

IN THE HIGH COURT OF FIJI

SUVA, FIJI ISLANDS

[HBC NO. 190 OF 2009]

BETWEEN : **HERBERT CONSTRUCTION COMPANY (FIJI) LIMITED**
(1ST PLAINTIFF)

AND : **TOKATOKA NASAU**
(2ND PLAINTIFF)

AND : **FIJI NATIONAL PROVIDENT FUND**
(DEFENDANT)

COUNSEL : **D. J. O'CONNOR AND MS F.E.CLEARY (FOR THE 1ST PLAINTIFF)**
: **R. MATEBALAVU (FOR THE 2ND PLAINTIFF)**
: **A.K.NARAYAN AND MS ALVINA ALI (FOR THE DEFENDANT)**

DATE OF HEARING : **17TH AUGUST 2009**

DATE OF JUDGMENT : **24TH AUGUST 2009**

JUDGMENT

INTRODUCTION

- [1] By an agreement dated 3rd October 2005, between the Plaintiff and MATAPO Limited the Plaintiff agreed to build a hotel called the MARRIOTT HOTEL and a Golf Club House at MOMI BAY, Fiji. The area is known as "MOMI BAY RESORT AND SPA" and the agreement was made on a Fiji Standard Form of Building Contract. It details the obligations of all the parties and includes drawings, a Specification and the Contractor's Insurance particulars.

The Contract price was **Five Million and Fifty Five Thousand, Two Hundred and Nine** Fijian Dollars Only (**F\$5,55,209.00**) Vat Inclusive.

- [2] Work began after the Agreement was completed but on the 15th of December 2006 the Plaintiff stopped work on the development because of unpaid bills of more than **13 ½ million dollars (\$13.5 M)**.

REGISTERED JUDGMENT AND CAVEATS

- [3] The Plaintiff has a registered judgment against MATAPO Ltd for \$17,047,942.12 for unpaid works on the development. It also registered caveats and a judgment for this amount on 107 of the freehold sections which BAYLEYS REAL ESTATE (FIJI) LIMITED were commissioned by the Defendant to sell at public auction on 22nd July 2009.
- [4] On a Chambers hearing before me on 20th July 2009 I ordered that the Caveats lodged by the Plaintiff be removed forthwith on all titles registered under the name of MATAPO LIMITED and that the Plaintiff pay the Defendant's costs to be taxed if not agreed.
- [5] I also ordered that Tokatoka NASAU be joined as CO-PLAINTIFF with the present Plaintiff. Numerous affidavits have been filed on behalf of the parties and I have received written and oral submissions by them relating to an Originating Summons issued by the first plaintiff against the Defendant on the 6th of July 2009 and on behalf of the second plaintiff.

- [6] The Originating Summons asks the Court to make the following DECLARATIONS:
- (i) Mortgage No. 577303 registered on 21 November 2005, with the Registrar of Titles at Suva, does not provide proper and valid security in respect of the land in the attached Schedule A.
 - (ii) The debenture dated 21 November 2005, registered at the Companies Office in Suva, is null and void.
 - (iii) All structures built on the foreshore land on Momi Bay by Herbert Construction are owned by Herbert Construction.

NATIVE LAND OWNERS

- [7] The Momi Bay Site is made up of a mixture of Freehold and Native land. Much of the land which the defendant is planning to sell was originally Native land. It was owned by the second plaintiff, TOKATOKA NASAU.
- [8] MATAPO LIMITED entered into a Land Swap Agreement with the native land owners under which Matapo took 68.7 hectares of native land from the landowners.
- [9] The landowners have raised serious allegations against Matapo. They claim there has been a breach of the Agreement and there are allegations of fraud, misrepresentation and unjust enrichment. The native land owners want their land back.

SECURITY

- [10] The FNPF and FIJI DEVELOPMENT BANK provided funding by way of a syndicated loan to MATAPO Limited to pay for the construction of Momi Development. The FNPF subsequently took over the FDB's interest in the syndicated loan so that the FNPF was the sole funder under the loan to MATAPO Limited.
- [11] FNPF claims that it is a secured creditor and has a security interest on the land on the Momi Development.

