IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

Civil Appeal No. ABU 0058 of 2016
(High Court Civil AppealNo.HBA 009 of 2013)

BETWEEN	:	**MAHESH PRASAD**	***Appellant***
AND	:	**SOHAN SINGH**	***Respondent***

Coram	:	**Calanchini P** **Chandra JA** **Lecamwasam JA**
Counsel	:	**Mr. N. R. Padarath for the Appellant** **Ms. V. Lidise for the Respondent**
Date of Hearing	:	**08 May 2018**
Date of Judgment	:	**01 June 2018**

JUDGMENT

Calanchini P

[1] I agree that the appeal should be dismissed with no orders as to costs.

Chandra JA

[2] I agree with the reasoning, conclusion and proposed orders of Lecamwasam, JA.

Lecamwasam JA

[3] This is an appeal filed by the Appellant against the judgment of the Learned High Court Judge at Lautoka dated 27th April 2016, on the following grounds of appeal:

1. *The learned Judge erred in law in holding the consent was required from the I Taukei Land Trust Board for the appellant to show cause to remain on the land and in particular :-*

   1.1 *The learned Judge erred in the interpretation and application of the Privy Council Decision of* **Maharaj v Chand** *[1986] 3 All ER 107 and* **Chalmers v Pardoe** *[1963] 3 ALL ER 552; and*

   1.2 *The Learned Judge erred in interpreting the meaning of the phrase "alienate or deal with the land" under Section 12 of the I Taukei Lands Trust Act.*

2. *The learned Judge erred in law in not holding that the issues raised in argument and the application of Section 12 of the I Taukei Lands and Trusts Act could not be determined by way of summary proceedings such as an application under Section 169 of the Lands Transfer Act*

3. *The learned Judge erred in ordering the Appellant to pay costs.*

[4] The facts of the dispute before this court in brief are:

The Respondent Sohan Singh is the registered lessee of Lot 22 on PR 916 in Tavua in the province of Ba comprised in Native Lease No. 29433. He had permitted the Appellant to occupy the house on the subject land. It is apparent from the documents filed that the Appellant has been in occupation at least since 2007. The Respondent filed proceedings under Section 169 of the Land Transfer Act (Cap 131) against the Appellant seeking an order of eviction.

It is not in dispute that the Respondent is the registered lessee of the property forming the subject matter of this Appeal.

[5] Against the above background, parties contested the matter before both the Master of the High Court and the High Court Judge at Lautoka with both holding against the Appellant and ordering costs.

[6] The present appeal is against the judgment of the learned High Court Judge at Lautoka on the grounds of appeal stated above.

[7] Of the documents produced by the Appellant, the letter of agreement dated 26.06.2009 and the receipt dated 13.01.2008 are important in addressing the grounds of appeal raised. The Appellant's position as per his affidavit dated 13.05.2013 is that he had begun occupying the land on the promise of the plaintiff and his son to transfer the 'house site' to him which he had paid for with the proceeds of the sale of his property in Matalevu, Tavua. The plaintiff and his son had further given an undertaking not to remove the Appellant from the property in question. (paragraphs 7 & 8 of the affidavit).

[8] Adverting attention to the 1st ground of appeal, it appears that the Appellant relies heavily on the decisions of the Privy Council in **Maharaj v Chand** [1986] 3 All ER 107 and **Chalmers v Pardoe** [1963] 3 ALL ER 552 in seeking relief.

[9] The decision of **Maharaj v Chand** (supra) supports the proposition that a personal license divorced from a real right in the property results in promissory estoppel and does not amount to a contravention of Section 12 of the *Native Lands Trust Act.*

[10] At the outset, it will be convenient to set out the relevant provision of the *I Taukei Lands Trust Act* (Hereinafter referred to as 'the Act'). Section 12 of the said Act reads thus;

"Consent of Board required to any dealings with lease

> *12. (1) 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 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:

Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before 29 September 1948 to mortgage such lease.

