

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

Civil Action No. HBC 01 of 2015

BETWEEN : **VILIAME BOGISA** of Lauwaki Village, Vuda as sole surviving Trustee of Elevuka Housing Scheme and also suing on behalf of the Tokatoka Nakelo of Viseisei and Lauwaki Villages in the District of Vuda in the Province of Ba.

PLAINTIFF

A N D : **ITAUKEI LAND TRUST BOARD** a statutory Board duly incorporated under the provisions of the iTaukei Land Trust Board.

1ST DEFENDANT

A N D : **HOUSING AUTHORITY** an authority duly constituted under the Housing Act.

2ND DEFENDANT

Appearances : Ms P. Mataika for plaintiff

Mr P. Nayare for 1st defendant

Mr V. Sharma with Ms T. Tuitoga for 2nd defendant

Date of Trial : 09 May 2017

Date of Judgment: 02 October 2017

J U D G M E N T

Introduction

[01] The plaintiff brought this action against the defendants claiming among other things damages for breach of the assignment. The specific claim

against the first defendant is that the first defendant out of its own funds pay the balance owing of \$474,500.40 to 2nd defendant on 15th September 2014 and refund any repayments made by it to the 2nd defendant from that date.

[02] The defendants filed a statement of defence and denied the claim. The 1st defendant's defence is that the main reason for not making full payment of \$73,000 to the 2nd defendant the landowning unit income was deficient to meet their assigned payment obligations to the 2nd defendant was because the income was being advanced to members of the landowning unit, including the Plaintiff himself, totalling a staggering sum of \$3,449,993.49 for the period from 13th October 1999 to 20th January 2015.

[03] The 2nd defendant in its statement of defence states that it approved a loan for the scheme for which the payment is from the members' lease income.

[04] At the trial, the plaintiff Viliame Bogisa (PW1) gave evidence and tendered documents marked "PE1-PE8" on behalf of the plaintiff and Nemani Tamani (DW1) for the 1st defendant. The 2nd defendant did not call any witness. I would state what each witness said in evidence in my discussion.

Background

[05] The plaintiff is the sole surviving Trustee of Tokatoka Nakelo Housing Scheme made on 2nd day of March 1994 ("the Scheme") and sues as such Trustee and representing Tokatoka Nakelo of Viseisei and Lauwaki villages of the district of Vuda ("the Tokatoka") and its members for their common interest and benefit.

[06] The 1st defendant iTaukei Land Trust Board (TLTB) is a statutory Trust duly incorporated under the provisions of the iTaukei Land Trust Act to administer the Tokatoka's lands and distribute lease income generated

therefrom to the members of the Tokatoka after deduction of its administration costs.

- [07] The 2nd defendant Housing Authority (HA) is a statutory authority duly incorporated under the Housing Act with powers to provide loans for village housing schemes.
- [08] The Tokatoka owns Etai Island which was leased out by HA on which was located the Beachcomber Island Resort, Elevuka Island leased out by HA on which was located the Treasure Island Resort and Kadavulailai Island on which was located the Bounty Island Resort the total lease income of which payable to Tokatoka exceeded \$100,000 a year.
- [09] Based on such income, in 1995, the plaintiff scheme on behalf of the Tokatoka loaned \$559,000 from HA to be paid back at \$73,000.00 per year within a period of 149 months totalling \$949,000.00 (“the loan”) for housing of Tokatoka workers in Viseisei and Lauwaki villages with the loan to be fully paid by 2008 and lease income in excess of \$73,000 per annum during that period be distributed to Tokatoka members.
- [10] TLTB administers the Tokatoka’s lands and lease income as a Trustee under the provision of the iTaukei Lands Trust Act and represented to the Tokatoka that if the Tokatoka signed an assignment of its rental proceeds for the Scheme’s housing purposes it would dutifully and properly act on the authorization contained in the assignment and reposing trust in such representation and agreement the Tokatoka signed an assignment of its rental proceeds for the first year to 2nd defendant and distribute balance to the Tokatoka members and gave the same to the 1st defendant to act thereon and did not make any alternative arrangements for payment of the loan.
- [11] The plaintiff alleges that TLTB was under a fiduciary duty to ensure the best interest of the Tokatoka to ensure that it pays the said payments and

if for any reason there was insufficient lease income to inform the Tokatoka of such deficiency so the Tokatoka could make alternative arrangements for payment so that no unnecessary interest was incurred and the principal with agreed interest would be paid within time. TLTB breached such trust, duty, representation and agreement.

- [12] TLTB did not pay the amount of \$73,000.00 per year as authorized by the Tokatoka. It paid \$178,639.92 by two payments on 8 July 2014 and 5 August 2014 and another \$6,000 in December 2014 respectively resulting in Tokatoka members going without any lease distribution in August 2014 and December 2014.
- [13] As a result of the breach of the agreement, TLTB had paid \$935,688.23 of the Tokatoka's lease income to the 2nd defendant leaving a balance loan of about \$381,613.06 out of an initial loan of \$559,000.00 payable at \$146,000.04 per year for 39 months from 15 September 14 to December 2017.
- [14] The Tokatoka members and the Scheme, according to the plaintiff, have suffered damages in loss of all payments from Tokatoka lease income made to 2nd defendant from 1996 to 2009 and loss of payments for unnecessary interests incurred and such damages aggravated by the Scheme having to incur a balance payment of \$474,500.40 payable at \$12,166.67 per month for 39 months from 15 September 2014 to December 2017 after payment of \$935,688.23 from an agreed total loan repayment of \$949,000.
- [15] The plaintiff claims damages against the TLTB in that they want the amount of \$94,088.71 be paid to the 2nd defendant by the TLTB out of their (TLTB) own funds and not from Tokatoka Nakelo lease income.

