IN THE HIGH COURT OF FIJI

[WESTERN DIVISION] AT LAUTOKA

Civil Action no. 197 of 2013

BETWEEN : **VINAY SANDEEP PRAKASH** of Namaka Park, Nadi, Project Administrator.

PLAINTIFF

AND : **MANDA YOLANDE IHAKA** of Nasoso, Nadi

DEFENDANT

Appearances : Mr Singh R for the **Plaintiff**
Mr Vuataki K for the **Defendant**

Judgement

Introduction

1. The Plaintiff has filed this Originating Summons dated 29th October 2013 supported by the affidavit sworn by him on 24th October 2013 claiming against the Defendant the following reliefs:

   i) Whether the Defendant is liable to pay as a refund to the Plaintiff the sum of $37000.00 paid by the Plaintiffs to the Defendant under the sale and purchase agreement entered between the Plaintiff and Defendant on the 19th June 2012.

   ii) Interest on the sum of $37000.00.

   iii) Costs on indemnity basis against the defendant.

   iv) Any other or further orders and relief as the court may deem fit in the circumstances.

2. The Plaintiff claims the said reliefs on the following grounds deposed by him in the affidavit:

   i) That the Plaintiff entered into a sale and purchase agreement on 19th June 2012 with the Defendant for a purchase of a portion of the land as a residential holding comprised in iTaukei Land Trust Board (iTLTB) No.

50039125 in the sum of $50,000.00, payment to be made by instalments.

ii) That the Plaintiff paid the sum of $37,000.00 in instalments to the Defendant under aforementioned sale and purchase agreement.

iii) That at all material times the lease to the said land was a commercial lease and could not be subdivided into residential holdings as contained in the sale and purchase agreement.

iv) That the sale and purchase agreement is not consented to by the iTLTB in compliance with section 12 of the iTaukei Land Trust Act and when the Plaintiffs solicitors enquired from the iTLTB whether its office was aware that a portion from the said land was being transferred to the Plaintiff they informed him that they did not have any such knowledge and that the Defendant has not lodged the sale and purchase agreement with them.

v) That the sale and purchase agreement is illegal and null and void and of no effect due their being no consent of the iTLTB pursuant to Section 12 of the iTaukei Land Trust Act.

vi) That consequently the sum of $37,000 paid by the Plaintiff to the Defendant should be refunded to the Plaintiff by the Defendant together with cost and interest.

Affidavit in Reply Sworn by the Sales Manager of the Defendant

3. The Defendants Sales Manager states in his affidavit in reply inter alia:

i) That the sub-division on native land known as Taukovakuca (part of) Lot 19 in Nadi comprising 806 square meters with the scheme plan for 23 lots on it was approved by iTLTB.

ii) That the Plaintiff entered into the sale and purchase agreement on 19th June 2012 with settlement to take place on July 2018. Application for consent would be done 3 months before the 19th June 2012 as iTLTB normally give 3 months from date of transfer to register a transfer.

iii) That iTLTB gave a development lease to Defendant who then gave them a scheme plan and iTLTB then allowed Defendant to purchase each lot on the plan prior to final survey. The sale and purchase agreement for each is given to iTLTB and the sale and purchase agreement for Plaintiffs lot is with iTLTB. The Defendant will apply for consent to transfer three months from settlement and the Plaintiff would be required to sign the consent application in triplicate at that stage.

iv) That the sale and purchase agreement is not illegal as the Defendant Solicitor had advised that the agreement can be held inchoate so long as

it does not touch the land but at the point of transfer the consent of iTLTB had to be obtained. The agreement was in the possession of iTLTB and they had not rejected it.

4. The Defendant prays that the Plaintiffs claim be dismissed with costs on indemnity basis or the Plaintiffs claim go to trial by way of writ action.

Hearing

5. When the matter came up for hearing on 25th August 2014 the learned Counsels of both parties made oral submissions and tendered written submission with leave of the court.

Law and Analysis

6. It is evident from the facts deposed in the affidavit of the Plaintiff that the refund is sought on the following grounds:

   i) The Agreement to Lease granted to the Defendant by the iTLTB was a commercial lease and could not be subdivided for residential lots.

   ii) There is no consent by iTLTB for the sale and purchase agreement entered into between the Defendant and the Plaintiff thus rendering it illegal and null and void.

Ground (i)

7. Let me now consider whether the lease granted to the Defendant by the iTLTB was a commercial lease which could not be subdivided for residential lots.

