DAYDREAM ISLAND LTD v RATU TIMOCI VUKI and Anor (HBC284 of 2005)

HIGH COURT — CIVIL JURISDICTION

PHILLIPS J

22 November 2006, 18 May 2007

Native title — native land and native reserve land — application for determination of preliminary issues — agreements on exclusive use — Native Lands Act (Cap 133) — Native Land Trust Act ss 7, 8, 16(2).

The Plaintiff alleged that by an agreement with the Defendant, the Plaintiff was granted the sole and exclusive right to use Malamala Island for various activities on the basis that the Defendant represented himself as the traditional lawful owner. In a letter dated 9 September 2005, the Defendant purported to terminate the agreement but the Plaintiff refused on the ground that the Defendant was estopped from relying on alleged breaches of the agreement. The Plaintiff sought orders to declare the letter as null and void; the agreement's commencement date, including an automatic right to extension, was 1 July 2005; and the Plaintiff was entitled to the sole and exclusive right to use Malamala Island for a period of 11 years commencing from 1 July 2005. The Plaintiff sought injunctions against the Defendants restraining them from interfering with or inhibiting in any way the Plaintiff's use of Malamala Island pursuant to its rights under the agreement, and against the Clowes Parties restraining them from interfering with its rights under the agreement and sought damages for earlier alleged interference. The issues raised by the Defendant in the summons were: whether the tenure for Malamala Island is native reserve land under the Native Land Trust Act and whether the agreements granting the Plaintiff exclusive use to Malamala Island were void for being in breach of the Native Land Trust Act.

Held — (1) Malamala Island is native land under the Native Lands Act and also under the Native Land Trust Act. In this regard the Register of Native Land is conclusive. The unchallenged assertions in the first Defendant's (D1) affidavit are compelling evidence that when the agreement was made, Malamala Island was land in a native reserve and such finding can safely be made on the evidence. The fact that the island is native land is fatal to Plaintiff's cause of action.

(2) The control of all native land is vested in the Native Land Trust Board and is administered in accordance with the traditional Fijian concept that such land cannot be owned in fee simple by an individual nor dealt with as such.

(3) Malamala Island was a native land and at the time the agreements were executed was also native reserve land. The plaintiff's agreements with the Defendant were therefore illegal and void for being in breach of the Native Land Trust Act. The cause of action as pleaded is premised on an illegal agreement which is void and unenforceable against the Defendants. There is thus no basis upon which the Plaintiff can proceed against the Defendants.

Application dismissed. Injunction dissolved.

Cases referred to

Perry v Clissold (1906) 4 CLR 374; [1907] AC 73; *Radaich v Smith* (1959) 101 CLR 209; [1959] ALR 1253, cited.

C. B. Young for the Plaintiff

Isireli Fa for the first Defendant

Jon Apted for the second Defendants

[1] Phillips J. Before me is a summons dated 11 October 2006 by the first Defendant (D1), Ratu Timoci Vuki (Ratu Vuki) for orders and directions that certain preliminary issues be determined prior to the commencement of the trial of this action. The preliminary issues stated on the summons are:

(i) whether the tenure for Malamala Island is Native Land Reserve Land under the Native Land Trust Act; and

(ii) whether the agreements of 30 September 1991 and 20 June 1994 granting the Plaintiff exclusive use to Malamala Island are void for being in breach of the Native Land Trust Act.

[2] The application is supported by the affidavits of Ratu Vuki sworn on 22 September 2006 and Ratu Viliame Tagivetaua of 6 September 2006 and is brought pursuant to Os 33(3)(4) and 34(1)(3). It is also supported by the second Defendants (D2) (the Clowes Parties).

[3] The Plaintiff (Daydream), opposed the summons.

[4] In my view the application is clearly one, which if decided in favour of the Defendants would dispose of the whole action. Daydream's cause of action against both Ratu Vuki and the Clowes Parties is based on the validity of it's agreement with Ratu Vuki. If established that the agreement was illegal and void, it follows that the agreement is unenforceable and there will be no basis upon which Daydream can proceed against them. Determination of the issues will put an end to the action, avoiding unnecessary expense and inconvenience to all the parties.

