IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 291 of 2021

BETWEEN : **MANA ISLAND RESORT (FIJI) PTE LIMITED** a limited liability company having its registered office at Suite 4-6, Building 2 HLB House, 3 Cruickshank Road, Nadi Airport.

Plaintiff

AND : **i-TAUKEI LAND TRUST BOARD** a body corporate duly constituted by the i-Taukei Land Trust Act having its Head Office at i-TLTB Building, 431 Victoria Parade, Suva.

Defendant

Appearances : Mr. C B Young for the Plaintiff
: N/A for the Defendant

Date of Hearing : 05 June 2023
Date of Ruling : 10 August 2023

JUDGMENT

INTRODUCTION

1. On 10 December 2021, Mana Island Resort (Fiji) Limited (**"MIRL"**) filed an Originating Summons pursuant to Order 7 Rule 2 of the High Court Rules 1988. MIRL seeks the following Orders:

    1. a declaration that the reassessment of rent under Native Lease 13835 can only be done in terms of clauses 2 (b) and 3 thereof and that Regulation 13 (1) of iTaukei (Leases and Licences) Regulations 1984 has no application.

    2. a declaration that the Notice of Reassessment of Rent dated 5 October 2021 issued by the Defendant to the Plaintiff in respect of Native Lease 13835 is invalid and of no effect for all or any of the following reasons:

        (a) the Defendant has failed to comply with Clause 3 of Native Lease 13835, in that, it did not ascertain the "*unimproved capital value of the said land...on the expiry of every decade of the said term*" before issuing the Notice.

        (b) if Regulation 13 (1) of iTaukei (Leases and Licenses) Regulations 1984 was

applicable then the Defendant failed to comply with that Regulation, in that:

(i) the Regulation provides for a start date and an end date within which to give the Notice of Reassessment thereby making time for the giving of the Notice of the essence.

(ii) the Notice should have been given "*not earlier than 12 months and not later than 3 months before the appointed date*".

(iii) the appointed date under NL 13835 was 1/1/21.

(iv) therefore, the Notice should have been given *"not earlier than 1/1/20 and not later than 30/09/20*" for the reassessment of rent to be effective from 1/1/21 being ten yearly from 1/1/71.

(v) but the Notice was given on 5/10/21; and

(vi) even if the rent was to be reassessed from 1/1/22 being 10 years from the last reassessment, the Notice should have been given not later than 30/09/21.

3. a declaration that the next reassessment of rent under Native Lease 13835 is on 1/1/31.

4. a stay of the Defendant's Regulation 13 (1) Notice dated 5 October 2021 and the Plaintiff's Regulation 13 (2) Counter-Notice dated 30 November 2021 from proceeding to arbitration under Regulation 21 pending the final determination of this proceeding.

5. an order that the Defendant pay to the Plaintiff the costs of this proceeding.

6. such further or other relief as may seem just to this Honorable Court.

2. The Summons is supported by an affidavit of Uma Kant sworn on 10 December 2021. The *i*-Taukei Land Trust Board (**"*i*-TLTB"**) opposes the application by an affidavit of Isoa Tuwai sworn on 17 March 2022.

3. As one will see from the above prayers, at issue between the parties is a Notice of Reassessment of Rent (**"Notice"**) over Native Lease 13835.

THE LEASE

4. Neither party has attached the lease in question in any of the affidavits they filed. However, they both make references to its provisions in their respective submissions.

5. The lease was issued by the *i*-Taukei Land Trust Board (**"*i*-TLTB"**) on 05 October 2021. MIRL is the registered lessee. The said lease commenced on 01 January 1971 for a term of ninety-nine (99) years.

6. Initially, the lease covered a total area of 150 acres. However, on 16 March 1983, some five acres of land was added to the lease which thus increased the total acreage covered to 155 acres.

7. This change was effected vide a variation to the lease agreement. I gather that the five acres in question was, hitherto, all comprised in a neighboring lease. That neighboring lease used to belong to a third party.

