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

CIVIL APPEAL NO.ABU 0123 of 2018
(High Court of Lautoka Civil Action No. HBC 180 of 2013)

BETWEEN : **GRANT ROBERT GRAHAM AND BRENDON JAMES GIBSON (2nd Defendant)**

Appellant (2nd Defendant)

AND : **INSPIRED DESTINATIONS (Inc.) LIMITED (Plaintiff)**

1st Respondent (Plaintiff)

BANK OF SOUTH PACIFIC LIMITED (3rd Defendant)

2nd Respondent (3rd Defendant)

Civil Appeal No. ABU 0126/2018
(High Court of Lautoka Civil Action No. HBC 180 of 2013)

BETWEEN : **BANK OF SOUTH PACIFIC LIMITED**

Appellant (3rd Defendant)

AND : **INSPIRED DESTINATIONS (Inc.) LIMITED**

1st Respondent (Plaintiff)

: **GRANT ROBERT GRAHAM AND BRENDON JAMES GIBSON**

2nd Respondent (2nd Defendant)

Coram : **Basnayake JA**
Lecamwasam JA
Dayaratne JA

Counsel : **Mr. W. Clarke and Ms. P. Low for the Appellant in ABU 123/2018 and 2nd Respondent in ABU 126/2018**
Ms. S. Devan for the Appellant in ABU 126/2018 and 2nd Respondent in ABU 123/2018
Ms. N. Khan for the 1st Respondent in ABU 123/2018 and ABU 126/2018

Date of Hearing : **12 November 2019**

Date of Judgment : **29 November 2019**

JUDGMENT

Basnayake JA

[1] This judgment is in respect of two appeals. The appellants are the original 2nd and 3rd defendants respectively. The appellants in both the appeals seek an order to have the judgment (pgs. 1 to 43 of the Record of the High Court (RHC)) of the High Court delivered on 19 October 2018 set aside. By this judgment the 2nd and 3rd defendants were ordered inter alia to refund to the plaintiff (1st respondent) FJD $900,000.00.

The Facts

[2] The plaintiff had entered into a sale and purchase agreement (Vol.3 pg. 575) with the 2nd defendant in respect of the business known as Amunuca Island Resort & Spa. The owner of this resort was Aanuka Island Resort Limited (AIRL) which was under liquidation. The 2nd defendant was appointed as the Receiver of AIRL. The 3rd defendant (The Bank) was the mortgagee of the properties owned by AIRL including Amanuca Island Resort and Spa. The 1st defendant who is not a party to this appeal was acting as the agent of the 2nd defendant. It is to be noted that at the hearing the plaintiff, with the leave of court, had discontinued the action filed against the 1st defendant.

[3] As per the amended statement of claim (Vol. 1 Tab 11 of the RHC) on 4 March 2010 the plaintiff and the 2nd defendant had entered into a contract for the sale of Amunuca Island Resort & Spa and paid a sum of FJD $850,000.00. On 2 September 2010 a further sum of FJD $50,000.00 was paid on account of this sale. The plaintiff alleges that the 2nd defendant on 2 December 2011 had cancelled the agreement. The plaintiff avers that at the time of the cancellation the contract was void *ab initio* due to lack of consent to have been obtained from the iTaukei Land Trust Board (TLTB) and claims a refund of the sum of FJD $900,000.00 with interest etc.

[4] The 3rd defendant (The Bank) in its statement of defence (Tab 15 of Vol. 1 of RHC) states as follows:-

> *1. The purchase price was FJD $8,500,000.00 plus VAT subject to apportionment set out in the sale and purchase agreement.*
> *2. Settlement to occur 6 months after the date of the agreement. This was extended by another six months on payment of $50,000.00.*
> *3. 10% of the purchase price to be deposited upon execution of the agreement.*
> *4. The plaintiff to be responsible for management of the Resort.*
> *5. He shall be responsible for obtaining the consent from the iTaukei Land Trust Board for the transfer of the Native Lease to the plaintiff (clause 4.1).*
> *6. Upon the deposit of another FJD $50,000.00 the 2nd defendant to exercise an option to defer settlement for a period up to 6 months (clause 5.1)*

[5] The 3rd defendant states that the plaintiff having deposited FJD $850,000.00 and another $50,000.00, breached the conditions of the agreement resulting in the cancellation and forfeiture of the deposit.