(2) For the purposes of this section "lease" includes a sublease and "lessee" includes a sub lessee."

[11] Thereafter, it is pertinent to advert the attention of the court to the issue of the veracity of the sale of his property in Matalevu, Tavua, which may have a bearing on whether the Appellant meets the requirements of **Maharaj v Chand** *[1986] 3 All ER 107,* in the sense of having acted to his detriment on the strength of a verbal personal promise by the Respondent or an understanding between them as to the transfer or alienation of one's property(the Appellant's) with the intention of benefitting from the property of the other (the Respondent's). While this also raises the question of whether, in the event that it is established that a promise was made by the Respondent to sell his property to the Appellant, it amounts to an alienation or dealing in terms of Section 12 of the *I Taukei Lands Trust Act,* which is unlawful unless the consent of the Board is obtained prior to the transaction, I will first deal with the matter of the existence of a promise, personal or otherwise.

[12] The Appellant was in the comfortable position of being able to give evidence about the sale of his property in Matalevu, Tavua by producing a certified copy of the Certificate of Title registration. In the absence of such evidence, it is not tenable to accept his position that the sale of his house in Matalevu, Tavua in fact took place and the proceeds of such sale was utilized to pay the respondent in purchasing his property on the strength of the promise made by the Respondent. Inarguably, the Appellant had paid $3000.00 to the Respondent, for a purpose yet to be determined, aided by the alleged sale of the property or otherwise. However, this does not aid in conclusively determining that the Appellant

acted detrimentally to his financial interests as a result of the personal promise allegedly made by the Respondent. Further, Pradeep Singh's acknowledgement of 19th July 2011 does not state that the money was accepted for the sale of the property, it merely says that the son of Sohan Singh has received $3000.00. The two incidents of the alleged sale of the Appellant's previous property and the payment of $3000 to the Respondent may very well be independent of each other and further, both may have absolutely no bearing on the Appellant occupying the property of the Respondent.

[13] For such reasons, I conclude that no verifiable promise had been made by the Respondent prompting the Appellant to act to his detriment and therefore the decision in **Maharaj v Chand** has no bearing on this matter. I refrain from lending my mind to the questions of whether such promise, if made constitutes promissory estoppel, or if it is in violation of Section 12 of the Act for obvious reasons.

[14] In attempting to solidify his position, the Appellant further relies on **Chalmers v Pardoe** (supra)in which the Privy Council acknowledged that "*There can be no doubt upon the authorities that where an owner of land has invited or expressly encouraged another to expend money upon part of his land upon the faith of an assurance or promise that that part of the land will be made over to the person so expending his money, a court of equity will prima facie require the owner by appropriate conveyance to fulfil his obligation*" however, ultimately held that even in a matter where "*licence to occupy coupled with possession was given, all for the purpose of...erecting a dwelling house and accessory buildings,...when this purpose was carried into effect, a "dealing" with the land took place*" which was therefore unlawful as the consent of the Native Lands Trust Board was not obtained prior to such dealing.

[15] The above provides me the opportunity to address Ground of Appeal 1.2- that the learned High Court Judge had erred in interpreting the meaning of the phrase "alienate or deal with the land" under Section 12 of the I Taukei Lands Trust Act. I will first deal with the matter of whether the letter produced by the Appellant titled "Letter of Agreement" dated

26.06.2009 (page 41, volume 1 of HC Record) discloses an alienation or dealing with the property as defined in Section 12 of the *I Taukei Lands and Trusts Act* which requires the consent of the Board prior to any such transaction.