Discussion

- [16] The issue to be decided by the court is whether the TLTB breached its duty under the assignment given by the plaintiff to pay and settle the loan the plaintiff obtained from the 2nd defendant for Elevuka Housing Scheme.
- [17] The plaintiff in this action is a member of Tokatoka Nakelo and sole surviving Trustee of Tokatoka Nakelo Housing Scheme named Elevuka Housing Scheme.
- [18] It is common ground that the plaintiff obtained a loan of \$559,000 from the 2nd defendant to be paid back in an instalment of \$73,000 per year within a period of 149 months totalling \$949,000.
- [19] The TLTB administers the Tokatoka's lands and lease income as Trustee under iTaukei Lands Trust Act (the Act). The TLTB agreed to make the repayment of the loan from lease income if the plaintiff signs an assignment to that effect. The plaintiff accordingly signed an assignment of 16 August 1995 (PE2) and authorized the TLTB to pay \$73,000 per annum to the 2nd defendant towards the loan of \$559,000 with final payment in 2008.
- [20] According to PW1, instead of making the annual payment of \$73,000, the TLTB made short payments from 1996 to October 2009 and no payment from 2010 to 2013 and overpayment of \$184,639.92 in 2014 totalling \$924,596.29.
- [21] With the leave of the court, the plaintiff filed a supplementary affidavit to show the total outstanding balance as at December 2017 as the settlement amount required by the 2nd defendant. The plaintiff in that affidavit at paras 3 to 7 states:
- “3. That I crave leave to add to my Affidavits filed herein and wish to add that if all payment of \$73,000 .00 were paid in accordance with the assignment*

signed by us we would have paid off the total debt plus interest of \$949,000.00 by 2008.

4. *That due to default in payment by 2nd Defendant in accordance with our assignment we have had to pay a total of \$1,348,987.51 which is the sum of \$949,000.00 plus the rehabilitated sum of \$399,987.51 ordered by the Prime Minister to be reduced by 2nd Defendant.*
5. *That the interest on the sum of \$399,987.51 at 7.5% is \$29,999.10 and as at 23rd August, 2017 the outstanding balance was \$120,017.32 and we had written a letter dated 23rd August, 2017 to 1st Defendant and they had not replied resulting in my Counsel asking that I make this my supplementary affidavit. Annexed marked "A" is the statement of accounts from 2nd Defendant up to 23rd August, 2017 and "B" copy letter dated 23rd August, 2017.*
6. *That the total outstanding balance at December 2017 as the settlement amount required by 2nd Defendant is \$124,087.81 and if \$29,999.10 is deducted then a balance of \$94,088.71 will remain. Attached marked "C" is a true copy of Settlement letter from 2nd Defendant.*
7. *That the amount of \$94,088.71 be paid to 2nd Defendant by 1st Defendant out of 1st Defendant's own funds and not from Tokatoka Nakelo lease income".*

[22] The TLTB did not file any response to the supplementary affidavit filed by the plaintiff. The Plaintiff's supplementary evidence given by way of the affidavit is supported with documents. I would, therefore, accept the plaintiff's evidence deposed in the supplementary affidavit. The plaintiff also gave clear and straightforward evidence at the trial. I would, therefore, accept the plaintiff's evidence given at the trial as well.

[23] I would reject the reason adduced by the TLTB for not complying with the assignment obligation that there was a directive to cease the payment

from the office of the Prime Minister dated 7 February 2013 in response to a complaint brought forward by the members of the said land-owning themselves – which directive was in place for 16 months until being uplifted by a further letter from the office of the Prime Minister dated 16 June 2014. The TLTB had defaulted in the payment in terms of the assignment even before the payment was stopped with a view to bringing about a settlement with the second defendant. The TLTB could not have made advanced payment if there were a deficiency in the rental proceeds.

[24] The second defendant has waived interest for the period (16 months) the payment was suspended by the office of the Prime Minister.

[25] The TLTB made short payment-instead of making the annual payments of \$73,000 from 1996 to October 2009-even though sufficient fund was available from the lease income and they did not make payment from 2010 to 2013 and overpayment of \$184,639.92.

[26] I agree with the plaintiff that if all payment of \$73,000 were paid in accordance with the assignment, the plaintiff would have paid off the total debt with interest of \$949,000 by 2008.

[27] I find that the TLTB breached the agreement by irregular payments and/or failing to make payments in accordance with the assignment and thereby caused loss to the plaintiff by way of extra interest arising from irregular or non-payment as agreed. Such loss is now estimated at \$94,088.71, being the total outstanding balance as at December 2017 as the settlement amount required by the second defendant.

[28] For the foregoing reasons, I would order the TLTB pay the sum of \$94,088.71 out of their own fund and not from Tokatoka Nakelo Lease income to the second defendant. I would make no order as to cost considering the special circumstances of the case.

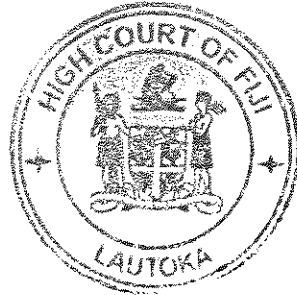
The Outcome

1. There is judgment in favour of the plaintiff.
2. The i-Taukei Land Trust Board will pay the sum of \$94,088.71 out of their own fund and not from Tokotoka Nakelo Lease income to the 2nd defendant.
3. No order as to costs.

M. H. Mohamed Ajmeer
..... 2/10/17

M. H. Mohamed Ajmeer

JUDGE



At Lautoka

02 October 2017

Solicitors:

For plaintiff: M/s Vuataki Law, Barristers & Solicitors

For 1st defendant: iTLTB Legal Services Department

For 2nd defendant: M/s Vijay Naidu & Associates, Barristers & Solicitors