[6] The 2nd defendant in his statement of defence states as follows:-

> *a) The plaintiff failed to provide completed iTaukei Land Trust Board (iTLTB) application forms for consent and transfer;*

b) The plaintiff failed to obtain consent from iTLTB to transfer the Native Lease and to remedy that breach within the period after being given notice to do so;

c) The plaintiff failed to maintain the Resort by not having necessary insurance cover for the Resort;

d) The plaintiff failed to attend to the settlement of the said Native Lease on 18 November 2011; and

e) The plaintiff failed to remedy the default on or before 2 December 2011 as required by the Default Notice dated 18 November 2011.

[7] The 2nd defendant further states (paragraph 8) that:

(a) It was an express obligation in the agreement for the purchaser to use its best endeavours to obtain the iTLTB's consent for the sale of the subject property;

(b) The plaintiff was afforded all of the necessary documentation prepared by the Vendor to enable it to obtain iTLTB consent, but failed and/or refused to do so;

(c) The purchaser failed and/or refused to obtain iTLTB consent and, as such, it cannot rely upon its own breaches to seek any remedy or relief;

(d) Denies that the entire agreement was void ab initio and further relies on a strict construction of the terms and conditions mutually agreed between the parties.

The Judgment

[8] The learned Judge stated that it was the plaintiff's case that the agreement was null and void *ab initio* and of no effect as it contravened section 12 of the iTaukei Land Trust Act (iTLTA). As per the statement of claim of the plaintiff, the transaction involves an alienation or a dealing which requires the consent of NLTB. As this consent was not obtained, it contravened section 12 of the iTLTA.

[9] The learned Judge relied on the Privy Council judgment in **Chalmers v Pardoe** [1963] 3 All E.R. 552. In this case Mr. Chalmers on a friendly arrangement with the owner of a native leasehold land entered into possession of a land and built a residential house and five other buildings without obtaining the consent of the iTLTB. The Privy Council held that (pg. 557), "*In the present case, however there was not merely agreement, but, on one side, full performance: and the Board found itself with six more buildings on the land without having the opportunity of considering beforehand whether this was desirable. It would seem to their Lordships that this is one of the things that s. 12 was designed to prevent*".

[10] The learned Judge having cited Cozens Hardy LJ in the case of **Gaskell v Walters** (1906) 2 Ch.D 1. at page 10 that, *"alienation implies a transaction by which property is given to another person",* stated, (pg. 20) that, "*I do not deny for a moment that section 12 does not prohibit the mere making of a contract…All I am saying is that section 12 prohibits the alienation or dealing with the land whether by sale; transfer or sub-lease or any other manner whatsoever without the prior consent of the Native Land Trust Board first had and obtained. It is the prohibition of the performance of a contract, not against the making of the contract".*

[11] The learned Judge states , that, (pg. 24) "The question is whether, upon the true construction of the agreement which constitutes the transaction *"alienate or deal with the Native Leasehold, whether by sale, transfer or sub lease or in any other manner whatsoever took place without prior consent of the Board had or obtained."* The learned Judge having perused the sale and purchase agreement and considering the fact that the plaintiff got possession, held that, *"the plaintiff assumed proprietorial privileges on the date of execution of the agreement. Possession was given for a particular purpose i.e. to allow the plaintiff to carry out the operation of the business. It is crystal clear that the plaintiff as the purchaser did obtain proprietorial interest in the land and possession of the land upon the execution of the agreement. This constitutes an alienation of the land. The evidence disclosed a deposit of 10% of the purchase price, namely, FJ $850,000.00*

was paid into the trust account of the 1st Defendant immediately on execution of the agreement. The plaintiff paid an additional FJ $50,000.00".