[5] At the hearing of the summons the parties addressed me on both, the merits of the summons and the preliminary issues framed by Mr Fa. Directions were not required.

The Plaintiff's claim

[6] In its amended statement of claim Daydream alleges that by an agreement with Ratu Vuki dated 24 June 1994, it was granted the sole and exclusive right to use Malamala Island for cruises, swimming, fishing, snorkeling and associated activities. It claims that Ratu Vuki represented himself as the traditional lawful owner of Malamala Island. Pursuant to the agreement it claims to have the sole and exclusive right to use the island. Daydream claims that Ratu Vuki's letter of 9 September 2005 purporting to terminate the agreement does not comply with clause 10 of the agreement and is of no legal effect. It also claims that Ratu Vuki is estopped from relying on alleged breaches of the agreement which it denies. Daydream has refused to accept Ratu Vuki's repudiation of the agreement.

[7] It seeks declatory orders that:

(i) the letter of 9 September 2005 purporting to terminate the agreement is null and void;

(ii) the agreement's commencement date including an automatic right to extension is 1 July 2005;

(iii) it is entitled to sole and exclusive right to use Malamala Island for a period of 11 years commencing from 1 July 2005.

[8] Injunctions are sought against Ratu Vuki and the Clowes Parties restraining Ratu Vuki from interfering with or inhibiting in any way from it's use of Malamala Island pursuant to it's rights under the agreement and restraining the Clowes Parties from interfering with it's rights under the agreement and damages for earlier alleged interference.

The relevant evidence

The agreement

[9] The agreement is annexed "A1" to the affidavit of William Gock sworn and filed on 30 September 2005. The following terms are relevant to my consideration of the issues:

(i) the recital describes Ratu Vuki as the Turaga-na-Bete of Namotomoto village and as the traditional lawful owner under the Native Lands Commission record of Malamala Island at Nadi Bay;

(ii) under cl 1, Daydream was granted the sole and exclusive right to use Malamala Island for cruises, swimming, fishing, snorkeling and associated activities;

(iii) under cl 2, this exlusive right was to inure for 11 years subject to annual extensions;

(iv) cll 3–5 provide for the calculation and payment of rent;

(v) cl 7 gave Daydream the right to use existing buildings on the island and to construct new buildings subject to Ratu Vuki's consent;

(vi) cl 9 gave Daydream the sole right to use the island for it's operations;

(vii) under cl 12, no non-tourist is allowed to go to the island without a letter from Ratu Vuki and Ratu Vuki is not permitted to allow tourists onto the island without Daydream's written consent;

(viii) cl 15 contains an agreement not to assign, underlet or part with possession of the right to the island without Ratu Vuki's prior consent, but permits Daydream to allow other companies to discharge tourists on the island.

Status of Malamala Island

[10] Ratu Viliame's affidavit deposed that he is the Chairman of the Native Lands & Fisheries Commission (NLFC) a statutory body established pursuant to the Native Lands Act (Cap 133). The NLFC is charged with maintaining records of ownership of all native land in Fiji and of it's boundaries and in the event of a dispute among indigenous Fijian landowners as to ownership, tenure and boundaries of native land, the NLFC is the final arbiter. Under the Act, NLFC keeps the records of ownership and boundaries of native land in Fiji. He stated that Malamala Island is native land and he also stated that the island is also native reserve land. Annexed to his affidavit is a copy of the Native Land Register for Malamala Island prepared by Commissioner David Wilkinson in 1896 corroborating that Malamala Island is native land and also native reserve land. Ratu Viliame also confirmed that the registered native owners of Malamala Island are the Yavusa Tukani, Noineiqoro and Botiluvuka of Namotomoto and Navoci villages Nadi.

[11] The evidence in Ratu Viliame's affidavit is uncontested. It is also undisputed that the Native Land Trust Board (NLTB) is not a party to the agreement, has not consented to the agreement, and has not executed the agreement under seal.

Preliminary issue 1: Whether the tenure for Malamala Island is native land reserve land under the Native Land Trust Act?