- [12] The Plaintiff alleges first that FNPF does not appear to have a proper or valid security interest as mortgagee over any of the swapped land. The swapped land is the most valuable part of the development and includes the residential subdivision. Secondly the plaintiff alleges that a debenture dated 21st November 2005 for \$74 million held by the defendant over the land is null and void because no consent was obtained from the Native Land Trust Board. It is said consent was required because the swapped land was then native lease land. Thirdly the foreshore land is not subject to a registered lease and the approval notice of lease has expired.
- [13] The plaintiff alleges that FNPF has purported to take possession of the Momi Development notwithstanding that it appears to have no valid security over the land.
- [14] All these allegations are denied by FNPF for reasons which I will give later.
- [15] As to the third declaration sought by the Plaintiff, the Plaintiff claims that these structures are owned by it under the reservation of title clause in the Building Contract. That clause known in the law as a ROMALPA CLAUSE after the name of the defendant in an English High Court and Court of Appeal Case, Aluminium Industrie Vassen BV v. Romalpa Aluminium Ltd (1976) 2 ALL E.R.552 is in the following terms :
- “The Contractor shall ensure that upon delivery to the Site, title to all goods and Materials to be incorporated permanently into the Works shall vest absolutely in the Employer, once the Employer has paid the Contractor. Without limiting the generality of the foregoing, the Contractor shall ensure that no goods or Materials, which are the subject of any contract whereby title is reserved to any third party, shall be brought onto the Site. The Contractor will disclose to the Employer any arrangement he has entered into relating to reservation of title in respect of materials or goods which are to be used in connection with the Works”.***

THE EVIDENCE

[16] Herbert Construction has filed seven affidavits :

- Abdul Islam (x 2), Plaintiff's previous Solicitor
- Malcolm Andrew Herbert (x 2), Director of Herbert Construction
- John Derek Wheatley, Building Supervisor for the Plaintiff
- Albert Queet, Registered Surveyor (x 2)

[17] The defendant has filed six affidavits :

- Fuga Peniata (x 3), Paralegal employed by FNPF
- Torika Goneca
- Rod Jepsen, Surveyor
- Steven Hallacy, Project Manager of the Defendant

[18] The Native Landowners have filed an affidavit by Semesa Matanivai Naitau.

RELEVANT SECURITY DOCUMENTS

- Mortgage Number 699696 dated 4th February 2005
- Mortgage Number 577303 and transfer of Mortgage document dated 30th April 2008
- Mortgage Number 699990 registered 8th April 2008
- Floating Debenture dated 21st November 2005.

PLAINTIFF'S CASE ON SECURITY

[19] In summary the Plaintiff's case is that the defendant has no valid security for the following reasons:

- The defendant did not obtain consent from NLTB for the floating debenture dated 21 November 2005. Consent was required because the land was then Native Lease Land. Accordingly, the floating debenture is invalid under the Native Land Trust Act (Cap 134)S5(2).

- Mortgage No. 699990 only provides security to the defendant in respect of 31.761 hectares of the swapped land and does not provide security over the remaining 36.939 hectares of swapped land.
- The Certificates of Title for the swapped land record the defendant as having security under mortgages No. 577303 and No. 699696.
 - Mortgage No.577303 does not provide security in respect of the swapped land. The certificates of title for the swapped land were issued 20 months after mortgage no. 577303 was executed. No memorandum was filed varying mortgage no. 577303 after the swapped land was amalgamated as required under Section 66 of the Land Transfer Act.
 - Mortgage No. 699696 provides security for the land “described in the schedule” and includes the swapped land, Lots 1,2,4,5 and 6, DP 9638. However, the certificates of title for Lots 1,2,4,5 and 6, DP 9638 were issued on 20 July 2007 (which is 2 ½ years after mortgage No. 699696 was executed).

FNPF's CASE ON SECURITY

- [20] FNPF relies on the registered Crown Grant Mortgage No. 699990 in addition to the floating debenture. It also relies on Mortgage No. 577303.
- [21] Mortgage No. 577303 provides security in respect of land owned by Matapo Limited before the land swap.
- [22] On 18th September 2008 a transfer of mortgage document was registered at the Lands Title Office transferring Mortgage no. 577303 from FDB to FNPF.

[23] The Plaintiff claims that the transfer of mortgage document included swapped land as part of the security interest notwithstanding that it was not subject to mortgage no. 577303 and the authority for that is Mr Queet. (Queet's Affidavit of 22nd July 2009 – paragraphs, 24 and 25).

[24] The Plaintiff disputes the claim by Fuga Peniata in paragraphs 20 and 21 of her Affidavit of the 6th of August 2009 that the swapped land is covered by Mortgage No. 577303 because it was subsequently amalgamated with other land owned by MATAPO which was subject to Mortgage No. 577303. She states that the defendant relies on mortgage 577303, or other mortgages and the debenture as valid securities. By the date of the transfer all the titles referred to by Albert Queet had been issued and were traceable to the previous titles covered by Mortgage No. 577303 and the specific request of the owner to issue them subject to that mortgage and caveat.

