NATIVE LAND TRUST BOARD v SHANTI LAL, APISAI, BANSI and SUSU (CBV0009 of 2011S)

SUPREME COURT — CIVIL JURISDICTION

MARSOOF, HETTIGE, CHANDRA JJ

26 April, 7 May 2012

Practice and procedure — appeal — first respondent (Lal) sought damages for breach of contract, statute, trespass and loss of production opportunity in relation to the assignment of a lease of land — High Court dismissed application as against the petitioner Board — Court of Appeal allowed the appeal holding Lal was entitled to the occupation of the 13 acres claimed by him, and awarded damages against the Board for breach of his entitlement to quiet enjoyment under the lease — Board sought leave to appeal — Administration of Justice Decree ss 8(1), (2)(b) — Agriculture Landlord and Tenant Act s 40 — iTaukei Land Trust Act — Supreme Court Act s 7(3).

The first respondent (Lal) sought damages for breach of contract, statute, trespass and loss of production opportunity. He claimed he was the lessee of approximately 13 acres of land known as TLTB No 4/10/3877 Solovi in the Tikina of Nawaka, covered by cane contract 2286, for 20 years from 1 January 1981. He claimed that the original lessee of this land had been granted a tenancy at will by the petitioner (the Board) to Subhaga Devi, and that he purchased the remaining period and interest in the lease from her, with the consent of the Board on 22 August 1985. He claimed that he was entitled to a 20 year extension of the tenancy from 1 January 2001 under the Agriculture and Landlord Tenant Act Cap 270. Lal claimed that after having been evicted from the land by the other respondents (Apisai, Bansu and Susu), he was able to resume occupation of the land with the assistance of the Board, but it failed to uphold his entitlement on the basis that his lease and entitlement was only in respect of 3 acres of land, and in breach of its contractual and statutory obligations, purported to terminate his tenancy by a notice dated 30 June 2000. The Board contended the remaining 10 acres was Crown land. After trial, the High Court dismissed the action against the Board, but gave partial relief to Lal by way of an award of damages in a sum of $20,000.00 against Apisai, Bansu and Susu for their trespass into, and conversion of, the 3 acre land. On 1 June 2011, the Court of Appeal reversed the High Court's judgment and held that Lal was entitled to the occupation of the 13 acres claimed by him, and awarded damages against the Board for breach of his entitlement to quiet enjoyment under the lease. The Court of Appeal also gave relief to Shanti Lal against Apisai, Bansu and Susu by making an award of damages for trespass to land and conversion of goods. On 11 July 2011, the Board sought special leave to appeal this judgment.

Held –

(1) When Subhaga Devi made her application dated 26 June 1985 to the Board for permission to assign her tenancy rights to Lal, and when the Board consented to the said assignment on 30 April 1986, it was aware that Subhaga Devi occupied 13 acres of land. In 1995, the Board re-assessed and increased the rent for the entirety of the 13 acres held by Lal. The Board also gave consent to Lal to mortgage the 13 acre land to a third party. By doing so, the Board gave Lal the expectation that he would be granted a tenancy at will for the additional 10 acres once a registration of survey was completed. Special leave to appeal on the basis of alleged contractual mistake should not be granted.

(2) The reliance by the Court of Appeal on a presumption of fact, namely a report of Divisional Surveyor Western, D Chang in 1977 did not provide a basis to grant special leave to appeal.

Special leave to appeal refused. Application dismissed.

Cases referred to

Bell v Lever Brothers Ltd [1932] AC 161; *Daily Telegraph Newspaper Co Ltd v McLaughlin* [1904] AC 776; *Raffles v Wichlhaus* [1864] 2 H & C906; 159 ER 375; *Smith v Hughes* [1871] LR 6 QB, cited.

Bulu v Housing Authority [2005] FJSC 1 CBV0011.2004S (8 April 2005); *Dr Ganesh Chand v Fiji Times Ltd.* (31st March 2011); *Praveen's BP Service Station Ltd v Fiji Gas Ltd* (6th April 2011), considered.