8. It is evident from the agreement for lease (annexure CRI I) that its for residential purposes. It is specifically stated on the agreement itself. Furthermore clause 2 (c) states that the lessee covenant with the lessor "***not to use the land for any purpose other than the erection of Residential Accommodation and its subsequent use for residential purposes***" . Therefore, I cannot agree with the Plaintiffs contention that the land was at all material times zoned for commercial use and could not be sub divided into residential holdings.

Ground (ii)

9. Next issue to be considered is whether the sale and purchase agreement is null and void due there being no consent of the iTLTB. Any dealing in land by a lessee of iTLTB has to be consented to by the Board pursuant to Section 12 of iTaukei Land Trust Act which provides as follows:

> ***"expect 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"

10. The Learned Counsel for the Defendant raises the following arguments in his submissions against ground (ii) on which a refund is claimed by the Plaintiff.

    a) (i) That the sale and purchase agreement was in the possession of iTLTB (as per paragraph 10, 11, 16 of the affidavit in reply) therefore iTLTB was aware of the agreement.

    (ii) That section 12 does not require "written consent" as in other legislation like Section 13 of the State Lands Act. Because of iTLTB's knowledge and there being no requirement of "written" consent the Court could imply that there was consent and the Plaintiff to perform his part of the bargain and no refund be given. The defence counsel submits that the Consent could be implied as found by Justice Byrne in the High Court and upheld by Court of Appeal at paragraph 33 in **NLTB V Subramani [2010] FJCA 9; ABU 0076 – 2005 25 February 2010**

    b) If it is held by court that the consent had not been obtained by the Defendant from the iTLTB for the sale and purchase agreement then the transaction between parties is illegal and the court should not assist the Plaintiff as held in **Damodar and Rantanji Ltd Redwood Investment Ltd and Others [1988 FJCA 5; [1988] 34 FLR 30 (1 July 1988)**

    c) The other alternative position is that the sale and purchase agreement is inchoate until consent is granted as held by Fiji Court of Appeal in **Jai Kissun v Sumintra [1970] 16 FLR 165, 160.** As such the Plaintiff will only be entitled to refund if Defendant had breached the inchoate agreement.

10. It is stated further in the Defendants submissions that the parties agreement was that the vendor provide finance and settlement to take place on the 19th of July 2018. On that date the vendor will handover a stamped Registable Transfer and the transfer will not be resgistable unless consent of iTLTB has been obtained. Consent will therefore be sought three months from 19th July 2018 till then the Agreement is held inchoate. That the parties have in clause 17 agreed that only on application to iTLTB for the transfer and it is refused by iTLTB will refund be given. Such time has not arrived and no refund should be ordered now and Plaintiff be held to perform his part of the contract held

inchoate until he has paid the required amount for settlement.

11. Whilst stating that the agreement for sale and purchase was submitted to the iTLTB the Defendant takes up the position that it is inchoate till a vendor hand over a stamped registable transfer to the vendee for which the vendor will seek the approval of iTLTB 3 months from 19th July 2018. It is further stated that only on application to iTLTB for the transfer and if it is refused by iTLTB will refund be given to the Plaintiff.

12. In my view the application for the consent for the transfer is not connected to the matter in issue now. What is to be considered now is whether the sale and purchase agreement is null and void ab-initio due to the lack of consent from iTLTB and not to consider whether the said agreement is inchoate on the ground that some of its conditions are to be fulfilled on a future date. There must be a valid agreement at the first instance to consider whether it is inchoate or not. Therefore, I decline to accept the Defendants argument that the Plaintiff is not entitled for a refund on the ground that agreement is inchoate.

13. It is contended by the Defendant that section 12 of the iTaukei Land Trust Act does not require written consent as in other legislation like section 13 of the State Lands Act. Learned Counsel for the Defendant refers to **NLTB V Subramani's** case in support of his argument.

14. In **NLTB v Subramani** it was held that the NLTB or the landowners themselves directly involved themselves in a dealing to renew a lease. It was evident in the said matter that officer of NLTB had requested Subramani to obtain the consent of the mataqali and he was given forms to fill in an attach there to the names signature of the member of mataqali. Subramani in his evidence has testified that he paid renewal application fee of $33.00 to the NLTB and was told by the NLTB officers that the application would be processed which might take some time. However, after many months Subramani was informed by NLTB officer that NLTB would not renew the native lease.