She was not cross-examined on her affidavit although, in fairness, none of the other deponents was also cross-examined.

[25] Annexed to the Originating Summons are seven pages entitled "CAVEATS/JUDGMENTS LODGED AT THE TITLES OFFICE ON ALL SWAPPED LAND". There are 58 titles mentioned on pages 1, 2 and halfway down page 3 in this list and the defendant submits, and I hold, that none of these titles had any element of any former swapped land in them. The Deputy Registrar would have correctly brought down R.M 577303 onto these titles.

[26] She was entitled to do this under Section 66 of the Land Transfer Act as it is claimed there had been a specific request made by Matapo to issue new titles subject to Mortgage 577303 over CT 36804 which had at that stage not been discharged.

[27] The Plaintiff claims that the Deputy Registrar did not act according to Section 66 of the Land Transfer Act which allows the variation of a mortgage to include: **(v) "unmortgaged land which becomes included in the same certificate of title as land the subject of the mortgage may be included in and made subject to the mortgage by a memorandum in the prescribed**

form” because she had not received any specific request for a variation of mortgage from Matapo Limited.

- [28] Much argument was addressed to me by the Plaintiff on this action of the Deputy Registrar. It was submitted that Section 66 allows unmortgaged land which becomes included in the same certificate of title as land which is subject to a mortgage to only be included in and made subject to the same mortgage by a registered memorandum varying the mortgage in the prescribed form.
- [29] The Plaintiff’s expert Albert Queet in his affidavit on the 12th of August 2009 claims that Ms Goneca has provided no evidence of her memorandum varying mortgage No. 577303 as required under the Land Transfer Act. He then says that he has searched the Titles Office for a Memorandum varying Mortgage no. 577303 and could not find any such Memorandum.
- [30] I have considered the evidence and listened to the arguments and am satisfied that there is no Memorandum in the sense in which the term is often used in the law, that is a record of a proposal on a particular subject for a person.
- [31] But Mr Narayan for the defendant was not deterred by this absence. He asks two rhetorical questions: “What form of a memorandum was he looking for? Did he have some pre-conceived form in mind and if so, what form?” He says the answer lies in Regulation 17 (2) of the Land Transfer Act which is in the following terms: ***“In cases where no forms are prescribed, an instrument or document may be in any form approved by the Registrar”***.
- [32] The request which the Deputy Registrar received is annexure TG 2 to her Affidavit of the 6th of August 2009. This is a Request for a New Certificate of Title and it obviously refers to Annexure AQ 5 of the affidavit of Albert Queet sworn on the 22nd of July 2009. So far as relevant AQ 5 is a copy certificate of title which states: “Pursuant to Request No.

609812...subject to the provisions and reservations contained in Crown Grant Numbers 1057 and 1583 a Certificate of Title is issued to Matapo Limited". This certificate of Title is number 37731 and in the top left hand corner there is this note: "Reference to Previous Title C.G.1583, C.T. 36804".

- [33] C.G.1583 and C.T.36804 are referred to in the request and on the front page of the request for a new certificate there is a reference no. 609812 which shows that the New Title was registered as C.T 37731 confirmed on the 20th of July 2007 at 10.12 am. Mr Narayan emphasizes that the Registrar has an unfettered discretion, in the absence of a prescribed form, to approve an instrument or document *in any form* and clearly, says Mr Narayan, the Registrar approved this form. Her decision cannot be questioned.
- [34] After much consideration and questioning of Mr Narayan in argument I have come to the conclusion that he is correct. It is the intention to bring the mortgage down, and not the form in which the request was made which is important. I therefore hold that the form used by the Solicitors for Matapo does operate as a variation of the mortgage because it was a request to the Titles Office for a new Title with the Mortgage to be brought down on it.
- [35] I only add that on the back of the request for a new title there is a Memorandum providing for prior leases, mortgages and encumbrances and these were for Mortgage no. 577303 over C.T 36804 and the Caveat over C.G. 1583.
- [36] Also of significance is the fact that MATAPO never complained about the Deputy Registrar's action so that under Section 39 of the Land Transfer Act the estate of the registered proprietor under the new title is paramount and his title guaranteed.

THE FLOATING DEBENTURE

[37] The Plaintiff alleges that this is invalid because no consent from the NLTB was obtained for it although it was a dealing in native lease land. This was the opinion of Albert Queet in his affidavit in paragraph 31 of his affidavit of 22nd July 2009. I do not accept Mr Queet's opinion. In my judgment no consent was required for the debenture because the NLTB had consented to the mortgage which was a fixed charge provided for by the debenture. This is proved by Annexure FP7 to the Affidavit of Fuga Peniata of the 15th of July 2009. This is a copy of an application for consent to mortgage under the Native Land Trust Act by Matapo Limited dated the 31st of August 2005 and consented to on the 1st of September 2005 by one Lui Burese an Estate Officer with the NLTB. For this reason I consider that any additional consent of the NLTB was not required and I reject this submission.