I Lutumailagi instructed by *iTaukei Land Trust Board Legal Services* for the Petitioner.

V. Mishra instructed by *Mishra Prakash & Associates* for the first Respondent.

A. Koroi instructed by *Vuataki Law* for the second Respondent.

[1] Marsoof, Hettige, Chandra JJ. The Petitioner, the Native Land Trust Board (NLTB), which stands renamed as the iTaukei Land Trust Board (TLTB) in terms of the Native Land Trust (Amendment) Decree No 8 of 2011, seeks special leave to appeal pursuant to s 8(2)(b) of the Administration of Justice Decree No 9 of 2009, against the judgment of the Court of Appeal (Ijaz Khan JA. William Marshall JA and PradeepHettiarachchi JA) dated 1st June 2011.

[2] By the said judgment, the Court of Appeal reversed the decision of the High Court of Fiji at Lautoka (Gwen Philips J) dated 11th July 2008, which had dismissed the action filed by the 1st Respondent, Shanti Lal, against the TLTB and the Second Respondents, who are the head of and /or members of the MataqaliBua, TokatokaVuniboiboi.

[3] Apisai, Bansu and Susu, who are the 2nd Respondents to the application for special leave to appeal, were originally cited as the 2nd Defendant to the action filed by Shanti Lal in which TLTB was the 1st Defendant. Apisai, Bansi and Susu, were sued in their personal capacity as well as in their capacity as representatives of the said MataqaliBua, and they strongly support the application of TLTB for special leave.

The Background Facts

[4] The original action filed by Shanti Lalwas couched as a claim for damages for breach of contract and / or statute and / or trespass and loss of production opportunity. Shanti Lal claimed that he was the lessee of approximately 13 acres of iTaukeiland known as TLTB No 4/10/3877 Solovi in the Tikina of Nawaka, which was covered by cane contract No 2286, for 20 years from 1st January 1981. He claimed that the original lessee of this land was Subhaga Devi, who had been granted a tenancy at will by TLTB, and that he had purchased the remaining period and interest in the said lease from her, with the consent of the TLTB granted on 22 August 1985. He claimed that he was entitled to a 20 year extension of the tenancy from the expiry of 20 years from 1st January 2001 under the Agriculture and Landlord Tenant Act (Cap 270) (ALTA).

[5] Shanti Lal claimed that after having been evicted from the land by Apisai, Bansu and Susu on at least two occasions, he was able to resume occupation of the land with the assistance of the TLTB, but thereafter the TLTB had failed to uphold his entitlement on the basis that his lease and entitlement was only in respect of 3 acres of land, and in breach of its contractual and statutory obligations, purported to terminate his tenancy by a Notice dated 30 June 2000, which also demanded compensation in the sum of $35,000.00. He alleged that the TLTB refused to give him his full entitlement under ALTA and was in breach of the provisions of ALTA

[6] TLTB denied that Shanti Lal was the lessee of anything more than the 3 acres that had been originally transferred to him in 1986, and specifically took up the position that the remaining 10 acres, which was actually the bone of contention in this case, was Crown land of which TLTB had no details in its files. Apisai, Bansu and Susu claimed that the 10 acres in question had reverted from the Crown to being an iTaukeiReserve for the MataqaliBua, and that in any event, any lease of the said land by TLTB would have contravened the provisions of the iTaukei Land Trust Act (TLTA). The pre-trial conference minutes and the proceedings in the High Court dated 12th December 2006 reveal that the parties were at issue in regard to mistake as well as estoppel.

[7] After trial, the High Court dismissed the action against the TLTB, but gave partial relief to Shanti Lal by way of an award of damages in a sum of $20,000.00, interest and costs fixed at $2,000.00 against Apisai, Bansu and Susu for their trespass into, and conversion of, the 3 acre land which the High Court found was his legitimate entitlement.