[12] At the commencement of the hearing, Mr Fa submitted that this issue be reframed as follows:

whether the tenure of Malamala Island is native reserve land. I have preferred the submission of Mr Apted that the issue be framed as, "whether Malamala Island is native land and native reserve land under the Native Land Trust Act". The issue as originally framed invited the court to make findings of fact in terms of whether Malamala Island is "native land" and "native reserve land". At the hearing Mr Young conceded that Malamala Island is native land. I do not consider that any prejudice will arise if findings are made on both points. Given that Daydream now concedes that Malamala Island is native land and in view of Ratu Viliame's uncontradicted evidence, I find that Malamala Island is native land under the Native Lands Act and also under the Native Land Trust Act. In this regard the Register of Native Land is conclusive.

Is the island native reserve land?

[13] Mr Young submitted that a conclusive finding in this regard is not possible given that evidence of the requisite gazetted notice has not been produced. However the unchallenged assertions in Ratu Viliame's affidavit is compelling evidence that when the agreement was made, Malamala Island was land in a native reserve and I am satisfied that such finding can safely be made on the evidence before me. In any event for reasons discussed below, the fact that the island is native land is fatal to Daydream's cause of action.

Preliminary issue 2: Whether the agreement of 30 September 1991 and 20 June 1994 granting the Plaintiff exclusive use to Malamala Island are void for being in breach of the Native Land Trust Act?

[14] I need consider only the 1994 agreeement. The Defendants contend that the terms of the agreement amount to leases or alternatively licences of native land which are in breach of the Native Land Trust Act because the NLTB is not a party and has not executed them under seal. They submit that the agreement is illegal and void for that reason alone.

[15] In reply, Daydream contends that the agreement established a personal right between it and Ratu Vuki. It says that the agreement is neither a lease nor licence and is premised on customary usage and does not fall within the ambit of Native Land Trust Act. With respect I disagree. The control of *all* native land is vested in the NLTB and is administered in accordance with the traditional Fijian concept that such land cannot be owned in fee simple by an individual nor dealt with as such.

Is the agreement a lease?

[16] A lease has been defined as an interest in land given by a landowner to another for a fixed duration such that the lessee has the right to exclusive possession of the land or premises leased.[1] I accept the submission from learned counsel for the Clowes Parties that the terms of the agreement, in particular cll 1–2, 9, 12 and 15, purport to confer on Daydream exclusive possession of Malamala Island. A fixed term is provided with an option to renew and also for rent. The reference to underletting also points to the existence of a lease. I also accept the submission that the fact that the agreement gave Daydream such rights for limited purposes does not detract from it being a lease. "Residential leases", "garden leases" and other such limited purpose leases are not uncommon. I find that the agreement constitutes a lease.

1. *Radaich v Smith* (1959) 101 CLR 209; [1959] ALR 1253.

Is the agreement a licence?

[17] If I am wrong in my finding above, then at the very least the agreement constitutes a licence. A licence conveys a right to enter upon and use land but it differs from a lease in that it does not confer exlcusive possession. The terms of the agreement clearly bring it within the scope of a contractual licence which has been defined as follows:

> Where a licence is granted by contract, the resulting right to occupy land is usually described as a "contractual licence," but it is not an entity distinct from the contract which brings it into being, but merely one of the provisions of that contract. A contractual licence may be revocable (and if revocable, may be made revocable by a specified period of notice) or may be irrevocable according to the express or implied terms of the contract between the parties, and may be assignable or not assignable according to the terms of the contract. In order to establish a contractual licence there must be a promise which is intended to the binding and is either supported by consideration, or is intended to be acted on and is in fact acted on.[2]

[18] If the agreement is not a lease it is most certainly a licence. A definitive finding is not necessary. The provisions of the Native Land Trust Act relied on by the Defendants apply to both leases and licences and would avoid the agreement, in either event.