THE CLAIM BY THE PLAINTIFF FOR OWNERSHIP OF THE STRUCTURES

[38] I pass now to the claim by the Plaintiff that it owns the structures which it built on the foreshore. The Plaintiff relies on the ROMALPA Clause in the Building Contract. I consider that the Plaintiff cannot rely on Section 14(3) because it does not state that the property in fixtures vests in the contractor until it is fully paid by the employer.

[40] I have said earlier that as at the 28th of May 2008, the total amount for the gross certified work was valued at \$34,282,835.59. Of this amount \$21,889,797.51 was actually being paid by MATAPO. A sum including VAT of \$13,942,167.84 remained unpaid. Therefore the major part of these costs was paid by Matapo. In my judgment the clause does not prevent the property vesting in Matapo in the absence of any clause preventing vesting in the property of the plaintiff until full payment.

[41] There are numerous cases on this subject. In the ROMALPA case the clause covering ownership of material stated that the ownership of the material to be delivered by the plaintiff would only be transferred to the defendants when they met all that was owing to the Plaintiffs.

- [42] The question of whether any attachment to property becomes a fixture and as such cannot be removed has been considered in many cases down the years.
- [43] In Sanwa Australia Leasing Ltd v. National Westminster Finance Australia Ltd (1988), NSW Lexis 8995 Powell, J considered this question at some length and he stated the law as being whether or not a chattel becomes a fixture placed or annexed to the land in question, depends on the intention of the person placing or annexing it to the land, that intention being determined by reference to objective facts, namely: *“the degree and object of the annexation which is in itself apparent and thus manifested the intention”*.
- [44] In Trust Bank Central Ltd v. Southdown Properties Ltd (1991) 1 NZ ConvC 190,851 Robertson, J quoted Wylie, J in the New Zealand case of Shattock v. Devlin who approved what was said in 27 Halsbury’s Laws of England (4th Edition Vol 2 p 143) : *“that the test depends on the objective and purpose of the annexation, that is whether it was for the permanent and substantial improvement of the premises or merely for a temporary purpose or for the more complete enjoyment for the use of the chattel as a chattel”*.
- [45] This judgment was confirmed on appeal to the New Zealand Court of Appeal and is found in (1994) 1 NZLR 406 under the title Whenuapai Joinery Ltd (1988) v. Trust Bank Ltd . The ROMALPA clause in the Building agreement in that case stated that the Title and Ownership to the goods supplied by the builder would not pass to the purchaser until the contract price and all other moneys payable to the company by the purchaser had been paid in full. I observe the difference between that clause and Section 14(3) of the Building Agreement in this case.
- The Court confirmed the judgment of Robertson, J.
- [46] There is an Affidavit on behalf of the defendant by Steven Hallacy stating that in his opinion, as a Project Manager, the design and construction of the structures built by the plaintiff showed that they were intended to be permanent and not intended to be removed. Any attempt to do so would cause some damage to the materials used and the land.

[47] I accept his opinion. It seems to me inconceivable that the plaintiff did not intend the buildings which it erected at a cost of millions of dollars to be easily removed. This to my mind is only commonsense but I also find it incredible that the defendant would advance millions of dollars for the erection of buildings if they were to be removed, as the Plaintiff says they could, by a 50-tonne crane.

LANDOWNERS' CLAIM

[48] I pass finally to the landowners' claim. In my view they can only have a claim in damages. *Frazer v Walker and Others* (1967) NZLR 1069 puts the question beyond any doubt that a mortgagee's title in land is indefeasible even if the mortgage was granted to an innocent mortgagee by the fraud of one joint mortgagor. The Court and Privy Council held in favour of the theory of immediate indefeasibility. This is not the place to discuss some academic criticism of the Privy Council decision but there can be no doubt that the judgment of the Board which was delivered by Lord Wilberforce puts the matter beyond any doubt. It is probably of some significance that Sir Garfield Barwick who was a recognized authority on land law was a member of the board.

CONCLUSION

[49] For reasons which I have given, I decline to make the declarations sought in the Plaintiff's originating summons. There will be judgment for the defendant against the plaintiff with costs to be taxed if not agreed.

I make Orders in these terms.

Dated at Suva this 24th day of August 2009.

.....

John E. Byrne

JUDGE