[8] On appeal, the Court of Appeal by its decision of 1st June 2011, reversing the High Court, held that Shanti Lal was entitled to the occupation of the 13 acres claimed by him, and awarded damages against TLTB for breach of his entitlement to quiet enjoyment under the lease. The Court of Appeal also awarded Shanti Lal with costs of the proceedings before the High Court fixed at $1,000.00 and costs of appeal to the Court of Appeal fixed at $2,000.00. The Court directed that the quantum of damages awarded by Court shall be determined by the Master.

[9] The Court of Appeal also gave relief to Shanti Lal against Apisai, Bansu and Susu by making an award of damages for trespass to land and conversion of goods, with a similar order for costs. The Court directed that the quantum of damages awarded by Court shall be determined by the Master.

Special Leave to Appeal

[10] In paragraph 12 of its petition for special leave to appeal dated 11th July 2011, the NLTB has set out several grounds on which the application for special leave to appeal is based. These grounds are quoted below:-

(a) The Court of Appeal erred in law in not properly interpreting s 40 of the Agriculture Landlord and Tenant Act (ALTA), which is a mandatory provision which bars any claim of compensation on the improvements on the land where there is no consent given by the TLTB (Board) for erection of buildings on any agriculture lease land.

(b) The Court of Appeal erred in law in holding that the mistake was solely on the Board and not the Respondent at paragraph 22 of the Judgment where it states that:

> *"In my view, the totality of the circumstances clearly indicates that there was mistake on the part of the NLTB. I cannot see any mistake on the part of Subhaga Devi and on the part of the appellant both of whom regarded themselves as being entitled to 13 acres of land".*

(c) The Court of Appeal erred in law in not holding that this is a case of mutual mistake.

(d) The Court of Appeal erred in law in holding that the Petitioner pay to the 1st Respondent damages for breach of his entitlement to quiet enjoyment as it failed to consider that the Board is a creature of statute by virtue of the iTaukei Land Trust Act (Cap 134) and its operations and actions is governed by the said Act.

(e) The Court of Appeal erred in law when it failed to consider that the initial transfer of the said lease from Subhaga Devi to the Respondent made reference only to three (3) acres and the contractual obligations of the Petitioner with the Respondent is only in respect of three (3) acres and not more.

(f) The Court of Appeal erred in law in relying on a presumption made by the Divisional Surveyor Western Mr. D. Chang at paragraph 12 of the Judgment which states:-

> *"However, TAW is made out to Subhaga Devi who I presume, hold an approval for 10 acres lease (C/N 2286). It should be obvious here that we are awaiting new tenancies in CSR's reverted lease which means fragmenting existing holdings for long term leases…."*

(g) The Court of Appeal erred in law in wrongfully asserting its views based on a presumption from paragraph 12 to paragraph 13 of the Judgment when it said:

> *"It appears quite certain that the NLTB either knew or certainly ought to have known that part of Subhaga Devi's holding was 10 acres of converted lease from the CSR……"*

(h) The Court of Appeal erred in law in wrongfully assuming that the CSR lease which held 10 acres once reverted to iTaukei land, automatically entitles the Respondent to the acquisition of 10 acres.

(c) The Court of Appeal erred in law in not taking into consideration the provisions of iTaukei Land Trust Act (Cap 134) at s 4 whereby the Board is vested with the powers to control, administer and deal with native land for the sole benefit of the landowners, thereby the reversion of the CSR leases was at the discretion of the Petitioner (TLTB) to decide upon.

(j) The Court of Appeal erred in law in not taking into consideration the tenancy at will status of Subhaga Devi over the land in question prior to the transfer to the Respondent.

(k) The Court of Appeal erred in law in not taking into consideration that the legitimate documentary title the 1st Respondent was entitled to, comprise only of 3 acres, and not 10 acres, when it stated at paragraph 28 of the Judgment:

> *Therefore, the appellant was entitled to the occupation of 13 acres. If he did not have legitimate documentary title to the 10 acres to which the trial Judge has referred, it was incumbent on the NLTB to furnish him with one. They were certainly not entitled to assert that as he only had documentation for lease of 3½ acres and not 13 acres which was claimed by him*

(l) The Court of Appeal erred in law in awarding exorbitant costs in the sum of Three Thousand Dollars ($3,000.00) which is harsh and excessive.

[11] During the hearing of this Petition before this Court, learned Counsel for TLTB Mr.Lutumailagi, invited the attention of Court to a few questions formulated by him and included in his written submissions. These questions are set out below:-

(a) What is the law in situations like the present case, where private contracting parties are under a mutual mistake as to the extent of the subject matter of their contract – does it make the subject matter different from what it actually is?

(b) What of the rights of itaukei land custom owners of the said 10 acres of the land in question which was previously held from the crown under a CSR lease as C/N 2286 and has since reverted to their occupation and usage and who are not privy to the subject private contract and who are entitled to the use, occupy and enjoy the said 10 acres of

the land in question? Does the law then, in such a situation, allow the rights of the 1st Respondent to take precedence over the rights of the owners of the said 10 acres of the land in question so that the latter are deprived of their entitlement to the same?

(c) Does the equitable maxim or principle of *nemodathabetnon*apply to the facts of this case?

(d) Whether the reliance of the Court of Appeal on a presumption of fact makes a basis for a sound decision?

(e) When would the court below be justified and entitled to overturn a finding of fact made in the High Court?

[12] In terms of s 8(1) of the Administration of Justice Decree No 9 of 2009, the Supreme Court has exclusive jurisdiction, subject to such requirements as prescribed by law, to hear and determine appeals from all final judgments of the Court of Appeal. However, it is trite law that in a civil case such as this, where a Petitioner has not obtained the leave of the Court of Appeal to lodge an appeal to the Supreme Court, the Supreme Court may grant special leave to appeal as provided in s 8(2)(b) of the said Decree only if he satisfies one of the several criteria set out in s 7(3) of the Supreme Court Act No 14 of 1998.

[13] Section 7(3) of the Supreme Court Act of 1998 provides that –

> *"In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises-*
>
> *(a) a far reaching question of law;*
>
> *(b) a matter of great general or public importance;*
>
> *(c) a matter that is otherwise of substantial general interest to the administration of civil justice. "*

[14] The provisions of s 7(3) of the Supreme Court Act quoted above, echo the sentiments expressed by Lord Macnaghtenin *Daily Telegraph Newspaper Co Ltd v McLaughlin* [1904] AC 776, which was the first case involving an application for special leave to appeal from a decision of the High Court of Australia to be decided by the Privy Council. Lord Macnaghten, at page 779 of his judgment, after observing that the same principles should apply as they did for an appeal from the Supreme Court of Canada, referred to the case of[@fffd]*Prince v Gagnon* [1882 – 83] 8 AC 103, in which it was stated that appeals would not be admitted-

> '*save where the case is of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character.'*

[15] These criteria have been examined and applied by the Supreme Court of Fiji in decisions such as *Bulu v Housing Authority* [2005] FJSC 1 CBV0011.2004S (8 April 2005), *Dr. Ganesh Chand v Fiji Times Ltd.,* (31st March 2011) and *Praveen's BP Service Station Ltd., v Fiji Gas Ltd.,* (6th April 2011), and it is clear from these decisions that special leave to appeal is not granted as a matter of course, and that for the grant of special leave, the case has to be one of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character. Even so special leave would be refused if the judgment sought to be appealed from was plainly right, or not attended with sufficient doubt to justify the grant of special leave.

[16] Accordingly, it is necessary in the first instance, to deal with the threshold issue as to whether any of the grounds of appeal set out in paragraph 12 of its petition for special leave to appeal dated 11th July 2011 or any of the questions formulated by Mr.Lutumailagi, satisfy the stringent criteria set out in s 7(3) of the Supreme Court Act of 1998.

[17] Mr.Lutumailagihas submitted that questions (a) to (c) formulated by him are far reaching questions of law, and that issue (d) raises a matter of great general or public importance. He has also submitted that (e) is a matter of substantial general interest to the administration of justice.

[18] Ms.Koroi, who appears for the 2nd Respondents Apisai, Bansu and Susu, supported the Petitioner ShanitLal's application for special leave to appeal, and in particular submitted that ground (a) set out in paragraph 6 of the said petition was a far reaching question of law and of general importance to those holding agricultural leases. She also submitted that ground (b) and (c) which related to the question of mistake, are also far reaching questions of law relevant to both real as well as personal property. She also submitted that ground (f) relating to a presumption arising from an entry made by a Divisional Surveyor also raises a very important question involving the administration of justice which goes into the nature of a tenancy at will and its transferability.

[19] Mr. Mishra has vehemently opposed the grant of special leave to appeal mainly on the basis that the grounds raised in the petition and the questions formulated by Mr.Lutumailagi are all factual matters which have been adequately addressed by the Court of Appeal in its judgment, and that they do not meet the stringent criteria laid down in s 7(3) of the Supreme Court Act of 1998. He has in particular submitted that the Court of Appeal has very rightly declined to hold that the contract between Shanti Lal and TLTB is a nullity for mistake, as the latter is estopped from denying that the extent of land to which Shanti Lal is entitled to is 13, and not 3, acres.

[20] In order to determine whether this is an appropriate case for the grant of special leave to appeal, and if so, on what questions special leave to appeal should be granted, the grounds advanced by TLTB and also the questions formulated by its learned Counsel, need to be evaluated in the backdrop of the facts of this case and in the light of applicable principles of law.

Contractual Mistake

[21] Mr.Lutumailagi has placed before this Court for its consideration question (a) which has been formulated by him on the basis that Shanti Lal's action was one for breach of contract and that the alleged contract was a nullity for mutual mistake. The question is based on grounds (b) and (c) set out in paragraph 12 of TLTB's petition for special leave to appeal dated 11th July 2011, and it focuses on the legal position that could arise when the contracting parties are under a mutual mistake as to the extent of the subject matter of their contract.

[22] It may be observed at the outset that there was no uncertainly about the extent of the land involved at the stage Subhaga Devi originally obtained her tenancy at will from TLTB with effect from 1st January 1971. Her application dated 23rd September 1970, was with respect to 10 acres of land, but it appears that consequent upon the Assistant Land Agent making a minute on the second page of his Inspection Report dated 24th September 1970, that only 3 acres fell within "the former CSR lease", it appears that Subhaga Devi pursued her application only with respect to 3 acres of land, after making the necessary

alteration in the form itself. Accordingly, the tenancy at will granted to Subhaga Devi dated 6thAugust 1976, which was later cancelled and replaced with the tenancy at will dated 6th January 1977, relate to only 3 acres of land.

[23] However, in the application dated 26th June 1985 made by Subhaga Devi to TLTB seeking its consent to assign the tenancy rights to Shanti Lal, she gave the extent of her tenancy at will as 13 acres, and TLTB consented to the said alleged assignment on 30th April 1986. It is evident from the Certificate of Assignment issued subsequently that the said assignment was registered with the Registrar of Titles on 22nd July 1986, and became effective from that date. Mr.Lutumailagi submits that the consent to assign was issued, when TLTB was labouring under a mutual mistake, and hence no binding contractual relationship arose for any extent of land beyond the original 3 acres that was leased to Subhaga Devi.

[24] It is manifest that both the High Court and the Court of Appeal considered that there was some confusion about the extent of land involved, and it appears from paragraph 28 of the judgement of the High Court that it found that the NLTB had consented to the assignment purportedly made by Subhaga Devi in favour of Shanti Lal under a common mistake as to title. However, while it is apparent from paragraph 22 of the judgement of the Court of Appeal that it was disinclined to approach the alleged mistake in the context of the usual contractual jargon, it would seem that the Court of Appeal differed from the High Court in its classification of the type of mistake that might have occurred, and Mr. Mishra has submitted that it conceived this as a case of a unilateral mistake.

[25] The common law of England, which is generally applicable in the Fiji Islands, broadly classifies mistakes that arise in the making of the contract, as unilateral, mutual and common mistakes. A mistake is said to be unilateral, where only one party to a contract is mistaken as to the subject-matter or terms or of the contract. The courts will generally uphold such a contract unless it was determined, as in *Smith v Hughes* (1871) L.R. 6 Q.B. 597, that the non-mistaken party was aware of the mistake and tried to take advantage of the mistake. A mutual mistake is said to occur when both parties of a contract are mistaken as to the terms. Each believes they are contracting to something different. The court usually tries to uphold such a mistake if a reasonable interpretation of the terms can be found. However, a contract based on a mutual mistake in judgement does not cause the contract to be voidable by the party that is adversely affected. *See,Raffles v Wichlhaus* (1864) 2 H & C906; 159 ER 375. A contractual mistake is described as a common mistake where, as in *Bell v Lever Brothers Ltd* [1932] AC 161, both parties hold the same mistaken belief of the facts. This case established that common mistake can only void a contract if the mistake of the subject-matter was sufficiently fundamental to render its identity different from what was contracted, making the performance of the contract impossible. This is similar to frustration of the contract, except that the event precedes, rather than follows the time of agreement.

[26] However, it is in our view unnecessary to go into the traditional classification of mistake in this case, as it is plain that the parties knew exactly what they were doing, and they did not labour under any mistake in regard to the extent of the land covered by the tenancy at will assigned to Shanti Lal, with the approval of TLTB. It was common ground that Subhaga Devi was in occupation of 13 acres of land, which included the 3 acres for which she had been issued

with a tenancy at will, with effect from 1st January 1981. The other 10 acres involved was covered by cane contract No of 2286.

[27] This fact is very clearly borne out by the report of the Divisional Surveyor Western, D. Chang dated 25th January, 1977 (Record of the High Court of Fiji Volume II page 376), where it is stated as follows:-

> *"…the TAN is made out to Subhaga Devi who I presume, holds an approval for 10 acres lease (C/N 2286). It should be obvious here that we are creating new tenancies in C.S.R reverted leases which means fragmenting existing holdings for long term leases eg-*
>
> *(i) into agricultural lease under ALTA*
>
> *(ii) into a residential lease."*
>
> It appears that the extent of 10 acres had reverted to TLTB from the Colonial Sugar Refining Company on the expiry of the lease made out in its favour, over which new tenancies were in the process of being created by TLTB.

[28] The position appears to have been further confirmed by the Inspection Report of an officer of the TLTB dated 19th May 1986 (Record of the High Court of Fiji Volume II page 376), which states as follows:-

> *"Checked Recording Sheet (H18/1) together with Draughtsman V. Sau and confirmed that the whole area is under Native Land. This was also checked with Surveyor DS Prasad who stated that whole 13 acres is Native Land.*
>
> *Suggest we await registration of survey before any further actions is done."*

[29] It is also evident that TLTB facilitated a survey of the entire 13 acres to be carried out prior to consenting to the assignment in favour of Shanti Lal. The Agreement dated 17th June 1986 entered into between Subhaga Devi and the Divisional Estate Manager (W) of TLTB for the purpose of making arrangements to survey the land, has also been produced in evidence (Record of the High Court of Fiji Volume II page 383), and this document is significant as it narrates at its very commencement, that Subhaga Devi has provisional approval notice over 13 acres of land on the basis of cane contract No 2286 over the said land.

[30] Thus, when Subhaga Devi made her application dated 26th June 1985 to TLTB for permission to assign her tenancy rights to Shanti Lal, and when TLTB consented to the said assignment on 30th April 1986, it was well aware that Subhaga Devi occupied 13 acres of land, and that it contained 3 acres for which she has already been granted a tenancy at will, and another 10 acres for which she had provisional approval.