[12] The learned Judge states that he had come to a clear conclusion that the arrangement between the plaintiff and the 2nd defendant did involve 'alienating or dealing' with the land. He states that, "*Under the Act the required consent is a condition precedent to formation and performance of the contract to purchase. What that means is that the NLTB's consent must be obtained before either party has incurred any obligations or acquired rights of any description in respect of the sale and purchase of land. In the instant case as per clause 3.1 and clause 10.1 the plaintiff as the purchaser has incurred obligations and acquired rights in respect of the sale and purchase of the land before obtaining the consent of the NLTB…This arrangement is caught by section 12".*

[13] The learned Judge has further held (pg. 29) that, *"On execution, the agreement conveys leasehold interest to the purchaser. The plaintiff was entitled to possession and operation of the resort business upon execution of the agreement*". Referring to section 4.1 of the agreement the learned Judge held, that, *"The agreement makes the NLTB consent a condition subsequent 'to formation and performance of the contract to purchase and is in breach of section 12 Native Land Trust Act. The part payment of the purchase price and the entry into possession to operate and manage the resort constitutes performance of the agreement for sale".*

[14] The learned Judge states thus, *"If an agreement is signed and held inoperative and inchoate while the consent is being applied for, I fully agree that it is not rendered illegal and void by section 12. An agreement for sale of native land would become void under section 12 as soon as it was implemented in any way touching the land without the consent having been at least applied for. Such a stage was reached when the plaintiff went into possession of the land to manage and operate the resort assuming proprietorial privileges".*

[15] In paragraph 31 the learned Judge states, that, *"The possession is parted with, to the plaintiff as purchaser pursuant to the agreement. The granting of such interest in the land and possession constitutes dealing with the land so as to come within the provisions of section 12 of the Native Land Trust Act. The evidence is that the plaintiff, pursuant to the agreement, took possession of the subject property on or about 01 April 2010. The possession was given for a particular purpose, i.e. to allow the plaintiff to carry out the operation of the business. No consent of the Native Land Trust Board was obtained for the transaction of sale or for the entry into possession. The transaction was unlawful. As a result, the agreement which constituted the transaction and entered into between the parties was and remains null and void ab initio because no consent of the Board as lessor was first had and obtained to the transaction as required under section 12 of the Native Land Trust Act. The transaction was prohibited by statute. As a result the agreement which constitutes the transaction was illegal".*

[16] In paragraph 21 of the judgment (pg. 23 of the RHC) the learned Judge having reproduced clause 4.1 of the agreement imposed a responsibility on the defence contrary to the terms of the contract. The learned Judge states, that, *"However, the primary responsibility for applying the native Land Trust Board's consent undoubtedly lies on the second defendant as vendor. In the present case, no application for consent as to the dealing between the present parties was ever submitted to the Native Land Trust Board".*

[17] The learned Judge in paragraph 30 (pg. 27) states as follows: *"Pursuant to clause 3.1 and Annexure "C"* captioned *"Management Arrangement", the Plaintiff as purchaser was to take interim possession of the subject property in order to operate and manage the Resort from the access date until the date of settlement. The evidence disclosed that the possession was given and the plaintiff entered upon the land as a purchaser for the operation of the business during the interim period in accordance with the management agreement terms set out in the Annexure C. The plaintiff was asked to go into possession to commence/operate and manage the resort. Certainly, the plaintiff assumed proprietorial privileges on the date of execution of the agreement".*

[18] The learned Judge in the same paragraph states, thus*, "It is crystal clear that the plaintiff as the purchaser did obtain proprietorial interest in the land and possession of the land upon the execution of the agreement. This constitutes an alienation of the land".*

[19] Thus the learned Judge held that the agreement was unlawful and null and void ab initio. The learned Judge further held that the agreement is unenforceable and therefore the 2nd defendant is not entitled to proceed to exercise its rights under Clause 7.8 and retain the deposit. The learned Judge further held that if the money is not returned the 2nd defendant would be unjustly enriched to that amount.

The grounds of appeal by the 2ND appellant

i. That the Learned Judge has erred in law in holding that the Management Agreement was caught by section 12 of the Native Land Trust Act (Now iTaukei Land Trust Act).

ii. That the Learned Judge has erred in law in declaring that the First Respondent as purchaser obtained a "proprietorial interest (sic)" in the land and possession of the land upon execution and operation of the Management Agreement.

iii. That the Learned Judge has erred in law by declaring that the Appellant is not entitled to retain the deposit of FJ$900,000.00 because the transaction and the agreement which constitutes the transaction is null and void ab initio and unenforceable, because it is tainted with illegality.

iv. That the Learned Judge has erred in law and/or in fact to conclude that the Appellant and the Second Respondent would be unjustly enriched if the Deposit was not returned to the First Respondent.

v. That in the alternative to grounds 1 and 2 above, the Learned Judge has erred in law by holding that the First Respondent is not in pari delicto with the Appellant & Second Respondent and the First Respondent's position is not tainted by the illegality of the transaction.