[16] The 'Letter of Agreement' reads thus:

> *"I, Mr. SOHAN SINGH the land lord of the house would like to give my written permission to Mr. MAHESH PRASAD who is the tenant in my house for the past few years.*
> *Nobody without my permission can remove Mr. MAHESH PRASAD from this house. Mr. MAHESH PRASAD can accommodate the place for as long as he wants. According to this agreement Mr. MAHESH PRASAD has to take good care of (sic) the house and the surrounding compound. He also has to up to date with the bills (ie. FEA, TELECOM and PWD).*
> *This agreement was made between Mr. SOHAN SINGH and Mr. MAHESH PRASAD".*

[17] As it is uncontested that the Respondent is the lessee of the property what remains to be determined is whether the above agreement amounts to 'dealing' with the property.

[18] The entirety of the content of the Letter of Agreement is more resonant of an agreement between licensor and licensee than that of a Lease (or sublease) Agreement. Thus, it stands as proof of the position of the Appellant as a licensee and nothing further. The clauses which require the Appellant/Licensee "to take good care of his house and the surrounding compound" and "to be up to date with the bills (i.e. FEA, TELECOM and PWD)" with no reference to an impending transfer, have all been agreed to by the Appellant with no evidence of dispute, thereby cementing his position as a Licensee occupying the property with the 'leave and license' of the Licensor.

[19] In responding to the question of whether the Respondent alienated or dealt with his property in giving a licensee, I prefer to advert my attention to the judgment of **Kulamma v Manadan** [1968]AC 1062, in which the Privy Council held the view that "... it does not follow...that...*merely because an Agreement can, in certain of its aspects, be described as, or as comprising a licence, it is to be classified with the type of license referred to...or...described as a dealing with the land.*". The facts of the preceding case are materially similar to that of the suit at hand, in that a formal written agreement existed between the two brothers to farm one's land. As apparent from the judgment of the Privy Council, even such an agreement did not amount to an alienation or dealing of the land.

[20] The Letter of Agreement dated 26.06.2009 is only a license which does not affect the land in any manner as in the case of a sale, transfer, lease, sub-lease, mortgage, charge or pledge or any other transaction which can affect the rights of the ITLTB or which is strong enough to make a dent in the rights of ITLTB.

[21] I therefore conclude that the licence is not a "dealing of land". As such the respondent has not breached any conditions of the lease and hence not contravened Section 12 of the Act.

[22] Even assuming the Respondent has breached a condition, such breach cannot accrue to the benefit of the appellant and it will be up to the ITLTB to take necessary steps against the respondent. And I stress that such a situation will not place the Appellant in an advantageous position over the Respondent merely because the Respondent has committed a breach.

[23] Further, while the contention of the Appellant in paragraph 16 of the affidavit that he had built a house on the property for his family which is currently occupied by his wife, son, and sister, is negated for reasons dealt with above, I fail to appreciate the Appellant's reliance on the authority of **Chalmers v Pardoe**, in which their Lordships were unequivocal in holding that a manifestly unlawful act, namely, contravening Section 12 of

the Native Land Trust Ordinance will not allow equity to "lend its aid" to the seeker of equity, even in the circumstance of him having improved the property.

[24] Therefore I am satisfied that the Appellant has not shown cause to remain in possession of the land. Although he had made an application for a lease (page 22, Vol.1), there is no proof of an agreement in his favour.

[25] For the reasons stated above, I hold that grounds:

1.1 - Should fail

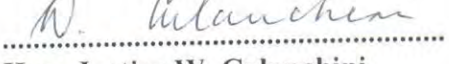
1.2 – Fails

2. Fails –The Appellant failed to establish a right to remain in possession as required by Section 172 of the Land Transfer Act. The Respondent was entitled to an order under Section 169 of the Land Transfer Act 19713.
3. Fails - it is at the discretion of the learned High Court Judge to order costs depending on the circumstances. Costs ordinarily follow the event and the amount awarded in the High Court was not excessive.

[26] I dismiss the appeal and order the parties to bear their own costs.

The Orders of the Court are:

1. *Appeal dismissed.*
2. *Parties to bear their own costs.*



Hon. Justice W. Calanchini
PRESIDENT, FIJI COURT OF APPEAL

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Hon. Justice S. Chandra
JUSTICE OF APPEAL

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL