IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 57 of 2013

BETWEEN : **RATU VERETI RALULU** of Nadula, Tavua, Farmer

Plaintiff

AND : ***i*-TAUKEI LAND TRUST BOARD** a body corporate duly constituted under the Native Lands, Act (Cap 134) of 431 Victoria Parade, Suva.

First Defendant

AND : **REGISTRAR OF TITLES**

Second Defendant

Counsel : M/S Nawaikula Esquire for the Plaintiff
Legal Officer – *i*-TLTB for the 1st Defendant
AG's Office for the Third Party

JUDGEMENT

(On Friday 06 May 2016, I delivered a short one-page ruling in favour of the plaintiff, with full reasons to be given later. These are my reasons). In this ruling, the following words/acronyms are used interchangeably (i) "native" and "*i*-taukei" (ii) "NLTB" and "*i*-TLTB" (iii) "Native Lands Trust Act" and "*i*-Taukei Lands Trust Act".

PRELIMINARY

1. Ratu Vereti Ralulu (**"Ratu Vereti"**) and the *i*-Taukei Lands Trust Board (**"*i*-TLTB"**) signed a lease agreement on **01 November 2006**. The subject matter is a piece of native land in Tavua legally described as native land known as *Nadula (Part Of), Tikina of Tavua; Area 1.5480 hectares* (**"the land"**). *i*-TLTB is refusing to register the lease instrument. In the "Register of Native Lands" kept under the provisions of section 8 of the Native Lands Act (Cap 133), the *mataqali* Tilivasewa[1] (**"mataqali"**) is recorded as the beneficial owners of the land in question. Ratu Vereti is a member of this *mataqali*.

2. Ratu Vereti is seeking orders akin to a specific performance order. Much of the argument between counsel centred around whether or not there was an offer and acceptance. I approach the issues on a slightly different footing as follows:

   (i) as there is a written agreement, to ask whether there is an offer and an acceptance is superfluous because the written document is evidence *per se* of their agreement. One only need inquire about offer and acceptance if the facts are unclear as to whether or not the parties had reached *consensus ad idem* in their dealing (**L'Estrange v Graucob** (1934) 3KB 394).

[1] *Yavusa* Bila, *koro* Tavua. Ratu Vereti is a member of this *mataqali*.

(ii) that said, I direct my inquiry instead on whether or not the written agreement is enforceable. In determining this, I ask the following questions:

(a) given that the parties' have reduced their agreement in writing, which then complies with Fiji's statute of frauds provision[2], does the document embody all the essential terms of an *i*-TLTB agricultural lease?

(b) if so, then the only way that *i*-TLTB might avoid the agreement is to, either establish a vitiating factor (such as illegality, misrepresentation, fraud, undue influence, unconscionability, mistake) and/or establish that another has a better claim to the land than Ratu Vereti. In both regards, the onus would be high on *i*-TLTB.

3. The above points are discussed more fully in the latter part of this judgement. If I may place the arguments that *i*-TLTB has raised before me within the context of the above analytical structure, its case is that it cannot go ahead with the agreement with Ratu Vereti because to do so would be illegal in terms of *the Native Lands Trust Act (Cap 134)* because (i) the members of the mataqali have not consented to the lease, which is a legal requirement under the Act, and (ii) it is in the best interests of the *mataqali* that the land be leased out instead to an entity namely Tilivasewa Development & Investment Company Limited (**"TDICL"**) and (iii) *i*-TLTB would be in breach of its statutory duty to act in the best interest of the *mataqali* if it were then to go ahead with the lease to Ratu Vereti.

INTRODUCTION

4. As I have said, the lease agreement in question was duly signed by both parties. It was also duly stamped and was even lodged at the Registrar of Titles on **02 November 2006** for registration. However, immediately after lodgement, *i*-TLTB would retract the document from the Registrar of Titles to stop the latter from registering the instrument. There are four main reasons why *i*-TLTB did so:

(i) first, *i*-TLTB alleges that the majority of the members of the *mataqali* do not wish that the land be leased out to Ratu Vereti.

(ii) second, *i*-TLTB argues that its offer was subject to contract, which did not happen because Ratu Vereti did not pay the monies required.

[2] i.e. section 59(d) of the Indemnity Guarantee & Bailment Act.

(iii) third, *i*-TLTB says that a company formed for the benefit of the *mataqali* members namely TDICL has a prior interest in the land. The *mataqali* would rather that a lease be granted to TDICL.

(iv) *i*-TLTB alleges that the economic returns to the *mataqali* would be greater if a development lease was granted to TDICL compared to what they would get out of an agricultural lease to Ratu Vereti.

5. TDICL, in fact, is a company formed for the benefit of the members of the *mataqali* and is the commercial arm of the said *mataqali*.

6. Following *i*-TLTB's retraction, Ratu Vereti wrote many letters to *i*-TLTB to urge the Board to register the instrument but to no avail. He also wrote letters to various Government Departments and Ministries seeking assistance (see below). Eventually, when *i*-TLTB would not relent, Ratu Vereti then filed on **09 April 2013** the Originating Summons which is now before me. He seeks the following Orders:

(i) a declaration that the defendants attempt to refuse to issue to the plaintiff a lease by letter dated September 15 2011 and upon returning to the plaintiff a cheque in the sum of $1142.80 is unlawful, null and void and of no effect.

(ii) that the defendant is obliged under contract to issue to the plaintiff a leasehold title in accordance with the offer it made on 02 December 1999 and in accordance with the lease document executed between the parties and dated 1st November 2006 which lease document the defendant has yet to remit to the plaintiff.

(iii) damages for unlawfully withholding the plaintiff's title with effect from December 2006 to the date of its delivery to the plaintiff.

(iv) any other Order.

(v) costs.

AFFIDAVITS

7. An affidavit sworn by Ratu Vereti on 09 April 2013 supports the Summons. In *Appendix 1*, I set out the chronology of all letters, documents and other happenings that transpired in relation to this dealing.

8. *i*-TLTB opposes the orders sought through an affidavit of Mr. Soloveni Masi sworn on 14 May 2013. Ratu Vereti responds to Masi's affidavit by a *"Further Affidavit"* sworn on 20 November 2013.

COMMENTS

9. The land was leased out to a Mrs. Ravea previously. She was the second ever lessee on the land[3]. Mrs. Ravea's lease expired on 31 December 2000, however, she had ceased occupation earlier sometime in 1997 or 1998. Before she ceased occupation, Mrs. Ravea, purportedly, had sold the balance of her lease tenure lease to one Josefa Ralulu (**"Josefa"**) who later sold it on to Ratu Vereti. It appears that all these happened without the knowledge or consent of NBF Asset Management Bank (**"NBF"**), which held a mortgage on the land at the time.

10. Ratu Vereti started occupying the land sometime in 1999.

11. The sale from Mrs. Ravea to Josefa, and from Josefa to Ratu Vereti, are both irrelevant to Ratu Vereti's case theory. However, on one occasion, the *i*-TLTB did try to capitalise on the irregularity in the dealings, seemingly, as a decoy to distract argument away from the real issues[4].

BACKGROUND

12. Sometime in late 1999, shortly after he started occupying the land, Ratu Vereti applied to *i*-TLTB for a lease. According to Ratu Vereti, he lodged his application together with the majority consent of his *mataqali*. Upon receiving his application, *i*-TLTB then processed it and, on 02 December 1999, offered him an instrument of tenancy for a term of 30 years commencing 01 January, 2001 with a rental of $400-00 per annum, reassessable in accordance with the Agricultural Landlord and Tenant Act.

13. That offer was *"subject to consultation of the relevant native owners and payment of the total remittance"* (my emphasis) and to payment of certain dues[5]. It also gave Ratu Vereti an option to upgrade from an instrument of tenancy to a formal lease, but only after signing an instrument of tenancy[6].

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[3] Masi deposes as follows at paragraph 10 of his affidavit:
...save as to admit that the said land was transferred from the original lease-holder to the said Ravea on or about the 30th October, 1991, I deny the rest and reminder (sic) of the allegations contained in paragraph 11 of the said affidavit and put the Plaintiff to strict proof of each of the said allegations.

[4] The *i*-TLTB had written thus *vide* a letter dated 17 May 2005 to Ratu Vereti:
It is with regret to inform you that the Board has decided not to issue an agricultural lease to you over the above land. The processing of a lease to Joseva Ralulu from Fereti Ralulu was improper and do not comply with the procedure and policies of the Board.
Further, the land is suitable for commercial and industrial development use and it will serve the best interest of the landowners as a whole.
The Board is refunding the sum of $1,142.81 made on 13/08/2004 purported to be part payment of this lease

[5] The offer letter from *i*-TLTB stated:

14. At some point in time, Ratu Vereti would have signed the instrument of tenancy. He would then have communicated to *i*-TLTB his desire to have a formal lease. *i*-TLTB would have told him then to settle a processing fee of $1,029.06 before the lease could be processed. Sometime thereafter, Ratu Vereti would approach the Cane Farmer's Cooperative, Savings & Loans Association (**"CFCSLA"**) for a loan to cover the processing fee. It seems that CFCSLA would only loan him the money if there was some certainty that a formal lease would be granted. Hence, on **13 August 2003**, *i*-TLTB would advise CFCSLA by letter that a fee of $1,029.06 was required to prepare and process Ratu Vereti's lease[7].

15. Later the same day, on 13 August 2003, CFCSLA settled the processing fee in full with *i*-TLTB out of a loan account of Ratu Vereti.

16. Some seven months or so later, a letter dated **23 March 2004** was written by the then Tui Tavua, Ratu Ovini Bokini to the General Manager, *i*-TLTB to stake TDICL's claim on the land.

17. The letter would mark the turning point in Ratu Vereti's and *i*-TLTB's relationship. Immediately thereafter, *i*-TLTB, which, had started processing Ratu Vereti's lease, would begin to display a sudden change in attitude. The various letters which I set out below demonstrate this clearly.

The instruments of tenancy have been prepared and are awaiting your signature ... If you wish to accept this offer please call at this office to sign the documents at which time you must also pay the following fees and rent:

		AMOUNT	VAT	TOTAL
New Lease Consideration	:	$3,000-00	$60-00	$3,060-00
NLTB Costs	:	500-00	50-00	550-00
Stamp Duty	:	125-00	Nil	125-00
Registration Fee	:	2-50	0.25	2-75
Lease Application Fees	:	50-00	5-00	55-00
Rent from 1/1/2001 to 31/12/2001	:	400-00	8-00	408-00
TOTAL	:			$4,200-75

If you do not call in to sign the documents and pay this sum within six (6) weeks from the date of this letter, I shall assume that you have withdrawn your application and do not wish to proceed further with the matter and I shall accordingly close my file, and may give consideration to other applicants for the land.

.....

(Semi Tabakanalagi)
REGIONAL DIRECTOR (WESTERN)

[6] The offer states:

If subsequent to the signing of your Instrument of Tenancy, you decide that you wish to have a formal lease of land, giving you " Registered Title", the Board will, of course, be glad for you to have this. .... (I)n such an event, it will be your responsibility to employ and pay a Registered Land Surveyor to prepare the necessary cadastral survey diagram on your behalf.

[7] Notably, the "processing fee" includes a "stamp duty" and a "registration fee" component.The letter said as follows:

Further to our Offer Letter dated the 2nd December, 1999 we wish to inform you that Ratu Vereti Naruku Ralulu is intending to lease this piece of land as per copy of the agreement attached.

Therefore, in the meantime, to prepare and process his lease, the amount of $1,029.06 is required. This amount includes:

NLTB Costs	$562-50
Stamp Duty	$125-00
Registration Fee	$2-81
Application Fee	$56-25
Rent – 1/2001 to 31/12/2001	$407-50
TOTAL	**$1,029-06**

18. More than a year after Ratu Ovini's letter[8], a Mr. Solomone Nata of *i*-TLTB, would write to Ratu Vereti on **17 May 2005** to convey *i*-TLTB's withdrawal of the offer and to return Ratu Vereti's cheque[9].

19. On **16 June 2005**, Ratu Vereti's solicitors would respond by returning the cheque to *i*-TLTB. The position they took was that a contract was already in place[10].

20. Obviously, *i*-TLTB's change of attitude made Ratu Vereti feel that his stake on the land was vulnerable. In a bid to doubly secure his interest, Ratu Vereti would file on 26 September 2005 an application for a declaration of tenancy at the Agricultural Tribunal under the Agricultural Landlord & Tenant Act (Cap 270).

21. I believe that Ratu Vereti's ALTA claim had a lot of promise. I believe too that *i*-TLTB knew that and was apprehensive about the promising prospects of the ALTA application[11]. As Ratu Vereti deposes in paragraph 23, sometime in October 2005, *i*-TLTB told him:

> ....to first pay arrears of $1,405.34, which I paid in fact on the 23rd October 2006, before they will prepare my lease documents.

22. Masi concedes that Ratu Vereti did pay the sum of $1,405.34 to *i*-TLTB on **23 October 2006** on account of arrears of **"ground rent"**[12]. He also concedes[13] that Ratu Vereti and *i*-TLTB would go on to execute a lease instrument on **01 November 2006** - a week after Ratu Vereti had settled the ground rent arrears, and some three years or so after Ratu Vereti had paid the lease processing fee. The lease document was duly stamped and was then lodged by

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[8] of 23 March 2004.

[9] Nata wrote as follows:

> It is with regret to inform you that the Board has decided not to issue an agricultural lease to you over the above land. The processing of a lease to Joseva Ralulu from Fereti Ralulu was improper and do not comply with the procedure and policies of the Board.
> Further, the land is suitable for commercial and industrial development use and it will serve the best interest of the landowners as a whole.
> The Board is refunding the sum of $1,142.81 made on 13/08/2004 purported to be part payment of this lease.
> Vinaka.
> Yours faithfully
> .....
> Solomone Nata

[10] Nawaikula Esquire wrote inter alia:

> the refund is wrong because an offer has been made, this has been accepted by the Board and my client, Josefa Ralulu has been paying rent for many years now.
> .....
> Yours Faithfully
> Nawaikula Esquire

[11] Ratu Vereti had filed the ALTA claim merely as a "safety net" in light of i-TLTB's sudden change in attitude. He had intended all along to withdraw the ALTA application if *i*-TLTB were to honour their agreement and issue him a lease title.

[12] (paragraph 21 thereof his affidavit).

[13] in paragraph 23 of his own affidavit.

i-TLTB at the Registrar of Titles for registration on the very next day, **02 November 2006.**

23. However, barely three weeks[14] later, *i*-TLTB would retract the lease instrument from registration. As one would expect, a series of letters ensued between Ratu Vereti, *i*-TLTB, and various Government Departments and agencies to which Ratu Vereti had turned for assistance.

24. The reason why *i*-TLTB retracted was because of pressure from Ratu Ovini.

THE LETTERS

25. Immediately after the lease instrument was lodged for registration, Ratu Vereti wrote to the Registrar of Titles (**"RoT"**) to request that his lease be registered quickly[15]. About a month later, he would seek assistance at the Prime Minister's Office. On **19 December 2006**, the PM's Office would write to the Justice Department[16]. The above was referred to *i*-TLTB for comment.

26. On **21 December 2006**, *i*-TLTB's then Acting General Manager, Mr. S. Tabakanalagi, wrote to the PM's Office and advised as follows:

    (i) that the landowners were against the granting of the lease. They intend to develop the land for commercial purposes.
    (ii) that Ratu Vereti had not accepted this and has since filed an ALTA claim.
    (iii) *i*-TLTB had advised RoT against registering the lease.
    (iv) the issuing of a letter in 2003 purporting to reactivate a lease offer made in 1999 " was being investigated for further consideration" .
    (v) all fees paid by Ratu Vereti have been refunded to him.

27. On **22 December 2006**, Ratu Vereti responded[17]. He would re-assert that he has occupied and cultivated the land since 1999 and that he had obtained the majority consent of the *mataqali* which he had lodged with his lease application to *i*-TLTB. He stressed that Mr. Semi Tabakanalagi, the same officer who had written to the Prime Minister's Office the day before, was the one who processed and approved his lease application. He further says that he

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[14] See S. Tabakanalagi's letter dated 21 December 2006 to the PM's Office which advised inter-alia that *i*-TLTB :
We have also taken the liberty of advising the Registrar of Titles against the registration of this particular lease yesterday and a copy is enclosed for your record.

[15] (i) so he could harvest his cane for crushing (ii) to facilitate the formalising of his cane contract from the Sugar Industry Tribunal and (iii) so he can repay his CFCSLA loan.

[16] (under whose authority the RoT functioned).

[17] by letter to the PM's Office.

has been paying rent including all the levies by *i*-TLTB – which *i*-TLTB has been accepting. The real problem, he would say, was that the Tui Tavua had a hold on *i*-TLTB to cancel his lease.

28. Three days later, on **27 December 2006**, Ratu Vereti wrote to *i*-TLTB to pursue his lease. He also went to see the Acting Solicitor General and CEO for Justice (**"A-SG"**) who wrote a letter on the same day to *i*-TLTB. In the A-SG's letter, is a notable observation that the lease was in registrable form[18].

29. On **01 February 2007**, Ratu Vereti would write another a letter to the PM's Office against *i*-TLTB. A month later, on **02 March 2007**, his lawyer wrote to *i*-TLTB to assert yet again that a contract of tenancy already existed[19] between Ratu Vereti and *i*-TLTB and that the only reason why he had mounted an ALTA claim was to give him some sort of a safety net in case *i*-TLTB reneged.

30. Other letters were written by Ratu Vereti to various other Government Departments and Ministries[20].

ALTA CLAIM STRUCK OUT

31. On **18 November 2008**, Ratu Vereti's ALTA application was struck out when his counsel did not appear on a mention date. Following that, he was

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[18] The letter said thus inter alia:

Mr. Naruku came to see me and I directed the Registrar of Titles to do the needful. It was then that we found out that all the requirements for registration under the Land Transfer Act have been satisfied. Fortunately or unfortunately ..... Your office based at the Titles Office notified us of NLTB's difficulty.

..... It does not help when NLTB threatens to institute legal proceedings against us, if we proceed to register the relevant application.

[19] Nawaikula's letter asserted as follows:

My client first applied to lease the subject land in 1999. .. he filled in the necessary application form for a lease. After processing the application the Board made an offer to him. He immediately paid all the necessary fees that were outlined in that offer ....Despite all that the Board never gave him his title .... Nonetheless he maintained payment of rent. .... a contract of tenancy exist on the basis of his occupation and cultivation and payment of the amount demanded in the offer.

With no other option he applied to the Agricultural Tribunal of 25th September 2005 citing his payment of rent and continued occupation in his request for the agricultural tribunal (Ref No. W/17/05) indulgence to declare in his favour a tenancy.

The application to the tribunal was not appropriate given that there existed a clear contract on the basis of the offer made the payment of fees and rent. The Board was legally bound to give him a lease but he cannot compel the Board. He applied to the Tribunal because of that.

My clients hope however was raised when in 2006 the Board intimated that after all those years of waiting his title will be registered.

.... Add to that the need and urgency to harvest and pay workers and for that you need to produce your title. My client immediately attended to the Lautoka office, and consistent to the Board's policy in such a circumstance, he was allowed and trusted with the title to attend to the Board's Suva office in order to liaise urgently with the legal department and the Board members for their signature for the purpose of faster stamping and registration of title.

My client attended to all the above in October and November last year. In December, however, things took turn for the worse in spite of the fact that there existed a valid contract of tenancy and registrable title. Your records will confirm that S. Vueti wrote to Titles Office in December 2006 directing the Titles Office not to register the lease document because my client was an illegal tenant. It was a laughable excuse....

On 21st December Deputy General Manager S. Tabakanalagi, after pressure from my client, wrote to the Prime Minister's Office to advice (sic) them the reason why the Board is taking such a stand is because the majority disapprove, the matter is before a Tribunal, and because of the instruction the Board gave to the Registrar of Titles Office. This despite the very clear understanding that all matters referred to by him were, in retrospect, irrelevant as there was a binding agreement and the Board was compelled by that to register the title.

[20] On **01 February 2008**, Ratu Vereti wrote to the Chairman of the Independent Investigation Team For Institutions Fijian (IITIF) who, on the same day, wrote a letter to the *i*-TLTB urging the latter to process Ratu Vereti's lease. On **14 May 2008**, the PM's Office wrote to the Ministry of Indigenous Affairs to look into Ratu Vereti's complaint.

On **03 July, 2008**, a letter was sent by *i*-TLTB to the PS for Indigenous Affairs explaining why Ratu Vereti's lease was withdrawn. That letter cites "differences that have surfaced between the landowning unit" as the reason and, accordingly, *i*-TLTB's Manager North/Western, Mr Eparama Ravaga, was going to consult Ratu Vereti and the mataqali to resolve their issues.

Ratu Vereti even resorted to the Department of Information. On **18 November 2008**, the Department wrote a letter to urge *i*-TLTB to complete the processing of Ratu Vereti's lease.

considering an application to set aside the striking out order and to reinstate the ALTA Claim.

32. On **29 January, 2009**, *i*-TLTB's Manager North Western wrote a letter to the Department of Information to explain that *i*-TLTB's decision against processing of Ratu Vereti's lease[21].

RETURNING OF CHEQUE

33. On **15 September 2011**, *i*-TLTB returned to Ratu Vereti the cheque of $1,142-80 under a cover letter. That letter told Ratu Vereti rather matter-of factly that the Board will not issue an Agricultural lease to Ratu Vereti because[22] the land "is suitable for commercial and industrial development use" and that this "will serve [the land's] best and highest use" which in turn will ensure optimum returns to the land owning unit which is in accordance with *i*-TLTB vision.

> Further note that as Board of Trustees for all *i*-Taukei land, it is part of our vision to realise full potential from areas leased for the land owners.

34. The above letter was accompanied by an undated and unsigned Notice of Unlawful Occupation by *i*-TLTB to Ratu Vereti[23].

35. On 10 January 2012, Nawaikula, yet again, returned the cheque to *i*-TLTB.

ALLEGED DEAL BETWEEN RATU VERETI & *i*-TLTB Re – ALTA CLAIM

36. Just like the ALTA claim before it was struck out, the prospect of reinstating it appears, somewhat, to have mellowed *i*-TLTB. Hence, on 04 May 2009, a meeting was held at *i*-TLTB office in Lautoka between Ratu Vereti and *i*-TLTB and a few other *mataqali* members who were facing similar issues. According

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[21] The reasons were:
(i) the consent from the relevant mataqali has not been obtained.
(ii) there is an earlier application for a Development Lease from to develop the subject land together with other vacant native land for commercial purpose.
(iii) that application was consented by sixty two percent (62%) of the registered member of the mataqali.
(iv) that Ratu Vereti had filed an application with the Agriculture Tribunal for a Declaration of Tenancy. The Board's defence in this case was that it cannot register any title, let alone leasing the said land to Mr Raiulu because there was no consent from the land owning unit. His claim with the Agricultural Tribunal was struck out on 18th November 2008.