8. Clause 2 (a) of the said lease provides that, for the first four years from 1971, the rental shall be $17,000 – 00 (seventeen thousand dollars) per annum. This is to be paid half yearly to *i*-TLTB on the first day of January and July of each year covered in this period.

9. From the fifth year, Clause 2 (b) and (c), combined, stipulate:

   (a) that the rent shall be calculated in January and July each year.

   (b) that the rent shall be calculated at 2 ½ % of the gross receipts of MIRL's hotel resort and allied operations on the land for the past six months

   provided, that the minimum rental shall not be less than 10% of the unimproved capital value (**"UCV"**) of the land at the relevant time and shall not be more than 25% of the UCV.

10. Clause 3 provides that the UCV must be ascertained by *i*-TLTB on the expiry of every decade. After ascertaining the UCV, *i*-TLTB must then notify MIRL of the figure arrived at. If, in the event, *i*-TLTB and MIRL could not agree on the figure, then the UCV shall be determined by arbitration in accordance with the Arbitration Act.

HOW RENT HAS BEEN ASSESSED OVER THE YEARS

11. Rent on the said land was assessed for the decade 1971 to 1980 and reassessed for the following decades (1981 to 1990 ; 1991 to 2000 ; 2001 to 2010 and 2012 to 2022).

12. In his affidavit, Isoa Tuwai recounts how *i*-TLTB and MIRL had approached the rental reassessment over these years.

13. Generally, *i*-TLTB would calculate the UCV for an upcoming ten year period at some point towards the end of the lapsing ten-year period and then notify MIRL of the UCV (figure). This would be followed by a letter by MIRL to *i*-TLTB questioning how *i*-TLTB had arrived at the figure. *i*-TLTB would then respond by letter. The parties may exchange further letters as they try to reach a compromise. At some point in the toing and froing of letters, the parties would agree on a UCV-figure (though, the option of taking it to arbitration is available if they do not). If the parties are able to agree on a figure to represent the UCV of the land, the rent would then be assessed in January and July each year for the next decade at 2 ½ % of MIRL's gross receipts over the last six months (**"$X"**). **"$X"** is the figure which MIRL will pay *i*-TLTB in January and July each year – provided that "SX" cannot be below 10% of the UCV or more than 25% of the UCV.

THE 05 OCTOBER 2021 NOTICE OF REASSESSMENT

14. On 05 October 2021, *i*-TLTB sent a Notice to MIRL. The said Notice purported to increase the annual rent from the current $300,000 – 00 plus VAT (three hundred thousand dollars) to $510,000 – 00 (five hundred and ten thousand dollars) plus VAT effective from 01 January 2022. I reproduce in full below the said Notice.

04/10/21

Mana Island Resort (Fiji) Pte Limited
Private Mail Bag
Nadi Airport

NOTICE UNDER REGULATION 13
ITAUKEI LAND TRUST (LEASES AND LICENCES REGULATIONS)

Dear Sir/Madam

Reassessment of Rent on iTaukei Land at MANA ISLAND (PART OF)
In the District of NADROGA/NAVOSA
File ref: NADROGA/NAVOSA /4950; Area 62.7261 Ha; NL: 13835

The rent payable under your lease (presently $300000.00 p.a) is due for reassessment from 1/01/2022 under the terms of your lease.

Under the provisions of the iTaukei Land Trust (Leases and Licenses) Regulations 1984, I hereby give notice that the iTaukei Land Trust Board proposes that the rent payable under your lease shall be $510000.00 (Five Hundred Ten Thousand Dollars Only) per annum to be effective from 1/01/2022 being the appointed date.

Under the regulation referred to above you may either;

a) Accept the proposed new rent; or

b) Serve the Board a counter-notice within two months of the date of service of this notice, advising that you intend to refer the matter to arbitration for determination as to the amount of the reassessment rent. In that counter-notice you must also indicate the name of the person you propose to be appointed the arbitrator.