Relevant provisions of the Native Land Trust Act

[19] Having found that the Island is native land, ss 7 and 8 of the Native Land Trust Act are relevant. These provide:

> *Native Land not to be alienated save in accordance with Act*
>
> 7. Subject to the provisions of the Crown Acquisition of Lands Act, the Forest Act, the Petroleum (Exploration and Exploitation) Act and the Mining Act, *no native land shall be* sold, *leased* or otherwise disposed of *and no licence* in respect of native land shall be granted *save under and in accordance with the provisions of this Act.* (Cap 135, Cap 150, Cap 148, Cap 146)
>
> *Alienation of native land by lease or licence*
>
> 8. (1) Subject to the provisions of section 9, it shall be lawful for the Board to grant *leases or licences* of portions of native land not included in a native reserve for such purposes and subject to such terms and conditions as to renewals or otherwise as may be prescribed.
>
> (2) *Any lease of or licence* in respect of land under the provisions of this Act shall be made out from and in the name of the Board and such lease or licence shall be executed under the seal of the Board. (Substituted by Ordinance 30 of 1945, s 6) (emphasis added)

[20] The Act is clear in that s 7 contains a general prohibition that leases or licences of native land can only be given in accordance with the provisions of the Act. And as submitted by Mr Apted, the clause of s 7 that begins "and no licence" patently sets out to regulate licences that do not create and "dispose of" an estate or interest in the land captured by the first. That is the only interpretation one can give the provision. It captures contractual licences within the Act. I am fortified in this conclusion by subs 8(2) which requires that leases *and* licences must be in an instrument "from or in the name of the Board" and "executed under the seal of the Board". It is apparent that the intention was clearly to regulate any lease or contractual licence and to require those to be granted by the NLTB under its seal. The agreement clearly contravenes the provisions of both ss 7 and 8 of the Act.

2. Halsbury's Laws of England, 4th ed, vol 27, at [9].

[21] The agreement also contravenes subs 16(2) of the Act. The provisions governing native reserves are much more restrictive. The provision confines the grant of a lease or licence of land in a native reserve to native Fijians. Daydream is not a native Fijian.

Illegality

[22] The leading authority is *Gonzalez v Akhtar*.[3] The relevant principles applying to contracts that contravene statutes were expressed by the Supreme Court as follows:

> According to orthodox statements of contract law, a contract may be illegal because making or performing it is prohibited by statute, expressly or by implication. A contract may also be illegal because it is contrary to public policy. Some contracts are illegal "*as formed"* while others are legal at their inception, but become illegal as a result of the way in which they are performed. See generally N C Seddon and M P Ellinghaus, *Cheshire and Fiffot's Law of Contract Eighth Australian Edition,* Australia, LexisNexis Butterworths, 2002, at pp 842–846. The position in England is essentially the same as that in Australia. See J Beatson *Ansons's Law of Contract,* 28th ed, Oxford, Oxford University Press, 2002, at pp 349–350.

If making or performing a particular contract is *expressly* prohibited by statute, the contract is illegal unless the statute itself indicates that a prohibited contract shall nevertheless be enforceable. In the absence of any such indication, a contract the formation or performance of which is expressly prohibited by statute is illegal.

[23] I have already found that s 7 of the Native Land Trust Act prohibits the entry into any lease or licence otherwise than in accordance with the Act. The agreement purports to grant a lease or licence of native land without the NLTB being named as the grantor, or having executed it under seal. I also uphold the submission that the agreement also contravenes s 16(2) of the Act.

[24] The making or performing of the agreement is expressly prohibited by the Act. It is illegal because it purports to give Daydream rights contrary to the Act. And as stated in *Gonzalez* the contract is illegal unless the statute itself indicates that a prohibited contract shall nevertheless be enforceable. In the absence of any such indication a contract, the formation or performance of which is expressly prohibited by statute is illegal. There are no provisions indicating the contrary in the Native Land Trust Act. The agreement is therefore illegal, void and unenforceable.

Estoppel inter partes

[25] I accept the submission that Daydream cannot rely on an estoppel interpartes of the kind found by the Privy Concil to exist in *Sheila Maharaj v Jai Chand*.[4] That case is distinguishable. The issue there was whether the rights created by the tenants were "dealings in land" under s 12. This application is not premised on s 12 nor on the phrase "dealing in land". The provisions relied on by the Defendants concern occupation or use under formal arrangements such as leases and contracts of native land over which no tenant's estate or interest has been created.