[22] The letter says:
Further to the Agricultural Tribunal ruling, we regret to advise that the Board has decided not to issue an Agricultural lease to you over the above land.
Also note the land is suitable for commercial and industrial development use as it will serve its best and highest use. The return to the land owning unit will also be high if the subject area is utilized accordingly to the above use.
Therefore, we are refunding the sum of one thousand one hundred and forty two dollars and eighty cents ($1,142-80) as part payment of offer dated on 13th August 2001.
Further note that as Board of Trustees for all *i*-Taukei land, it is part of our vision to realise full potential from areas leased for the land owners.

[23] The said Notice stated as follows:
NOTICE OF UNLAWFUL OCCUPATION
DESCRIPTION OF LAND: NADULA PART OF
A recent inspection of the above land reveals that you are in unlawful occupation and that you hold no title or consent from the *i*-Taukei Land Trust Board to be in occupation.
- Any consent to occupy you may have from the *i*-Taukei Owners is null and void as only the *i*-Taukei Land Trust Board has the legal power to deal with *i*-Taukei Land.
- We give you until 25th day of December 2011 to vacate the land and remove any building you may have erected thereon. If you remain in occupation of the land after 25th day of December 2011 legal action will be taken against you for the recovery of possession and you will be required to pay the court costs and fees thereby incurred.

to the minutes, an arrangement was reached wherein Ratu Vereti had agreed not to reinstate his ALTA action in return for *i*-TLTB's promise to process the issuing and registration of a lease to Ratu Vereti[24].

37. Although *i*-TLTB, through Masi, refutes the above[25], the evidence would seem to confirm all. For instance, Masi concurs with the following words of Ratu Vereti:

> .....on 26th May 2009, Mr. Eparama Ravaga followed up on the meeting held in his office on 04th May 2009 by letter directed to Mr. Waisake Ravutubananitu stating that given the tenants occupation and their status as Mataqali members, the matter should be referred back to the Mataqali and that he was arranging a date to convene the Mataqali meeting. Annexed here marked RVNR 30 true copy **letter dated 26th May 2009**.

38. The letter of Eparama Ravaga dated **26 May 2009** confirms the meeting that took place in his office. It also makes reference to the struck-out ALTA claim and acknowledges that Ratu Vereti is a member of the *mataqali* and has been occupying and cultivating the land for some time. Ravaga then suggests that the "matter" of Ratu Vereti's claim be referred to the *mataqali* "for their deliberation and advice". In that regard, he promises to arrange for a *mataqali* meeting[26].

39. That meeting that Ravaga arranged happened on 16 June 2009. At the meeting, a TDICL spokesman[27] would convey a direction from the Tui Tavua that land being occupied by Ratu Vereti be surrendered for the benefit of TDICL. Ratu Vereti expressed some misgivings about all this. On **16 December 2009,**

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[24] The minutes of a meeting held at the *i*-TLTB is annexed to Ratu Vereti's affidavit which record *inter alia* the following:

The above tenants wish to reinstate their above land matters back in the Agricultural Tribunal to declare their tenancy. Mr. Ravaga has agreed that the Board is going to issue the lease based on the following reasons:

1) Being the Mataqali Member
2) Occupying and cultivating the land for many years under Customary Occupation
3) Built houses and other improvements

RESOLUTION

4) All concerned parties agreed not to file the reinstate the above cases in the Tribunal after assurance of Mr. Ravaga to issue the leases to the above landowners and sitting tenants who are asking for legal formalize occupancy.

[25] He simply deposes:

.....I categorically deny each and every allegation contained in paragraph 45 of the said affidavit and I put the Plaintiff to the strictest proof of each of the said allegations.

[26] The letter read:

RE: Lease Application - Ratu Vereti Raluiu Totivi & Vetala Bari

We refer to our various discussions in my office with regards to the above applications.

As advised the Court cases at the Agricultural Tribunal for the declaration of tenancy has been struck out for non-appearance of the tenants solicitor; Messrs Niko Nawaikula.

However, given the tenants current occupation and their status as members of Mataqali Tilivasewa; NLTB believe that the matter should be referred back the Mataqali for their deliberation and advice.

We are now arranging for a date to convene the mataqali meeting where a decision can be made to resolve these pending applications once and for all.

(my emphasis)

[27] **Meeting of Landowners & i-TLTB 16 June 2009.**The meeting of the *i*-TLTB is recorded in the *i*-taukei language. A Mr. Manasa Nale is recorded as having stressed at the meeting that the Tui Tavua has authority over all the land, fauna, and the people of Tavua and everything about the *vanua* of Tavua. The Tui Tavua has been instrumental in the formation and the running of the Tilivaseva Development Company. He has also directed and authorised that land which is being occupied by Ratu Vereti be surrendered for the benefit of the company, which company is set up for the benefit of the *mataqali*. Ratu Vereti is recorded to have expressed some misgivings about all this.

following that meeting, Messrs Niko Nawaikula, wrote to *i*-TLTB to request that the processing of the lease be hastened. A similar follow up letter was written on **11 June 2010** and **24 June 2010** by Ratu Vereti and on **28 June 2010**, to the Office of the Prime Minister.

APPROACHING THE ISSUES

40. Let me just say at the outset that, in my view, there was clearly an offer made by *i*-TLTB on 02 December 1999 (see paragraphs 13 and 14 above) which offer was accepted by Ratu Vereti on 13 August 2003 (see paragraphs 15 and 16 above).
41. As I have said, both counsel went to such great lengths to analyse (and counter-analyse) the facts in terms of offer, acceptance, and consideration.
42. In my view, that approach is superfluous in the circumstances of this case. One need only consider these elements if the facts were unclear as to whether there was ever a meeting of minds (*consensus ad idem*) between the parties[28]. In any given case, the inquiry into whether or not there was an offer, acceptance and consideration is only embarked upon to assist the court in determining whether or not the parties did reach an agreement in the course of their negotiations.
43. However, where the parties have signed a written agreement, the document is evidence *per se* of *consensus ad idem* and subsumes all that had happened prior to it. The general principle was stated by the House of Lords in **L'Estrange v Graucob** that a person signing a document is bound by it[29].
44. Accordingly, where the parties have signed a written agreement, it is senseless to have to review the proceeding conduct of the parties to determine whether they had ever reached a "meeting of minds". Yet, this is exactly what *i*-TLTB is seeking to make this court do by its argument that the offer to Ratu Vereti **"was subject to contract"**.
45. The approach in **L'Estrange v Graucob** is complemented by the well established principle in **Prenn v Simmonds** [1971] 1 WLR 1381, 1384. The latter is authority that, as a matter of evidence law, if there is an issue of construction of a term of

[28] For example, in a battle of forms type of scenario.

[29] see also; Lautoka General Transport Company Ltd v Vosa [2012] FJSC 27; CBV0015.08; CBV0017.08 (24 October 2012; NBF Asset Management Bank v Sharma [1999] FJHC 159; HBC0132J.1999 (2 September 1999); Clark v Zip Fiji [2012] FJHC 1207; HBC05.2010 (10 July 2012); Asset Management Bank v Suliana [2002] FJHC 207; HBC0093j.2000s (8 February 2002).

a contract, then pre-contractual negotiations cannot be used to aid the court. While there is no issue of construction before me, the principle therein is relevant for guidance in this case before me.

46. As Wilberforce LJ said:

> "The reason .... is not a technical one or even mainly one of convenience..... It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, though converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words? If the same expressions are used, nothing is gained by looking back: indeed, something may be lost since the relevant surrounding circumstances may be different.