You will then have a further one month from the date of service of your counter-notice to refer the matter to arbitration.

If you do not serve a counter-notice, nor refer the matter to arbitration, within the prescribed time limit, you will be deemed to have accepted the proposed new rent.

Should you wish to discuss the matter with a member of my team, please do call in and we will be glad to see you by appointment to explain it to you.

Your faithfully
sgd: Solomoni Nata
DEPUTY GENERAL MANAGER OPERATIONS, RESEARCH AND DEVELOPMENT

THE PLAINTIFF'S POSITION

15. MIRL argues that the above Notice is not valid, hence, the declaratory and stay orders pleaded in its Summons. MIRL's reasons for asserting that the Notice is invalid are as follows:

(i) the Notice was given under Regulation 13(1) of the *i*-TLTB (Leases & Licenses) Regulations 1984 (**"1984 Regulations"**).

(ii) the 1984 Regulations stipulates a formula for rental re-assessment based on the open market rent (**"OMR"**) approach.

(iii) the MIRL lease however stipulates at Clause 3 that rental re-assessment shall be determined on the basis of the **unimproved capital value** of the land.

(iv) Clause 3 stipulates:

(a) that *i*-TLTB must ascertain the *unimproved capital value* of the land on the expiry of every ten years of the lease term

(b) that *i*-TLTB must then notify MIRL of the said value

(c) if the value is not mutually agreed between *i*-TLTB and MIRL, then the value shall be determined by arbitration in terms of the Arbitration Act.

(v) the MIRL lease commenced in 1971, and has its own stipulation that rent must be calculated on the basis of the unimproved capital value of the land. The 1984 Regulations came into force some thirteen years later on 16 November 1984. It (1984 Regulations) cannot operate retrospectively (**Ishwarlal & Ors v NLTB** [Supreme Court, 1976, as per (Williams J), 5th March]

(vi) by the same token, the 1984 Regulations cannot operate prospectively on a pre-existing lease such as the MIRL lease so as to entitle the *i*-TLTB to unilaterally impose the *open-market method* of rental reassessment for the decade 2022 to 2032 over the unimproved capital value approach already stipulated by clause 3 of the said lease.

(vii) even if one were to assume for one moment that Regulation 13 were to be applied, the said Notice failed to comply with the time limits stipulated in the said Regulation.

(viii) furthermore, the OMR review method adjusts rent to the market rate. It assumes that the land is available for letting in the open market during the review period, and then tries to work out a rate based on how the market might respond. To work this out, evidence to justify a proposed increase is required (e.g. evidence of a higher rent elsewhere or an informed opinion of a real estate agent for example).

(ix) *i*-TLTB has produced no such evidence.

(x) *i*-TLTB would also be required to produce evidence to justify a proposed rental increase if it was proposing an increase under the *unimproved capital value* approach.

i-TLTB's POSITION

16. As I gather from the affidavit of Isoa Tuwai, *i*-TLTB's position might be summarized as follows:

(i) the 05 October 2021 Notice of Reassessment which *i*-TLTB sent on 05 October 2021 was intended to allow the parties to discuss the applicable unimproved capital value for the next ten years (2022 to 2032)

(ii) the *i*-TLTB is open, in good faith, to engaging with MIRL to discuss the issue

(iii) although the Notice of Reassessment dated 05 October 2021 is stated as being a "notice under Regulation 13", the provisions of the lease, as they relate to unimproved capital value assessment, would apply (not the regulations).

(iv) Regulation 13 does not apply because:

(a) it only applies to rent reassessment and not assessment of unimproved capital value assessment

(b) Regulation 13 provides for rent reassessment every five () years. In contrast, the provision of the MIRL lease specifically provides for reassessment or adjustment of rent annually based on MIRL's gross receipt.

DISCUSSION

17. The issue in this case has to do with, firstly, the amount which the *i*-TLTB has arrived at in its reassessment, and secondly, the method which the *i*-TLTB had used to arrive at that amount.