The grounds of appeal of the 3rd Appellant

i. The Learned Trial Judge has erred and/or misdirected himself in law and in fact in holding that the part payment of the purchase price under the sale and

purchase agreement made in March 2010 and the management of Amanuca Island Resort and Spa by the First Respondent constituted a performance of the sale and purchase agreement executed on or about March 2010 and therefore infringed Section 12 of the Native Land Trust Act (Now 'iTaukei Land Trust Board Act.')

ii. *The Learned Trial Judge has erred and/or misdirected himself in law and in fact in holding that the operation of the business of Amanuca Island Resort and Spa by the First Respondent created "proprietorial privileges" or "proprietorial interest" in the land on the date of execution of the sale and purchase agreement executed on or about March 2010.*

iii. *The Learned Trial Judge has erred and/or misdirected himself in law and in fact in holding that the Management Agreement constituted an "alienation" of the land.*

iv. *The Learned Trial Judge has erred and/or misdirected himself in law and in fact in failing to consider that under the sale and purchase agreement, the First Respondent was only granted an access to enable the First Respondent to operate Amanuca Island Resort and Spa from the date of access to the settlement date.*

v. *The Learned Trial Judge has erred and/or misdirected himself in law and in fact in misconstruing the Management Agreement and failing to consider that the Second Respondent was required to keep the Amanuca Island Resort and Spa open for business as per the requirements of the Native Lease dated 7 October 2009, NLTB reference no. 50020028 affecting all that land described as Matanibeto (part of) Lots 1 on SO 5890 (formally Lot 1 on SO 5063 and Lots 1 & 2 on SO 5889 in Malolo, Nadroga and having an area of 16.5958 hectares.*

vi. *The Learned Trial Judge has erred and/or misdirected himself in law and in fact in holding that the sale and purchase agreement executed on or about March 2010 did not contain any express provision which stated that the sale and purchase agreement was not binding unless and until the NLTB (now iTaukei Land Trust Board's) consent was first had and obtained when the obtaining of the consent as per clause 4.1 was a condition of sale stipulated in the sale and purchase agreement.*

vii. *The Learned Trial Judge has erred and/or misdirected himself in law and in fact in holding that the Appellant and the second Respondent had the primary responsibility for applying for the Native Land Trust Board's consent which was contrary to the terms and conditions of the sale and purchase agreement executed on or about March 2010.*

viii. *The Learned Trial Judge has erred and/or misdirected himself in law and in fact in failing to consider that the First Respondent had failed to invoke clause 4.5 of the sale and purchase agreement in cancelling the sale and purchase agreement for lack of consent from Native Land Trust Board.*

ix. *The Learned Trial Judge has erred and/or misdirected himself in law and in fact in holding that there was a total failure of consideration under the sale and purchase agreement and failed to consider that the failure of consideration was due to the default of the First Respondent to obtain the requisite consent on transfer under the sale and purchase agreement.*

x. *The Learned Trial Judge has erred and/or misdirected himself in law in failing to hold that the First Respondent was in pari delicto and therefore not entitled to recover a sum of F$900,000.00 paid as deposit under the sale and purchase agreement.*

xi. *The Learned Trial Judge has erred and/or misdirected himself in law in failing to consider the principles of 'pari delicto' as expounded in the case of Gary Scott Motil & Anr v North (Fiji) Group Limited, Supreme Court Civil Appeal No. 0005 of 2017.*

xii. *The Learned Trial Judge has erred and/or misdirected himself in law and in fact in holding that the Appellant would be unjustly enriched if the deposit sum of F$900,000.00 was not returned.*

xiii. *The Learned Trial Judge has erred and/or misdirected himself in law and in fact in holding that the failure of consideration (viz no document of title being delivered to the First Respondent) and not the illegality of the contract enabled the deposit sum of F$900,000.00 to be returned to the First Respondent.*