[26] In any event, in this case the formation and performance of the agreement is illegal. In these circumstances equity cannot lend its aid to Daydream.

3. [2004] CBV 00011.2002S (*Gonzalez*).
4. *Sheila Maharaj v Jai Chand* [1986] AC 898; [1986] 3 All ER 107.

Jus testii

[27] I have also upheld the Clowes Parties submission in this regard. The *jus testii* principle does not assist Daydream. The underlying principle of any appeal to *jus testii* is the actual possession of land and the de facto assumption of the character and ordinary right of the owner.[5] As submitted by Mr Apted, Daydreams claim and emphasised by Mr Young in oral submissions, is that it claims only a contractual right to use the island. Daydream has no alternative claim based on possession of the island, nor one based on rights of ownership. It denies that it is in the possession of the land. It has never claimed to assume the character of owner and it has never claimed that it exercises the ordinary rights of ownership. Indeed, it's case is premised on claims that Ratu Vuki is the owner, that he has entered into a contract to let Daydream use the island for limited purposes and that he and the Clowes Parties should be prevented from breaching or interfering with that contract. Accordingly, *jus testii* is completely irrelevant to Daydream's claims. Furthermore, if applied, it would require the court to enforce an illegal contract, which would be contrary to well-established principles discussed by the Supreme Court in *Gonzalez.*

Issue estoppel

[28] Issue estoppel occurs when a particular matter is taken to have been decided in earlier proceedings. On the other hand, res judicata relates to the entire cause of action. It applies when the same cause of action is reasserted in new proceedings.[6]

[29] The earlier ruling of 3 May 2006 did not consider or decide the preliminary issues raised in the present application. The only operative part of the ruling for the present purposes is para 25 where Finningan J held:

> I determine the issue by holding that the agreements of 1991 and 1994 granting the plaintiff an exclusive right of use of Malamala Island *has not yet been established* to be unlawful without the consent of the NLTB. This issue *remains open*. (emphasis added)

[30] The court expressly made no final decision. The issue raised in the present application are entirely different to those considered by Finnigan J. Issue estoppel does not arise.

Costs

[31] I have declined the submission that this is a case for an award of costs on an indemnity basis. I have given this careful consideration and although in my view this is a borderline situation, I am not satisfied that Daydream should have known that the action could not succeed. Misconduct by Daydream is not alleged. The injunctive orders by Finnigan J were not appealed. Neither was his ruling of May 2006. Daydream's claims, in particular that it had personal rights against Ratu Vuki did succeed, albeit temporarily, in prior interlocutory hearings before Justice Finnigan. However I find unsatisfactory that Mr Young conceded so late in the day that the island was native land. I also find it inconceivable that the directors of Daydream did not know from the outset that the island was native land. Surely they would have been fully aware of this having relied on Ratu Vuki's title of Bete and of the island being recorded in the Native Lands

5. *Perry v Clissold* (1906) 4 CLR 374 at 377; [1907] AC 73 at 79.
6. See commentary in *Australian Civil Procedure*, B C Cairns, 4th ed, LBC Information Services, 1996, p 171.

Commission records. In these circumstances I am satisfied though that this is an appropriate case for an award of increased costs in the Defendants favour.

Conclusion

[32] The application succeeds. Malamala Island is native land and at the time the agreements were executed was also native reserve land. Daydreams agreements with Ratu Vuki are illegal and void for being in breach of the Native Land Trust Act. The claim for special damages against Ratu Vuki is not pleaded as a separate cause of action. The pleadings do not disclose that it raises any separate cause of action. It is insufficiently pleaded to proceed to trial. The cause of action as pleaded is premised on an illegal agreement which is void and unenforceable against the Defendants. There is no basis upon which Daydream can proceed against the Defendants.

Orders

(i) The injunction is dissolved.
(ii) The action is dismissed.
(iii) The Plaintiff is to pay costs of $2500 to each Defendant.

Application dismissed. Injunction dissolved.