

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 41 of 2018

BETWEEN: **JUXTA BEACH (FIJI) LIMITED** a limited liability company having its registered office at 74 Ellis Place, Fantasy Island.

PLAINTIFF

A N D: **EXTREAM SPORT FISHING (FIJI) LIMITED** a limited liability company having its registered office at HLB Crosbie & Association, Chartered Accountants, Top Floor, HLB House, 3 Cruickshank Road, Nadi Airport, trading as **FANTASIA RESORT.**

DEFENDANT

Appearances: Ms. Lata S. for the Plaintiff
 Mr. Singh A. K. for the Defendant
Date of Hearing: 29 November 2022
Date of Ruling: 18 August 2023

R U L I N G

INTRODUCTION

1. Before me now is a summons filed by the Defendant on 25 March 2022. The summons is filed pursuant to Order 20 Rule 5 (1), (2) and (5) and Order 24 Rule 7 of the High Court Rules 1988. The summons seeks the following orders:
 - 1) that leave be granted to the Defendant to amend its Statement of Defence and Counter Claim that was duly filed in Lautoka High Court on 4th May 2018.
 - 2) that leave be granted to the Defendant to file Affidavit verifying supplementary list of documents within 7 days of the leave granted by the Court.
 - 3) for an order that agreed facts 1.1 and 1.2 in the pre-trial conference minutes be deleted.
 - 4) that the costs of this application be in the cause.
 - 5) any other order that the Court deems just and appropriate.

2. The affidavit of John Sofianopoulos sworn on 25 March 2022 is filed herein support of the application. The Plaintiff opposes the application by an affidavit of Abbas Ali sworn on 28 April 2022.

BACKGROUND

3. On 26 February 2018, the Plaintiff filed a writ of summons and statement of claim against the Defendant seeking unspecified loss and damages and an order that the Defendant or its servants, agents, contractors and tenants be refrained from entering the Plaintiff's land. Furthermore, the Plaintiff seeks an order that the Defendant forthwith remove all structures and fittings constructed thereon.
4. The Plaintiff is the registered proprietor of *i*-Taukei Lease No: 32908. The land covered in this lease is 1.4199 hectares in size.
5. At some point, the Plaintiff had plans to subdivide the said land and sell off the lots.
6. However, before the Plaintiff commenced (or completed) any subdivision work, the Plaintiff had started entering into some arrangements with some prospective buyers. One such prospective buyer was the Defendant.
7. According to the Statement of Claim, the Plaintiff and the Defendant did enter into some Memorandum of Understanding on 06 May 2011 about the purchase of a "Lot 2 on plan 804655 comprising an area of 4000m²."
8. Understandably, the parties are at variance as to how they came to their arrangement. However, from all the pleadings filed, what appears to be undeniable is that the arrangement in question:
 - a) involved a purported sale of "Lot 2" by the Plaintiff to the Defendant.
 - b) involved the payment of monies by the Defendant as part consideration of the deal, to the Plaintiff - which the Defendant did pay some monies.
 - c) saw the Defendant commencing some substantial infrastructural work on "Lot 2".
 - d) saw the Defendant expending money in these works, (notably, the Defendant pleads that it had spent over \$2,000,000 in putting up a sewer tank, borehole, water and sewer-line system, power generated power cables, structural engineer costs etc.).
9. It appears that the Defendant had done all the above:
 - a) on the encouragement of the Plaintiff
 - b) without there being a written sale and purchase agreement with the Plaintiff.
 - c) without there being consent from the *i*-TLTB which is required under Section 12 of the *i*-Taukei Lands Trust Act.
 - d) without there being any formal subdivision of the land in question to carve out Lot 2.

10. The Plaintiff's claim is premised on the argument that, whatever arrangement it had with the Defendant, was subject to the *i*-Taukei Lands Trust Act and that, because no prior consent of the *i*-TLTB had been sought, or obtained, the dealing is therefore void and is unenforceable in law.
11. The Defendant alleges in paragraph 6 of its statement of defence that the Plaintiff had "perpetrated" frauds. The Defendant then pleads:

"Specific performance of verbal contract between the Plaintiff and the Defendant entered into in June 2011".
12. On 14 March 2018, the Plaintiff had applied for summary judgment / and a trial of a preliminary point of illegality. The preliminary point raised is ordered as such;

"...an application on behalf of the Plaintiff for summary judgment and/or judgment on a trial of a preliminary point of illegality as to any dealings with the Defendant and/or occupation and/or exercise of proprietary rights in the absence of consent of the *i*Taukei Land Trust Board under section 12 of the *i*Taukei Lands Trust Act....".
13. On Friday 29 March 2019, Nanayakkara J. delivered a Ruling by which he dismissed the application and granted unconditional leave to the Defendant to defend the Plaintiff's claim and pursue the counter-claim.
14. I note that the Learned Judge had considered the following:
 - a) the law on summary judgment.
 - b) that the Plaintiffs case is premised on a Memorandum of Understanding which was not executed by the parties or stamped.
 - c) that there is no clear definition of the land which the parties had entered into their arrangement over.
 - d) the Memorandum of Understanding appears to have the hallmarks of a sale and purchase agreement on Native Lease 04/10/7357.
 - e) however the lease was registered in the Plaintiff's name on 05 September 2016. Whereas the Memorandum of Understanding was signed on May 2016.
 - f) so, it seems that, at the time the Memorandum of Understanding was entered into, the Plaintiff did not have a legal interest to sell over the land in question.
 - g) this casts doubt on the Plaintiffs truthfulness and reliability.
 - h) the Defendant's case is premised on the, against that what it had with the Plaintiff was a parole agreement and an allegation of fraud.