47. Lord Gifford in (1877) 4 R 58, 69-70) said[30]:

> "Now, I think it is quite fixed - and no more wholesome or salutary rule relative to written contracts can be devised - that where parties agree to embody, and do actually embody, their contract in a formal written deed, then in determining what the contract really was and really meant, a Court must look to the formal deed and to that deed alone. This is only carrying out the will of the parties. The only meaning of adjusting a formal contract is, that the formal contract shall supersede all loose and preliminary negotiations - that there shall be no room for misunderstandings which may often arise, and which do constantly arise, in the course of long, and it may be desultory conversations, or in the course of correspondence or negotiations during which the parties are often widely at issue as to what they will insist on and what they will concede. The very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations or upon mixed communings partly consisting of letters and partly of conversations. The written contract is that which is to be appealed to by both parties, however different it may be from their previous demands or stipulations, whether contained in letters or in verbal conversation. There can be no doubt that this is the general rule, and I think the general rule, strictly and with peculiar appropriateness applies to the present case."

48. This general approach was applied by the Fiji Court of Appeal in **HP Kasabia Brothers Limited v Reddy Construction Company Limited** [1977] FJCA 4; [1977] 23 FLR 235 (25 November 1977); **Din v Westpac Banking Corporation** [2004] FJCA 30; ABU0066.2003S (26 November 2004); **Kumar v National Insurance Company of Fiji Ltd** [2006] FJCA 67; ABU00156U.2006S (10 November 2006) and by the Supreme Court of Fiji in

[30] Cited in Chartbrook Limited (Respondents) v Persimmon Homes Limited and others (Appellants) and another (Respondent) [2009] UKHL 38.

Kumar v National Insurance Company of Fiji Ltd [2012] FJSC 10; CBV0009.2008 (9 May 2012).

OBSERVATIONS

49. Having said all the above, let me just say here at this time that pre-contractual conduct sometimes may be subject to very close scrutiny by the courts. If for example, there is an allegation that, during negotiations, party **A** did engage in a conduct of doubtful integrity, the court may be entitled to see whether that conduct (if the allegation is proved), did induce party **B** to enter into the contract, and if so, whether **A**'s conduct falls within the range which the law (or equity) recognises as one which might vitiate a written contract (e.g. fraud, misrepresentation, undue influence, or unconscionability). In this regard, the inquiry will not be about whether there was ever a meeting of the minds[31] during negotiations. Rather, the inquiry will be about whether the meeting of the minds, of which the written document is primary evidence, is vitiated by a misrepresentation, or a fraud, or an undue influence, or duress, which was committed by one party against the other during negotiations and which induced the latter to enter into the agreement.

50. Accordingly, as I have said, I am not inclined to launch into an inquiry as to whether or not any offer that *i*-TLTB made was subject to contract. Rather, I will focus on the following allegations of *i*-TLTB to see (i) whether they are substantiated by the facts and (ii) if so, whether they are sufficient to vitiate the signed agreement in question.

51. The two allegations are as follows:

    (i) that the majority of the members of the *mataqali* would rather that the lease be issued to TDICL than Ratu Vereti.

    (ii) whether TDICL indeed has a prior interest?

[31] which, as I have said, would offend L'Estrange v Graucob (supra).

MAJORITY OF *MATAQALI* MEMBERS WOULD RATHER A LEASE BE ISSUED TO TDICL THAN RATU VERETI.

52. There are two aspects to this issue. The first is whether or not the majority consent of the *mataqali* is required before the particular parcel of native land in question can be leased out to Ratu Vereti? The second is, assuming that consent is required, whether the absence of it would vitiate the agreement for illegality?

53. Both counsel presuppose that without the consent of the *mataqali*, no lease can be granted to Ratu Vereti. *i*-TLTB, of course, would assert this very point. Ratu Vereti however insists that he did obtain the majority consent. This, he had lodged at *i*-TLTB in 1999 together with his lease application.

54. As a matter of fact, I believe Ratu Vereti[32]. If *i*-TLTB had required consent, how could it have overlooked it in the circumstances of this case considering the steps it had already taken in preparing the lease instrument, executing it, arranging for stamp duty payment, and then lodging it for registration? How could the Board have written as early as **17 May 2005** to assert that it is in the best interest of the *mataqali* that the land be leased to TDICL and yet execute, stamp and lodge for registration a lease in **November 2006**?

55. But, that is "assuming that the consent is required".

56. Section 9 of the *i*-Taukei Lands Trust Act (Cap 134) provides:

> *Conditions to be observed prior to land being dealt with by way of lease or licence*
>
> **9.** No native land shall be dealt with by way of lease or licence under the provisions of this Act unless the Board is satisfied that the land proposed to be made the subject of such lease or licence is not being beneficially occupied by the Fijian owners, and is not likely during the currency of such lease or licence to be required by the Fijian owners for their use, maintenance or support.

57. Section 9 has been read as applying only to native land within a native reserve[33]. In other words, before a piece of *i*-taukei land within a native reserve

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[32] He deposes in his affidavit that one of his sons actually went on horseback from house to house to collect the signatures which he then lodged together with the lease application in 1999.

[33] Ratabua v *i*-Taukei Land Trust Board [2015] FJHC 7; HBC222.2011 (9 January 2015) where the Court concurred with a submission that the consent of the majority of the mataqali for the grant of a lease outside a reserve is not required.

Consent is integral in the consultation process which the *i*-TLTB must comply with, but it was relevant only to ascertain if land is beneficially occupied or needed for the benefit of the landowning unit.

Williams J in Radreu v Gold Mining Co Ltd (1978) FJSC 84. He said:

> *Section 9 merely enacts that the Board has to be satisfied that the grant of a lease or license is not adverse to the interests of the Fijian owners. It does not set out the special procedure to be adopted by the Board in order to ensure that the interests of Fijian owners shall not be adversely affected. (emphasis added)*

Cullinan J in Waisake Ratu No 2 v Native Land Development Corp & NLTB, (1987) 37 FLR 146 said at page 163:

can be leased out, *i*-TLTB must be satisfied first that the land is not beneficially being occupied by the *i*-taukei landowners and/or is not likely during the currency of such lease or licence, to be required by *i*-taukei landowners for their use, maintenance or support.

58. Accordingly, *i*-TLTB will require of any applicant wishing to lease a portion of native reserve land to first obtain the consent of the majority of the landowners. If consent is granted, *i*-TLTB will then begin the de-reservation process before it will issue a lease over the land.

59. A *fortiori*, a piece of native land which was originally within a native reserve but which has already been de-reserved, or, a piece of native land which has never been within any reserve boundary, could not be under any beneficial occupation by the native owners. In that regard, it would be superfluous to have to consult with the *i*-taukei landowners[34].

60. In this case, the land was previously leased out to Mrs. Ravea. Before her, it was leased out to a predecessor in title. There was even a mortgage on the land in favour of NBF. There is even (also exhibited in the affidavit of Masi) a copy of a letter dated **28 October, 2009** by a Ratu Totivi Kama[35] which states that the *mataqali* has been trying to secure a lease over the said land since 1987[36]. All these, and the fact that the land has been cultivated by Ratu Vereti since 1999[37],

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The section quite clearly imposes a duty upon the Board of at least consultation in the matter certainly with respect to the second limb of the section. Indeed, it seems to me that even with the first limb, in order to ensure that the land is not being beneficially occupied, the Board would need to consult with the native owners in the matter.(emphasis added)

In Serupepeli Dakai No1 & Ors v NLDC (1983)29 FLR 92 at page 99, the Fiji Court of Appeal said:

This is clearly not so – the Board alone has the power, and any consultations prior to authorizing leases may have been merely a public relations exercise and have lead, as Kermode, J believes, to a mistaken belief by individual members that they are entitled to be consulted.(emphasis added)

Cullinan J agreed with the following passage from the judgment of Kermode J :

The consent of any mataqali as a unit is not legally required to any Act that the Board can legally do under the Act unless the Act specifies that consent of the native owners i.e. the land owning mataqali is required. Individual members are not owners and their consent is not required.(emphasis added)

The judge then referred to regulation 2 of the Native Land (Miscellaneous Forms) Regulations (Cap 134)

4.12 A fortiori, regulation 2 of the Native Land (Miscellaneous Forms) Regulations, (cap134) enacts that the "consent(of)a majority of the adult native owners" is to be given in "such form as the Board may consider appropriate" when it is required to be given under the principal Act. I note that the i-TLTB issues a separate form when land outside the reserve is leased.