[31] In this context, it needs to be mentioned that TLTB has re-assessed and increased the rent of $75.00 per annum fixed for the tenancy at will granted to Subhaga Devi at its inception, to $126.00 per annum in 1986. The rent has been later increased to $240.00 per annum in 1991 and to $355.00 per annum in 1995. It is apparent from the Notice of Re-assessment of Rent on Agricultural Holdings dated 9the August 1995 served on Shanti Lal(Record of the High Court of Fiji Volume II page 265), that TLTB had effected that increase for the entirety of the 13 acres held by Shanti Lal. TLTB has also given its consent to Shanti Lal to mortgage the 13 acre land to a third party.

[32] We are of the view that by issuing the Certificate of Assignment which was registered with the Registrar of Titles on 22nd July 1986, and charging Shanti Lal with a higher rental for the 13 acres of land, TLTB gave Shanti Lal the expectation that he will be granted a tenancy at will for the additional 10 acres once the registration of survey envisaged in the Inspection Report referred to in paragraph 28 above, and the other paper work, is completed. This prompted the

Court of Appeal to indicate in paragraph 28 of its judgment that if Shanti Lal did not have legitimate documentary title to the additional 10 acres included in the said Certificate of Assignment, it was incumbent on the TLTB to furnish him with one. However, we note that the Court of Appeal refrained from making any formal order against TLTB, to allow it to freely exercise its powers according to law.

[33] For these reasons, we are not inclined to grant special leave to appeal on question (a) formulated by Mr.Lutumailagi on the basis of the alleged contractual mistake.

Rights of iTaukei landowners and the NemoDat rule

[33] Mr.Lutumailagi has also formulated another question as (b) which focuses on the alleged rights of itaukei landowners of the 10 acres included in the TLTB consent to assign. This question is inherently connected to the other question, formulated as (c), that refers to the equitable maxim *nemodathabetnon,* which simply means that no one can give more that what he has.

[34] It is here important to note that TLTB has cited, as it is lawfully bound, Apisai, Bansu and Susu, as the 2nd Respondents to the application for special leave to appeal on the basis that they were parties to the original action filed in the High Court. In fact, they were the the 2nd Defendants to the action filed by Shanti Lal in which TLTB was the 1st Defendant, and Shanti Lal has brought them into the case on the ground that they had interfered with his rights claiming rights of their own and as in their representative capacities as members of the MataqaliBua, TokatokaVuniboiboi.

[35] Ms Koroi has made some fine submissions on behalf of the said Apisai, Bansu and Susu, but they are of no avail since no leave to appeal has been obtained by them from the Court of Appeal, nor have they filed any application in this Court seeking special leave to appeal from the judgement of the Court of Appeal. As such, they are bound by the judgment of the Court of Appeal, and in our opinion, no purpose will be served by granting special leave to TLTB on the said questions (b) and (c) in this case.

The Presumption

[36] The next question formulated by Mr. Lutumailagi was question (d) which was whether the reliance of the Court of Appeal on a presumption of fact makes a basis for a sound decision. This is a presumption as to regularity of official acts, and arises from grounds (f) and (g) set out in paragraph 12 of the application for special leave to appeal. The report of Divisional Surveyor Western, D. Chang has already been adverted to in paragraph 27 of this judgment, and we note that the presumption arises from a record made by TLTB in the ordinary course of its functions in a file maintained by it, and is in fact strengthened, not discredited, by the other facts and circumstances described the course of this judgment.

[37] We are not therefore inclined to grant special leave to appeal on the basis of this question.

Overturning findings of the High Court

[38] There remains question (e) formulated by Mr.Lutumailagi, which is "When would the court below be justified and entitled to overturn a finding of fact made in the High Court?" We do not consider this an appropriate question for special leave, and in any event, the answer to this question in the context of this case, is to be found elsewhere in this judgment.

Conclusion

[39] For the aforesaid reasons, we refuse special leave to appeal and dismiss the application filed by TLTB. In all the circumstances of this case, we do not make any order for costs.

Application dismissed.

Adam Anastasi
Solicitor