragraph 10(d) that if the consents were refused the defendant would be compensated for improvements, I agree that such implied terms is not only inconsistent with that pleaded in paragraph 10(b) that agreement would remain inoperative and inchoate until consents were obtained but it would compensate an illegal tenant for illegal improvements and is inconsistent with the decision in *Chalmers v Pardoe*.

The final implied term pleaded is that upon any consent being refused the defendant would have the option to cancel the agreement or to sever off the invalid part and affirm the contract as to the balance is untenable. There is a single agreement leasing the whole property and providing for possession to be given of the whole property, with a single inseverable rent to be paid for the whole and the tenant entered into possession and performed it without consent making the whole agreement illegal and void.

In view of my finding that the agreement to lease Ex. 20 is illegal and void under all three Acts, it is not necessary to go into the question whether the agreement is void under the Indemnity Guarantee and Bailment Act, or the question of the validity of the director's meeting on 10.10.79 or the question of presumption of regularity as to the execution of the agreement except to say that on the evidence before me, I cannot but conclude that, as suggested by counsel for the plaintiff, the Director's meeting of Northern Hotels Limited of 10.10.79 was planned for such a time and in such circumstances as to ensure that the two directors in Sydney would not be represented and Clarks would have voting control of their meeting and be able to pass resolutions approving the lease of the Hotel and Airport property to the defendant.

Although in this case, the plaintiff company is a party to an agreement to lease which is illegal and void, it is well established that it is entitled to recover possession of its land on the strength of its title. Its right to possession does not depend on the illegal agreement but on its registered ownership of the land comprised in the lease agreement. On the other hand, the defendant cannot rely on such agreement on

which alone he has to justify his remaining in possession because of its illegality. *Amar Singh* A
v Kulubya (1964) AC 142, *Logessa v Pachamma* (Fiji Court of Appeal No. 59 of 1979).

The plaintiff has obtained the necessary consent to institute these proceedings to
recover possession.

There will, therefore, be judgment for the plaintiff and the defendant is ordered B
to deliver possession of all the said land and Hotel property to the plaintiff
forthwith. The defendant's counterclaim is dismissed.

The defendant is ordered to pay the plaintiff's costs on the claim and the counter-
claim to be taxed if not agreed.

Judgment for the Plaintiff. Order for possession.