[34] see cases cited above.

[35] a former Tui Tavua.

[36] Ratu Totivi Kama's assertion that TDICL has been trying to lease the land since 1987 is yet another supportive evidence that the land was not being beneficially occupied by the native owners.

[37] On **04 February 2009**, *i*-TLTB Lautoka Office apparently wrote a similar letter to the PM's Office to explain it's position. This letter is not exhibited in Ratu Vereti's or Masi's affidavit. However, Ratu Vereti did comment on the letter in one that he wrote to the Prime Minister's Office:

1. I have been occupying and farming the land since 2001 and have my house situated on the said land.
2. If there is a double leasing issue, to whom the lease issued to and when it was issued as I refer to Seremaia Vueti's letter dated 20/12/06 addressed to the Registrar of Titles.

.....

The consent of the mataqali was submitted to the NLTB.

The Tilivaseva Development & Investment Company lease covers only 1.0438 hectares on the land known as Vatunidrusa expired on 31/12/08 and it does not cover Nadula land which is clear (refer map attached and Fiji Court of Appeal ruling on Civil Appeal No. ABU0032 of 2007S).

are very strong *indicia* that the land was (and still is not) within any native/*i*-taukei reserve. If in fact, the land did revert to native reserve status after the expiry of Mrs. Ravea's lease, there is no evidence before me to show that the requisite formalities (of reverting to native reserve) were carried out.

61. Where then is the need to obtain the prior consent of the *mataqali* in this case?

62. According to Masi, *i*-TLTB was told by a representative of the *mataqali* that all leases that did not have the support of the majority members were to be cancelled. He annexes and marks **"SM 6"** a copy of the signature of the majority members of the *mataqali* objecting to the issuance of a said lease to Ratu Vereti.

63. **"SM6"** is a letter dated 29 August 2005 by Ratu Ovini in his capacity as *"Turaga ni Mataqali"* and as *"Tui Tavua"*. It is addressed to *i*-TLTB and is expressed in the *i-taukei* vernacular. My translation and reading of the letter (which, as a first-speaker of that vernacular, I can do) is as follows:

> We are the members of mataqali Tilivaseva of Yavusa Bila in Tavualevu.
>
> We have met and decided unanimously that all leases listed below to which the mataqali has not consented should be cancelled.
>
> (6 leases listed thereunder including Nadula, (Contract No: 19459), Lessee Vereti Ralulu)

64. However, as Ratu Vereti points out, the signatures in **SM6** were procured after and much later than the majority consent he had obtained, and submitted to *i*-TLTB in 1999 with his lease application. This, *i*-TLTB had accepted, and taken into account in processing the instrument of tenancy and lease in his favour.

65. It appears that the *mataqali* had initially granted its consent to Ratu Vereti in 1999. However, in 2005 (as indicated by SM6), the *mataqali* had a meeting and had a change of heart. It would appear that, at that meeting, the promise of better returns (in a TDICL-lease) would at least have been discussed.

66. In my view, because the consent of the *mataqali* is not legally required to lease out a piece of native land that is outside any native reserve, it cannot be a ground to vitiate the lease agreement that Ratu Vereti and *i*-TLTB had signed.

67. Had there been a stipulation in the Native Lands Trust Act (Cap 134) that any lease issued without the consent of the native owners is null and void, then one

could at least say that the lack of consent should taint the agreement with illegality thus rendering it unenforceable. But there is no such stipulation in the Act.

68. At this point, I reiterate that the offer that *i*-TLTB gave to Ratu Vereti in December 1999 was, *inter-alia, "subject to consultation of the relevant native owners".*

69. The duty to consult is one that is imposed upon the Board under section 9 (see relevant case law in footnotes 32). The purpose of consultation is to ensure that any land to be leased is not beneficially occupied by the native owners or is one that they will not require for their use during the term of a lease. But, as I have said, this duty is only imposed if the native land to be leased is in a native reserve.

BEST INTEREST OF MATAQALI

70. *i*-TLTB has a statutory duty to act in the best interests of the *mataqali*. Section 4(1) of the *i*-Taukei Land Trust Act vests the Board with the power to control and administer all native land for the benefit of the *i*-taukei owners. *i*-taukei landowners cannot alienate or charge their communally owned land without the *i*-TLTB's consent[38].

71. Section 6[39] of the Act forbids the sale, leasing or disposal of any i-taukei otherwise than in accordance with the Act.

72. Assuming that it is in the best interest of the *mataqali* that the land be leased out to TDICL, is the agreement with Ratu Vereti therefore vitiated by the (assumed)[40] fact that it is not in the best interest of the *mataqali*? In other words, is *i*-TLTB yet entitled to avoid the agreement it had with Ratu Vereti in preference of one to be given to TDICL by virtue of the Boards obligation under sections 4(1) and 6 of the i-Taukei Land Trust Act (Cap 134)?

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[38] Section 4(1) of the i-Taukei Lands Trust Act provides:

4.-(1) 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.

[39] Section 6 provides:

Provisions as to transfer of native lands

6. When any native land has been transferred to or acquired by the Crown a certificate shall be executed in such a form as may be prescribed. Such certificate shall contain a diagram of the land to be comprised therein on such scale as may be prescribed and shall be executed by the Board under seal on behalf of the native owners and by the Director of Lands on behalf of the Crown. A record of such transfer shall be made in the "Register of Native Lands" kept under the provisions of section 8 of the Native Lands Act.

[40] (assuming it is fact, which it is not as there is no evidence of this before me).

73. I think not. The duty is upon *i*-TLTB to act in the best interest of the native owners. The duty starts from the time *i*-TLTB receives a lease application The duty must continue right through its negotiations, contract formation, and even in the administration of the lease agreement.

74. However, once *i*-TLTB enters into a valid agreement, it cannot opt out of it unilaterally in preference to another who promises better economic returns so to speak. I am not convinced that the promise of a better economic return by TDICL is sufficient ground for *i*-TLTB to seek to vitiate its agreement with Ratu Vereti. In any event, there is no evidence before me that TDICL 's option is in the best interest of the *mataqali*.

WHETHER TDICL INDEED HAS A PRIOR INTEREST?

75. *i*-TLTB tries to avoid its agreement with Ratu Vereti by claiming that TDICL has a prior interest in the land. This raises a priority issue. The question is not whether the contract with Ratu Vereti is null and void. Rather, the question is whether the interest that accrues to Ratu Vereti from the contract should prevail against the one that TDICL has, or *vice versa*?

76. Ratu Vereti's interest derives from the signed contract. It is an equitable proprietary interest which, thus, entitles him to the equitable remedy of specific performance.

77. Specific performance will only be available to Ratu Vereti if what he has with *i*-TLTB is a valid and a binding agreement. To be valid, the agreement must be evidenced in writing and thus comply with Fiji's statute of fraud's provisions (see section 59(d)[41] of the Indemnity, Guarantee and Bailment Act (Cap 232))[42]. Also, *i*-TLTB's obligation to register the lease, must not, in law, be subject to the approval or consent of a third party. Lastly, the lease instrument must embody all the essential requirements of a lease in order to be enforceable.

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[41] Section 59(d) provides:

Promises or agreements by parol

"59. No action shall be brought-
(d) upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them....
unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged there or some other person thereunto by him lawfully authorised.