xiv. *The Learned Trial Judge has erred and/or misdirected himself in law and in fact in holding that the First Respondent's action was for money had and received when the First Respondent's action for reimbursement of the deposit of F$900,000.00 was wholly premised on the sale and purchase agreement executed on or about March 2010.*

xv. *The Learned Trial Judge has erred and/or misdirected himself in law and in fact in holding that the First Respondent was entitled to a claim of unjust enrichment and restitution when such cause(s) of action had not been pleaded by the First Respondent.*

xvi. *The Learned Trial Judge's decision is wrong and erroneous and tantamount to a wrongful exercise of discretion having regard to all the facts and circumstances of the case and evidence of the whole.*

The submissions of the learned counsel for the 2nd and 3rd Defendant/Appellants

[20] The learned counsel submitted that the key issue is the finding in the judgment that the agreement became illegal upon the plaintiff taking possession without the consent of the iTLTB. The learned counsel submitted that the sale was subject to the purchaser obtaining the consent of the iTLTB. The parties agreed that the purchaser would obtain the consent of the iTLTB and the vendor (Defendant) was to provide reasonable assistance to enable the purchaser to obtain such consent. The transfer was to be effected only after the plaintiff obtained the consent. Pending the sale the plaintiff was allowed to enter into possession for the purpose of running the business under a management agreement. The purchaser was appointed as Manager of the Resort. The Management agreement was part of the sale and purchase agreement.

[21] The learned counsel submitted that the consent of the iTLTB is not a requirement to enter into a sale and purchase agreement (pgs. 626-634). The 2nd defendant as vendor rendered the necessary assistance to the plaintiff to obtain the required consent. On 22 February 2011, the defendant had sent with a covering letter (Pg. 550), copies of iTLTB application forms for consent to assign (pg. 553) and transfer, for execution and return, but to no avail. The learned counsel submitted that section 12 of the Native Land Trust Act and section 8 of the Native Land Trust Regulation does not specify as to who should submit the form to obtain the consent from iTLTB. The agreement was for the plaintiff (the purchaser) to obtain the consent. In terms of section 10.1 of the sale and purchase agreement, the purchaser was given the license to enter into possession and to operate the business.

[22] The learned counsel also submitted that, whether the Management Arrangement required the consent of the iTLTB was never an issue in this case. There was no pleading. There was no pre-trial conference. There was no issue at the trial on this. The only issue at the trial was whether the consent of the iTLTB was required at the time of executing the sale and purchase agreement. It was mentioned for the first time in the judgment. The learned

counsel submitted that he had no occasion to meet this question at any time at the trial. The learned counsel submitted that when there was transfer of property the purchaser became the owner. In order to be the owner necessarily the consent of the iTLTB was a requirement. The purchaser did not have any rights to the land that occupied the Resort. The purchaser was only managing the Resort until such time as the transfer was executed. In order to execute the transfer the purchaser was required to obtain the consent of the iTLTB. The purchaser agreed to obtain the consent in the agreement. The 2nd defendant as vendor agreed to assist the plaintiff to obtain the consent. The learned counsel submitted that as the vendor the 2nd defendant gave the plaintiff necessary assistance.

[23] The learned counsel submitted that at the time of entering into this agreement, there was an ongoing business and the defendant was required to continue with it. The mere conduct of running a business required possession and control of the premises. However the occupier will have no title. It is by way of a transfer that the title is passed to the purchaser which requires the consent of iTLTB. It was further submitted that the contract of agreement itself does not amount to a "deal" as laid down by section 12. It is the transfer that becomes the deal.

Submissions by the learned counsel for the 1st respondent (plaintiff)

[24] The learned counsel for the plaintiff submitted that the management of the property amounts to an alienation.

Analysis

[25] The key issue as said by the learned counsel for the Appellant is whether the sale and purchase agreement coupled with the management arrangement amounts to a "deal" that will require the consent of the iTLTB. Although several grounds of appeal were raised on behalf of the two appellants while addressing court, the learned counsel addressed court mainly on the requirement of consent. My conclusion on this issue is that the sale and purchase agreement does not amount to an 'alienation or a deal' under section 12 of the

NLT Act and therefore the agreement is valid and the contract entered into, legal. For that reason I do not wish to answer each and every appeal ground separately. As I find the agreement legal, questions with regard to unjust enrichment do not arise. I will reproduce section 12 of the Native Land Trust Act and section 9 of the Native Land Trust Regulation.