18. The question is - was the 05 October 2021 Notice issued under Regulation 13 an attempt by *i*-TLTB to unilaterally change the method of rent reassessment from the UCV to the OMR approach?

19. Paragraph 2 of the said Notice is worded as follows:

> Under the provisions of the iTaukei Land Trusts (Leases and Licenses) Regulations 1984, I hereby give notice that the iTaukei Land Trust Board proposes that the rent payable under your lease shall be $510,000.00 (Five Hundred Ten Thousand Dollars Only) per annum to be effective from 1/01/2022 being the appointed date.

20. While the Notice is headed "Notice Under Regulation 13", the Notice does appear to I also note that the said Notice leaves room for negotiation. Rather, it is an attempt to negotiate a variation of the contract to substitute the UCV method with the OMR approach,

21. The Notice then goes on to say that under the 1984 Regulations, MIRL may either accept the "proposed new rent" or serve the Board a counter notice within two months of the date of service of the notice and a further one month from the date of service of the counter notice to refer the matter to arbitration.

22. It is the above which appears to be problematic. The language, in fact, appears to be an attempt to lock MIRL into accepting the position that – whether MIRL agrees with the "proposed new rent" or not – and while any disagreement over the figure is still open to arbitration, the method of assessing that amount must, henceforth, be based on Regulation 13 rather than

23. Both parties are in agreement that the UCV method of rental reassessment as embodied in clauses 2, 3 and 11(a) of the MIRL lease, is applicable – and not the OMR approach which the 1984 Regulation introduced.

24. It follows that any amount proposed by the *i*-TLTB using the OMR approach, would be irregular on its face as it would contravene the binding provisions of clauses 2, 3 and 11(a) of the lease.

25. It follows *ipso facto* that both parties are agreeable that *i*-TLTB would be in no position to unilaterally vary the lease agreement by imposing the OMR approach to replace the UCV method.

26. Unless the lease agreement in question contains a stipulation that the *i*-TLTB may unilaterally vary the method of rent assessment down the line to comply with subsequent changes in approach in the legislative or regulatory changes – there is no room to entertain any argument that MIRL is under any obligation to accept such a change in approach.

27. I accept that it is open to the parties to enter into negotiations to vary the method of assessment, however, the manner in which the *i*-TLTB approached the issue gives one the impression that it was a thinly veiled attempt to lock MIRL into such a variation.

28. The Notice therefore cannot be said to be a step towards negotiating the UCV value. Rather, it is an attempt to negotiate a variation of the contract to substitute the UCV method with the OMR approach.

29. I note that, according to the i-TLTB, the lease does not stipulate a particular timeline for rental assessment and that it is still open to the parties to negotiate. Given that neither party has produced the lease in Court, I will accept that.

ORDERS

30. I am of the view that the Notice in question

1. I declare that the reassessment of rent under Native Lease 13835 can only be done in terms of clauses 2 (b) and 3 thereof and that Regulation 13 (1) of *i*-Taukei (Leases and Licences) Regulations 1984 has no application.

2. I declare that the Notice of Reassessment of Rent dated 5 October 2021 issued by the Defendant to the Plaintiff in respect of Native Lease 13835 is invalid and of no effect for

all or any of the following reasons:

(a) the Defendant has failed to comply with Clause 3 of Native Lease 13835, in that, it did not ascertain the "*unimproved capital value of the said land...on the expiry of every decade of the said term*" before issuing the Notice.

(b) Regulation 13 (1) of *i*-Taukei (Leases and Licenses) Regulations 1984 is inapplicable

3. I refuse a declaration that the next reassessment of rent under Native Lease 13835 is on 1/1/31. Instead, the parties should negotiate further on the rent based on the UCV.

4. if the parties are not able to agree on a UCV, then they of course may proceed to arbitration.

5. the *i*-TLTB is to pay MIRL's costs which I summarily assess at $1,000.

.....

Anare Tuilevuka

JUDGE

Lautoka

10 August 2023