[42] Or if there is no written document, that it is enforceable under the doctrine of part-performance.

78. As I have said, a lease agreement was executed by the parties so there is no statute of frauds issue in the case.

79. Also, as I have discussed above, I am of the view that the consent of the *mataqali* was in fact obtained and, in any event, is not required at law in this case.

80. Lastly, in my view, the lease instrument in question embodies all the essential elements of a lease[43] and was in registrable form.

81. The kind of interest that purportedly vests in TDICL was first broached in a letter dated **23 March 2004** by the then Tui Tavua, Ratu Ovini Bokini to the General Manager, *i*-TLTB. In that letter, Ratu Ovini alleges[44]:

(i) that NBF, which had a mortgage over the land, had advertised a mortgagee sale, and to which TDICL had offered $8,000, which NBF had accepted by letter of 11 February 1998.
(ii) that *i*-TLTB had consented to the proposed sale.
(iii) that TDICL plans to subdivide the land
(iv) that *i*-TLTB has granted to TDICL a 5-year development lease
(v) TDICL's proposed development would yield better returns to the mataqali

82. The above letter ends with a plea to *i*-TLTB to cancel Ratu Vereti's lease. Notably, Ratu Bokini's letter came at a time just when *i*-TLTB was beginning to process Ratu Vereti's lease. As I have said, by that time, a valid contract had already been reached between Ratu Vereti and *i*-TLTB. However, as I have said, the written agreement subsumes all this.

The Alleged Five-Year Development Lease

83. The assertion by Ratu Ovini that *i*-TLTB had *"given us a 5-year development lease effective from 01 January 2004"* is not one that *i*-TLTB specifically concedes to in the affidavit of Masi. Masi has not adduced a copy of the instrument or related documents in his affidavit. Instead, all he is prepared to say is that TDICL has a "prior interest".

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[43] The essentials of a valid agricultural lease over a native land, in my view are as follows:
(i) the land must be clearly described
(ii) the rent must be clearly described
(iii) the term of the lease must be clearly described

[44] The letter alleges the following:
(i) an NBF letter of 11 February 1998 agreeing to TDICL's tender to purchase the land for $8,000.00.
(ii) the consent by NLTB dated 06 August 1998 subject to clearance of all rent arrears and costs.
(iii) TDICL plans to subdivide the land at the back of the Tavua market.
(iv) a 5 year development lease purportedly granted by NLTB effective from 1st January 2004
(v) TDICL's proposed development on the land would yield better returns to the landowners and to the public.
(vi) a request to cancel Ratu Vereti's lease accordingly to allow the development of the area into its best economical use.

84. I refuse to accept that *i*-TLTB did give a development lease to Ratu Ovini/TDICL (see paragraph 89 below).

The Alleged Mortgagee Sale

85. NBF, as I have said, had a mortgage on the land in question. Presumably, the mortgage was given by Mrs. Ravea as security for monies she had borrowed to finance her purchase of the lease. The mortgage would have been consented to by *i*-TLTB as required under section 12 of the Native Lands Trust Act[45]. On 12 December 1997, NBF advertised in the Fiji Times a mortgagee sale of the lease. TDICL responded with an offer to purchase for $8,000. NBF then wrote to TDICL in February 1998 as follows:

> *TENDER NO. 260/97 – I/TENANCY NO. 3710*
> *IN THE NAME OF RAVIA OF TAVUA TOWN*
>
> *This is to confirm that your offer to purchase the above named property for a sum of $8,0000 (EIGHT THOUSAND DOLLARS ONLY) on an "as is where is basis" has been approved by the bank on the following basis:-*
>
> 1. *That within 7 days from the date of this letter, you are to provide to the bank evidence of finance.*
> 2. *Effect settlement within 30 days from the date of this letter.*
> 3. *You are to appoint your own solicitor in this matter and any fees and charges will have to be met from your own costs. If the above is acceptable to you, kindly sign and return the original of this letter in confirmation hereof.*

86. In my view, NBF's reply to TDICL's offer constituted a counter-offer that it would accept $8,000 if TDICL provided evidence of finance in 7 days and effect settlement in 30 days.

87. There is no evidence before me that TDICL ever accepted that counter-offer. Had TDICL done so, the lease surely would have been transferred to its name. Had that happened, *i*-TLTB would have been involved one way or another in the administrative and regulatory aspects of the transaction. Hence, it is not hard to imagine that *i*-TLTB would be the repository of related documentation

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[45] Section 12 provides:

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 sublessee.

such as the lease transfer, stamp duty, registration papers etc. No such document is annexed to Masi's affidavit.

88. In any event, that no lease was ever granted to TDICL, whether through the purported mortgagee sale, or otherwise, is confirmed by the following letter dated **05 December, 2011** by *i*-TLTB to the Tui Tavua.

> We herein confirm that the Native Land known as Vunauci, Vatunidrusa and Nadula and as edged yellow in the enclosed plan is vacant and not leased to any individual.
> The land in owned by the Mataqali Tilivasewa of Tavualevu Village, Tavua.

89. I am not inclined to believe that TDICL ever accepted the counter-offer of NBF. Accordingly, it is hard for me to accept that, out of its brief engagement with NBF in 1997/1998, TDICL did acquire an equitable interest (let alone a legal one) sufficient to take priority over the equitable one that vests in Ratu Vereti.

TDICL's Plans To Sub-Divide The Land Would Yield Better Returns to The Mataqali

90. I have dealt with this in part in paragraphs 64 to 70 above. As I have said, *i*-TLTB has a statutory duty under section 4(1) of the Native Lands Trust Act to administer native lands in the **"best interests"** of the *mataqali*.

91. If I might just point this out at this time, whether or not the TDICL option is a better option is a question of fact. There is no real evidence before me that TDICL's option is in fact a better option.

92. The legal aspect of the duty to "act in the best interest of the native owners" was canvassed by Mr. Justice Inoke in **Volavola v AG, Director of Lands and NLTB** [2011] FJHC 277; HBC88.2005L (20 May 2011)[46]. In that case, Inoke J started by saying that the matter of determining the scope of the duty was one of statutory interpretation. He opined that this was a lesser duty than the trustees' "usual" one to act **"in the best interests of the beneficiaries"**. Nonetheless, he did allow himself to be guided by the "usual" duty that trustees have in tackling the statutory interpretation issue at hand[47].

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[46] Inoke J had introduced the issue thus:

> [52] Lastly, the Plaintiffs argue that the NLTB acted in breach of its duty under s 4(1) of the Native Land Trust Act to administer their lands for their benefit by failing to obtain payment by the State of "fair market value" rent.

[47] Inoke J said:

> [71] That seems to me, as a matter of statutory interpretation, to be different from the usual trustee's duty to act **"in the best interests of the beneficiaries"**. The duty here is **something less** than that. Subject to that rider, I am guided by what was said by Sir Robert Megarry V-C in Cowan v Scargill **(1985) Ch 270, 286-7**:

93. To assist him in determining the meaning of "benefit" under section 4, Inoke J cited various authorities[48] out of which he concluded that NLTB's duty to act "**for the benefit of the Fijian owners**" will entail the following:

(i) to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide.

(ii) to seek advice on matters which the NLTB does not understand, such as the making of investments, and on receiving that advice to act with the same degree of prudence. This requirement is not discharged merely by showing that the trustee has acted in good faith and with sincerity.

(iii) its duty may be discharged even when the benefit to the Fijian owners does not involve a financial advantage. The benefit may include protection of the land in question and prevention of waste and loss.

94. If ever *i*-TLTB were to breach its duty to act in the best interest of the *mataqali*, of course it will be held accountable to the *mataqali* which may, yet, have a cause of action against *i*-TLTB.