> Section 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;* (The proviso and sub section (2) not reproduced).
>
> Section 9 (1): (Regulation)-*Land in a native reserve held under or by virtue of a lease, agreement for a lease or tenancy at will, or any part of such land, shall not be* ***transferred, mortgaged, assigned, sublet, licensed or in any other manner*** *whatsoever dealt with or passed to any person other than a native Fijian; and any purported or attempted transfer, mortgage, assignment, sublease, license or other dealing which is in contravention of this paragraph shall be null and void* (Sub section 2 is not reproduced)(Emphasis added).

[26] The learned Judge having reproduced section 12 (1) (pg 22) states in paragraph 18 that, "The leading case upon the interpretation of section 12 of the Native Land Trust Act is **Chalmers v Pardoe** (supra)….The Privy Council was of opinion that the **transaction amounted to an agreement for a lease or sublease but even regarding it as a license to occupy coupled with possession, their Lordships considered that a "dealing" with the land took place**". I am of the view that the facts in Pardoe's case is different. On an informal arrangement with the lessee (Pardoe) Chalmers had entered into a lease land and constructed a house and five other buildings. In the present case the plaintiff was allowed to run an ongoing business as Manager until such time as the transfer was effected. The

consent of the Board was required for the transfer. As the plaintiff did not obtain the consent of the Board for the execution of the transfer, the sale agreement was cancelled by the defendant. There is no dispute that the purchaser was permitted only to run an ongoing business. There is no evidence that the plaintiff constructed any buildings or did anything to show ownership.

[27] The learned Judge in paragraph 21 (pg. 23) stated that *"the primary responsibility for applying the Native Land Trust Board consent undoubtedly lies on the second defendant as vendor".* He made the above statement after reproducing section 4.1 of the sale and purchase agreement which states that, *"As soon as reasonably possible following the entry into this Agreement, the purchaser shall, at the purchaser's cost in all respects: (a) Obtain the consent of the Native Land Trust Board in Fiji to the transfer of the Lease to the Purchaser, and.."* ((b) Not reproduced). The learned Judge has thus erred in interpreting the plain language under section 4.1 where the plaintiff as purchaser had clearly agreed with the vendor to obtain the consent of the Board at the cost of the plaintiff. Nowhere in the agreement does the vendor agree to obtain the consent of the Board for the plaintiff.

[28] The learned Judge having referred to clauses 4.1 (a) and 4.4 and reproducing clauses 7.4 and 7.4 (a), 9.1 and 2, 10.1 and 3.1 of the Management Agreement in paragraph 30 (pg. 477) concludes that the arrangement between the plaintiff and the 2nd defendant did involve '**alienating or dealing with the land**'. He states thus, "***Upon a careful reading of the agreement as a whole this is the only construction that can reasonably be given to what was intended to be the effect of the agreement. To adopt any other construction is to render the legislation futile***".

[29] It appears that it is the Privy Council judgment in Chalmers v Pardoe and the fact of the plaintiff paying a deposit of 10% of the sale price and taking possession of the land that has led the learned Judge to arrive at the above conclusion. The facts in Pardoe are different. Therefore it has no application to this case.

[30] Section 12 (1) prohibits an alienation or deal with the land by sale, transfer or sublease without the consent of the Board first being obtained. Regulation 9 prohibits transfers, mortgages, assignment, sublease, license or other dealings. The most pertinent question in this case is whether the sale and purchase agreement coupled with the acceptance of a deposit and allowing the purchaser (plaintiff) to take possession fall within the ambit of the transactions referred to in either section 12 (1) or Regulation 9. The learned Judge in paragraph 15 (pg. 21 of the judgment) asked the question whether the agreement which constitutes the transaction breached section 12. Any transaction which comes within the ambit of section 12 is declared unlawful unless the consent of the Native Land Trust Board is first had and obtained.