15. In this matter though the Defendant states in his affidavit that the agreement for sale and purchase is lodged with the iTLTB pending approval or consent there is no evidence attached or acknowledgement from the Board as to receiving the agreement for approval. Therefore, I find that the said statement is unfounded and cannot be accepted. The Defendant has not adduced any evidence to prove that the iTLTB is aware of the agreement for sale and purchase. Therefore, I cannot accept the contention of the Defendant that the consent of the Board could be implied as in Subramani's case. Furthermore, there is no evidence adduced to prove that the NLTB was involved in the process of executing the sale and purchase agreement between the Plaintiff and the Defendant. As such I am of the view that the principles laid down in Subramani's case cannot be applied to this matter.

16. Furthermore, though the Defendant contends that the written consent of the iTLTB is not necessary for the sale and purchase agreement and consent could be implied as in Subramani's case, clause 2 (4) of the agreement for lease annexed to the Affidavit of the Defendants Sales Manager marked "CRII" clearly states that: ***prior written consent of the iTLTB is required to alienate or deal with the land or any part thereof by sale transfer, sublease or license or in any other manner whatsoever.***

17. Therefore, the Defendant being the lessee of the land on the strength of the said Agreement for Lease and bound by its covenants cannot say that the prior written consent of the board is not required for the sale and purchase agreement.

18. In **Chalmers v Pardoe [1963] 3 ALL ER** the Privy Council affirmed that the mere agreement to deal with land would not contravene section 12, for there must necessarily be some prior agreement in all such cases. Otherwise there would nothing for which to seek the Boards consent. It was also held in that case that there was not merely an agreement, by on one side full performance by constructing buildings on the land and taking over possession and control for number of years. Therefore, it was held that the agreement had become unlawful as a "dealing" contrary to section 12.

19. In this matter the Defendant has agreed by the sale and purchase agreement to construct a residential house on the land allocated to the Plaintiff. It is not denied by the Defendant that he has accepted part payment on the agreement. As such the Plaintiffs Counsel contends that acceptance of a part payment by the Defendant amounts to part performance under the agreement which makes the agreement an unlawful dealing under section 12.

20. In **D.B. Waite (Overseas) Ltd V Sidney Leslie Wallath [1972] FJCA 2; 18 FLR 141 (30 October 1972)** where the agreement was one of which the parties intended to effect the transfer of the native lease after satisfying the requirements of the Law as to the consent of the Native Land Trust Board; not having been implemented in any way except by payment of a deposit it was held that the agreement has not been vitiated by lack of consent.

21. In the said case Gould V. P clarified at what point an agreement, lawful when made becomes unlawful in the following passage;

> ***"It was not sought in that case to say exactly at what point an agreement, lawful when made, becomes unlawful, but I have no doubt, on the facts as found and outlined above, that the present agreement never reached the latter stage and it was never intended that it should do so. The payment on $2 on signature and $2000 the following day were obviously by way of deposit; completion was to be after fourteen days and possession was not taken, even when the date for***

completion had passed. It was a straight forward dealing pursuant to which the parties intended, after satisfying the requirements of the law, to effect the transfer of the native lease. I accept therefore, that the agreement was lawful and remained so right up to the time it was repudiated by the appellant company; up to that time the consent of the Native Land Trust Board could have been applied for without any impropriety, and given or refused."

22. However, as discussed paragraphs 16 and 17 above the Defendant in this case is bound by the covenants of the Agreement of Lease he has entered into with the iTLTB. Accordingly, the Defendant has to get the prior written consent of the iTLTB to deal with the land. It is evidentially not proved that he has sought the written consent of the Board prior to executing the agreement. The Board might have imposed strict conditions in the Agreement for Lease due to the nature of the lease; being a lease of a land to construct residential units. I find that this case differs from **D B Waite V Wallath** case due to the special covenant incorporated by the Board in the Agreement of Lease.

23. If the Court determine that prior written consent of the iTLTB is not necessary for the sale and purchase agreement it will defeat the purpose of incorporating the said covenant in the Lease.

    In my view the iTLTB might have incorporated the said covenant to have a hold on the development activity that would take place on the land. It is the duty of the iTLTB to see that the leased land is utilised for the development without breaching the covenants of the lease. iTLTB being the custodian of iTaukei lands has a fidiuciary duty to administer such lands for the benefit of the Fijian owners.

    Section 4 (1) of the iTaukei Land Trust Act provides that:

    "the control of all Native Land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the Fijian Owners"

24. In considering the above circumstances I think the court should be mindful of the intention of the iTLTB in incorporating a covenant which prohibits any person to enter into a dealing on the leased land without the prior written consent of the Board.