- i) the parole agreement alleged may have some issues as against Section 59 of the Indemnity Guarantee and Bailment Act Cap 232 (Statute of Frauds Provision).
- j) however, the receipts issued by the Plaintiff to the Defendant per monies paid are sufficient written “memorandum or note of a contract for the sale of the land” as per Section 59.

15. On 25 January 2021, the trial matter was vacated on the Defendant’s application on the following conditions:

- 1) the Trial set for 25 January, 2021 and 26 January, 2021 at 10.30am is vacated. Trial fees paid by the Plaintiff are to be carried forward.
- 2) the Defendant is to pay trial fees separately on the counter claim before 24 February, 2021.
- 3) trial is vacated and adjourned on the following conditions:
 - i. that Judgment is entered on the facts agreed to in the Pre-Trial Conference Minutes dated 01 October, 2019.
 - ii. on 24th February and 25 February, 2021, argument will be heard on the relief sought by the Plaintiff and any claimed legal entitlement arising out of the agreed facts.
 - iii. costs in the sum of \$6,000 for the day.
 - iv. on 24 February and 25 February, 2021, the Trial will commence on the Defendants counter claim.
 - v. if John Sofianopoulos, for any reason or another is unable to attend Trial personally, then she should consider filing the necessary application in Court for Viva Voce evidence to be taken either by Skype or Zoom. Any such application should be filled in a timely manner.
 - vi. if John Sofianopoulos does not apply for a Zoom or Skype Trial, and fails to be present here in Fiji for Trial on 24 February and 25 February, the Court will consider indemnity costs and/or striking out the defence and counter claim and entering Judgment against the Defendant.
 - vii. the matter is adjourned to 24 February and 25 February, 2021 at 10.30am for Trial.

16. On 24 February 2021, the following orders were entered:

- 1) the Defendant, its servants, agents, contractors and tenants shall by 12 March 2021 vacate the Plaintiff’s iTaukei Lease No: 32908 and remove all structures and fittings constructed thereon.

- 2) damages for the Plaintiff to be assessed, if not abandoned.
- 3) liability for damages on the counterclaim to be determined, if not abandoned.
- 4) there be costs to the Plaintiff in the sum of \$3,000 to be paid by 12 March 2021.
- 5) the matter is adjourned to 12 March, 2021 for mention only at 10.30am.

17. On 17 June 2021, the following orders were entered:

- 1) final 21 days to Defendant's Engineers and Contractors to remove the structures from the subject land and restore the pegs removed with prior notice given to the Plaintiff. So Plaintiff can be on site when removal process is going on.
- 2) if the Defendant's Engineers and Contractors are not able to complete those in 21 days then the Plaintiff's Engineers and Contractors will complete the process and have damages if any costs assessed against the Defendants.
- 3) matter is adjourned to 02 August, 2021 for Trial at 10.30am.

18. On 12 October 2021, the following orders were entered:

- 1) the Defendant's caretaker is not to interfere with the Plaintiff's execution of the previous orders (not remove pegs, not bar access).
- 2) the Plaintiff is to engage one Engineer to complete process as previously ordered.
- 3) matter adjourned to 28/10/2021 for Review.

19. On 01 March 2022, Raikanikoda & Associates filed a Notice of Change of Solicitors for the Defendant. On 03 March 2022, the following orders were granted:

- 1) that the trial of the Defendant's counter-claim listed for 3rd and 4th March, 2022 is vacated.
- 2) that there shall be costs against the Defendant which is summarily assessed in the sum of \$7,000 to be settled within 21 days.
- 3) that the matter is adjourned to 25 March 2022 for mention at 10.30am.

20. On 25 March 2022, Raikanikoda filed the summons which is now before the Court (see paragraph 1 above).

21. I have a discretion as to whether or not to grant leave. The general principle is that leave may be granted at any stage of the proceedings if allowing the amendment is necessary in order to determine the real controversy between the parties and does not result in injustice to the other parties.
22. I have read the proposed amended statement of defence. The relief claimed in the agreed statement of defence is still maintained; that is, the allegation of fraud and the relief for specific performance of the oral agreement. I note the relief claimed is all perceived on the thinking that the alleged oral agreement entered into between the parties is enforceable in law. There is no equitable relief claimed.
23. As for the defendant's application that agreed facts 1.1 and 1.2 in the pre-trial conference minutes be deleted, the defendant's main argument is that his former solicitor did not consult him prior about consenting to the agreed fact. The defendant further submits that the said agreed facts were not pleaded and could not validly be agreed to. Because the said agreed facts later led to a judgement which was entered by consent, I am of the view that the defendant will have to apply to set these agreed facts aside by a new action in the same way that the law requires that an application to set aside a consent judgement must be begun by a new writ action rather than as an interlocutory in the same action where the consent judgement was entered .

ORDERS

24. I grant the following Orders:
- 1) leave to the Defendant to amend its Statement of Defence and Counter Claim and file and serve these within seven days.
 - 2) leave to the Defendant to file and serve within seven days a Supplementary Affidavit Verifying List of Documents.
 - 3) costs in the cause.
25. Case adjourned to 13 October 2023 for mention at 10.30 a.m.



Anare Tuilevuka
JUDGE
Lautoka

18 August 2023