[31] The plaintiff does not complain that the 2nd defendant breached the terms of the contract. He does not complain that the 2nd defendant failed or neglected to obtain the consent of the Board. The plaintiff also does not complain that the 2nd defendant forfeited the deposit against the terms of the contract. The plaintiff cannot complain for the reason that he has agreed with the 2nd defendant with regard to the payment and the forfeiture. The plaintiff had gone to the extent of making another payment of FJD $50,000.00 in order to get an extension of the date of settlement. The plaintiff does not complain about the late payment either. The cause of action as per the amended statement of claim (Tab 14 vol. 1 RHC) is that the sale and purchase agreement is null and void *ab initio* for lack of consent.

[32] In this case there is no dispute that possession was given for the purpose of operating the business. That was done under the Management Arrangement. The learned Judge ruled the agreement illegal. According to him the agreement became illegal as the plaintiff was given possession without first obtaining the consent of the Board. Possession was given under the Management Arrangement under which the plaintiff was made manager to continue with the ongoing business.

[33] It is important to properly understand the intention of the parties in terms of the sale and purchase agreement. There was a specific obligation cast on the purchaser to obtain the

consent of the Board in order for the transaction to be completed. They did not intend to circumvent the requirement stipulated in section 12. In fact, the agreement had been cancelled by the vendor since the purchaser failed to obtain the consent of the Board during the agreed period of time. This itself establishes the agreements that had been reached between the parties as per the sale and purchase agreement and that is proof of their intention not to breach or by-pass the conditions set forth in section 12.

[34] I am of the view that what the court required was to find whether the facts of this case fell within the ambit of section 12 of the iTaukei Land Trust Act. Does the sale and purchase agreement coupled with granting possession amount to an, 'alienation or dealing' under section 12? The alienation or dealing has to be either a '*sale'*, '*transfer'* or '*sublease'* or *'in other manner'*. The sale and purchase agreement does not belong to the category of sale, transfer or sublease. Could it come under '*other manner'*? The phrase, *'the other manner'* has to be interpreted in terms of the *ejusdem generis* rule. That means, where a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include items of the same class as those listed (Black's Law Dictionary 10th Edition (831). Bennion on Statutory Interpretation (Seventh Edition) at pg. 564 states that where a word of wider meaning included in a string of particular words forming a genus, ejusdem generis principle may operate to restrict the meaning of the wider word so as to keep it within the genus. In this case therefore consent under section 12 will be required only for '*sales'*, '*transfers'* and '*subleases'*.

[35] Regulation 9 (1) prohibits mortgages and assignments as well. The question to answer is whether the sale and purchase agreement coupled with the management arrangement could be categorized into one referred to under section 12. Could the sale and purchase agreement and the Management Arrangement be categorized as a 'sale' or a '*transfer'* or a '*mortgage'* or a '*sublease'*? I am of the view that the learned judge has erred in interpreting the transaction as one to 'alienate or a deal' under section 12 of the iTLTA. If the sale and purchase agreement does not come within the ambit of section 12, it cannot be illegal. If it is not illegal, it will not be void. If the contract is valid, then the parties would be bound by its terms.

[36] The learned Judge ordered to refund the deposit back to the plaintiff on the basis that the contract was illegal; that the contract was void *ab initio*. However it is not so. The defendant forfeited the deposit as per the terms of the contract. I am of the view that the sale and purchase agreement was valid and the cancellation was done in terms of the contract. Therefore I am of the view that the learned Judge has erred in ordering the refund. Hence I set aside the judgment dated 19 October 2018 and allow the appeal with costs. The plaintiff is ordered to pay costs in this court in a sum of $5000 to the Appellants (2nd and 3rd defendants). The Appellants (2nd and 3rd defendants) are also entitled to costs in the High Court.

Lecamwasam JA

[37] I agree with the reasons and conclusions of Basnayake JA.

Dayaratne JA

[38] I have read in draft the judgment of Basnayake JA and agree with the reasons and conclusions.

The Orders of the Court are:

1. *Appeals of the appellants allowed.*
2. *Judgment dated 19 October 2018 set aside.*
3. *Costs $5000.00 payable by the 1st respondent (plaintiff) to the appellants in equal shares.*
4. *Appellants are entitled to costs in High Court as well.*

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Hon. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

COURT OF APPEAL
FIJI

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Hon. Justice V. Dayaratne
JUSTICE OF APPEAL