25. In view of the reasons set out in the above paragraphs, I hold that the sale and purchase agreement executed in contravention of the covenants of the Agreement of Lease is ab-initio null and void. Therefore, whether the agreement is vitiated or not on the payment made is not a issue to be considered in this matter.

26. Let me now consider whether the purchaser has a right to recoup the deposit paid on an agreement held to be ab-initio null and void.

27. Argument has been raised by the Defendant that in the event the contract is illegal the Court cannot come to the aid of either party. The Learned Counsel for the Defendant relied on **Damodar v Redwood** where it was held that it is trite law that equity will not aid a party to an illegality.

28. The Learned Counsel for the Plaintiff disagreeing with the argument of the Defence counsel relies upon the principles laid down in the case of **Kikuo Sukashita v Concave Investment Limited [1999] FJHC 3; HBC 0121 j.1998 s (5 Feb 1999)** in support of his contention that the payment could be recovered from the Defendant even when the agreement is held to be null and void.

29. In the said judgement his Lordship Justice Fatiaki has categorised the aspect of the Plaintiffs Originating Summons as being a claim for "money had and received" or for restitution according to the principles discussed in the judgements of the House of Lords in the case of **Fibrosa Spolka Akeyjna v Fairbairn Lawson Combe Barbour Ltd (1943) AC 32**

30. In the said case the Plaintiff being an overseas citizen had in contravention to section 6(1) of the Land Sales Act paid the Defendant a deposit in reduction of sale price. The agreement was deemed illegal as the Plaintiff had not obtained prior consent of the Minister to enter into the dealing. The High Court held that the dealing was illegal and void however agreed that the deposit paid is recoverable on the principals discussed in the **Judgement of Fibrosa v Fairbrairn** case.

31. Justice Fatiaki has quoted the words of Lord Roche in the Fibrosa case (ibid) in his judgement which was directly applicable to the plaintiffs claim. I will reproduce the said paragraph which I find applicable to the plaintiffs claim in this matter too:

> '***It is, I think, a well settled rule of English law that, subject always to special provisions in a contract, payments on account of a purchase price are recoverable if the consideration for which that price is being paid wholly fails: see: Ockenden v. Henley EB & E 485, 492. Looking at the terms of the contract in the case now under consideration, I cannot doubt that the sum sued for was of this provisional nature. It was part of a lump sum price, and when it was paid it was no more than payment on account of the price. Its payment had advantages for the*** (defendant company) ***in affording some security that the*** *(plaintiff)* ***would implement their contract and take up*** *(the transfer)* ***and pay the balance of the price, and it may be that it had***

other advantages .....but if no.....document of title were delivered to (the plaintiff) **....** (or, as in this case, the contract is declared illegal ab-initio) ***then, in my opinion, the consideration for the price including the payment on account, wholly failed and the payments so made is recoverable. It was contended that unless there is found some default on the part of the recipient of such payment ... the consideration cannot be said to have wholly failed merely because the frustration of the contract produced a result which, had it been due to some default, would have amounted to a failure of consideration. I find no authority to support this contention, which seems appropriate to an action for damages, but foreign to the action for money had and received.***'

32. In this matter the Defendant admits receiving $37000 from the Plaintiff under the sale and purchase agreement which I determined as above to be null and void ab-initio. The transaction between the Plaintiff and the Defendant in this matter is similar to the transactions discussed in Fibrosa case and Sakashita V Concave case.

33. In applying the principles laid down in the above cases I am content to categorise the claim of the Plaintiff in this matter as a claim for "money had and received" or for restitiution.

34. In the light of the foregoing hold I that the Plaintiff is entitled to recover a sum of $37,000.00 from the Defendant with interest and costs.

35. In the exercise of my discretion under Law Reforms (Miscellaneous Provision, Death and Interest) Act Cap 27. I award interest at the rate of 3% per annum on the sum of $37,000.00 from the date of Originating Summons till the date of Judgement.

36. **Final Orders**

i) The Defendant to pay to the Plaintiff or his Solicitor the sum of $37,000.00 together with interest at the rate of 3% per annum on that sum from the date of Originating Summons 29th October 2013 till date of this Judgement within 21 days.

ii) The Defendant shall pay the Plaintiff costs summarily accessed in a sum of $1,500.00 within 21 days.

Lal S. Abeygunaratne
Judge
25/09/2014

HIGH COURT OF FIJI
LAUTOKA