95. However, even if *i*-TLTB had acted in breach (which I am not concerned about here), that breach would still not be enough to suddenly vitiate its agreement with Ratu Vereti – nor would any breach (of which there is no evidence before me) suddenly propel whatever interest TDICL might claim to one that is capable of displacing the one that has accrued to Ratu Vereti. To reiterate, once *i*-TLTB has entered into a lease agreement, it is bound by it. That agreement can only be rescinded on any of the grounds I have set out above. No such ground exists in the circumstances of this case.

96. In **Khan v Native Land Trust Board** [2009] FJHC 216; HBC198.2006L (23 September 2009), Mr. Justice Inoke found the following *obita* in his ruling:

> [38] It seems to me that the NLTB in this case has not only breached its obligations against the Khans but has also breached its obligations against the landowners by not verifying the needs of the landowners first. The latter breach has now been rectified by the issue of a lease of the subject land to one of the members of the landowners. As for the breach against the Khans, even if they asked for specific performance, this Court will not be able to grant that remedy in the circumstances of this case.

I turn to the law. The starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between the different classes of beneficiaries. The duty of the trustees towards their beneficiaries is paramount. They must, of course, obey the law; but subject to that, they must put the interests of their beneficiaries first. When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests. In the case of a power of investment, as in the present case, the power must be exercised so as to yield the best return for the beneficiaries, judged in relation to the risks of the investments in question; and the prospects of the yield of income and capital appreciation both have to be considered in judging the return from the investment.

[48] Sir Robert Megarry V-C said this in Cowan v Scargill (supra) at p 288; In re T's Settlement Trusts [1964] 1 Ch 158 as per Wilberforce J; In re C. L. [1969] 1 Ch 587, as per Cross J.

97. In the above case, the Khans were evicted by the *mataqali* from a piece of land they had been occupying and cultivating. They had also signed a tenancy agreement. *i*-TLTB however had reneged on giving them a registered lease. Inoke J found that *i*-TLTB was obliged to issue the Khans a registered lease, but had instead given it to one of the *mataqali* members. The Khans had accepted the breach as repudiation of the agreement and terminated it. They were awarded monetary compensation for the loss sustained by them in consequence of the failure to issue the leases, and were discharged from their unperformed primary obligations under them.

CONCLUSION

98. For all the reasons given above, I find in favour of Ratu Vereti. Accordingly I order that the *i*-TLTB do forthwith proceed with completion of the registration of the lease to Ratu Vereti. I award costs to Ratu Vereti which I summarily assess at $1,500 (one thousand five hundred dollars only). If for one reason or another, *i*-TLTB cannot now do so, then Ratu Vereti will be entitled to apply to this court for assessment of common law or equitable damages in lieu of specific performance.

HIGH COURT OF FIJI
LAUTOKA

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Anare Tuilevuka
JUDGE
10 June 2016

Appendix 1

Date	Action Taken
12/12/97	NBF Mortgagee Sale Advertisement
11/02/98	Letter of NBF to TDICL accepting TDICL tender with conditions. This is also date which Masi asserts was when NBF sold land by mortgagee sale to TDICL
	Ratu Vereti submits lease application & consent of mataqali
02/12/99	iTLTB Offer of Instrument of Agricultural Tenancy term 30 years commencing 01/01/01 if want formal lease with registered title, get registered surveyor to prepare diagram Query – Does it say get consent of mataqali?
13/08/03	Letter by iTLTB to Cane Farmers Co-Op Savings & Loans Association advising agreement for lease completed. Advising that $1,029.06 processing fee required.
	$1,029.06 processing fee paid by CFCSLA
23/03/04	Letter by Ratu Ovini to iTLTB
17/05/05	Letter by iTLTB
16/06/05	Ratu Vereti's lawyers return cheque to i-TLTB
26/09/05	Ratu Vereti applied for ALTA Declaration of Tenancy
0?/10/05	iTLTB told Ratu Vereti to settle all his arrears before proper lease document will be prepared.
23/10/06	Ratu Vereti settled all his arrears at iTLTB. iTLTB cheque in sum of $1,405-34 attached to Ratu Vereti's affidavit.
01/11/06	Instrument of Tenancy Signed
02/11/06	iTLTB filenote from one Silika to Vuli Kaci wherein the former telling latter that "document has been registered in the Registrar today 02/11/06 @ 2.45 p.m. Please register".
21/12/06	iTLTB letter to PM saying that initial granting of the lease was against wishes of the majority mataqali who'd intended to develop the land for commercial purposes. As a result, the approval was accordingly withdrawn and all fees refunded. *"We have also taken the liberty of advising the Registrar of Titles against the registration of this particular lease yesterday and a copy is enclosed for your record"*
22/12/06	Ratu Vereti wrote to PM's Office. • Consent letter from majority of members of land owning unit for my lease was duly completed and a copy of the same was sent with my lease application form to the Board's office in Lautoka. • The current GM of the Board (Ref to Semi Tabakanalagi) was then Manager Western who processed and approved my application. • Since then, paid all levies to the Boar $400 p.a., $1,400 • Tui Tavua persuading the Board to cancel my lease.
27/12/06	Ratu Vereti wrote to Acting GM iTLTB asking that lease be registered.
	Also went and saw Acting SG and PS for Justice. SG said he'd directed RoT to register the lease as lease in registrable form
01/02/07	Ratu Vereti wrote letter of complaint to PM Office against i-TLTB.
02/03/07	Ratu Vereti instructed Nawaikula
14/03/08	PS PM Office wrote to PF iTaukei Affairs to look into complaint
03/07/08	Letter from Meli Benuci (iTLTB) to PS Fijian Affairs explaining why Ratu Vereti lease withheld. Reason – differences between LOU on this issue. iTLTB requested Manager North/West Ravaga to carry on consultation between Ratu Vereti and members of his LOU to find solution.
18/11/08	Ratu Vereti ALTA claim struck out
	PS Information wrote to iTLTB to urge iTLTB to complete processing Ratu Vereti lease.
15/12/08	iTLTB responded advising they have referred matter to iTLTB Lautoka Office.
29/01/09	Letter by iTLTB Manager North Western to Deputy Secretary for Information explaining iTLTB position. • Consent from mataqali not on • Mataqali prefers lease to TDICL • We have an "earlier application for a Development Lease from Tilivaseva Developmen Company with consent of majority • ALTA Claim struck out
04/02/09	iTLTB Lautoka Office wrote to PM Office to explain iTLTB version of the story.

04/05/09	Meeting between iTLTB & Ratu Vereti's son @ iTLTB Lautoka Office
26/05/09	Letter by iTLTB Manager North-Western
16/06/09	Meeting between iTLTB & mataqali elders in Tavua
28/10/09	Ratu Totivi Kama (former Tui Tavua) writes to iTLTB in vernacular says that mataqali has been trying to secure the land since 1987.
16/12/09	Messrs Nawaikula wrote to iTLTB requesting latter to hasten processing of lease.
11/06/10	Follow up letter by Nawaikula to iTLTB.
24/06/10	Follow up letter by Ratu Vereti
28/06/10	Follow up.
15/09/11	iTLTB wrote letter to Ratu Vereti saying **"Board has decided not to issue an Agricultural Lease".** • Land is suitable for commercial and industrial development use as it will serve its best and highest use. • The returns to the LoU will also be high if the subject area is utilised accordingly to the above use. • **Therefore we are refunding the sum of one thousand one hundred and forty two dollars and eighty cents ($4,142-80) as part payment of offer on 13th August 2001".** • As board of trustees of iTaukei Land, it is part of our vision to realise full potential from areas leased for the land owners.
	iTLTB undated Notice of Unlawful Occupation • Letter gives date by which land should be vacated as 25/12/11
05/12/11	Letter by iTLTB to Tui Tavua confirming no one holds any lease over the land
10/01/12	Nawaikula returns cheque to iTLTB.