IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO: ABU 0032 OF 2011
(HIGH COURT CIVIL ACTION NO. 220 OF 2010)

BETWEEN : **ETUATE MATAWALU**

Appellant

AND : **1. NEMANI TAMANISAU**
2. SAKARAIA BARI

Respondents

CORAM : **Calanchini, P**
Lecamwasam, JA
Amaratunga, JA

COUNSEL : **Mr. A. Patel for the Appellant**
Respondents in Person

Date of Hearing : **12 September 2013**

Date of Judgment : **03 October 2013**

JUDGMENT

Calanchini P:

[1] I have read the draft judgments and agree that the appeal should be allowed.

Lecamwasam JA:

[2] The plaintiff (appellant) instituted the original action in the High Court at Lautoka under section 169 of the Land Transfer Act Cap 131 against the defendants to recover vacant possession of the land depicted as Lot 8, DP 5547, Sutlej Place, Off Howrah Crescent, Riffle Range, Lautoka, the subject matter of lease number 333108.

[3] The property in question was originally registered in the name of Sitiveni Karikari who mortgaged the property to the Housing Authority. Sitiveni migrated to New Zealand leaving possession of the land in the hands of the defendants, who are his brothers. As repayments of the mortgage were in default the Housing Authority (HA) advertised the property for mortgagee sale and eventually the plaintiff having successfully tendered, became the registered proprietor on 19th April 2010. As the second defendant failed to vacate the premises, both the Housing Authority and the plaintiff issued "notices to quit" on the defendant. As the defendant did not hand over the possession of the premises, the plaintiff filed the original action in the High Court at Lautoka and the Master of High Court delivered the ruling on the 28th January 2011, allowing the application of the plaintiff and ordered the second defendant to vacate the premises forthwith. The first defendant had earlier vacated.

[4] Being aggrieved by the decision of the Master the 2nd defendant appealed against the order and filed a summons seeking orders for leave to appeal out of time, stay of execution of the order of the Master and leave to add the Housing Authority as a party. The learned High Court Judge who heard the case granted relief in respect of leave to appeal out of time and stay of execution of the order of the Master but refused to add the Housing Authority as a party.

[5] The original plaintiff (appellant) being aggrieved with the order of the learned High Court Judge has filed the instant appeal on following grounds:

> *"1. The Learned Judge erred in law and in fact holding the Learned Master "was unduly swayed by the indefeasibility provisions of the Act" in particular sections 38, 39 and 40 of the Land Transfer Act when the Learned Master comprehensively considered the nature of the Respondent's (Original Second Defendant) claim to a right of possession and the onus of proving such right to remain in possession.*
>
> *2. The Learned Judge erred in law and in fact in granting leave to appeal out of time to the Respondent (Original Second Defendant) and proceeded further to allow the appeal when in fact the only application before the Learned Judge was an application for leave to appeal out of time. The Learned Judge erred in not calling upon the Appellant (Original Plaintiff) to address the merits of the proposed appeal.*

3. *The Learned Judge erred in law and in fact in omitting to consider the Respondent (Original Second Defendant) was not at anytime the registered proprietor of the subject land namely Lot 8, DP 5547, Sutlej Place, Off Howrah Crescent, Riffle Range, Lautoka and had no privity of contract or estate vis a vis the Appellant (Original Plaintiff) nor vis a vis the Housing Authority. Additionally the Learned Judge erred in law and in fact is not considering or properly considering that the previous registered proprietor Sitiveni Karikari of the said land, the Housing Authority had lawfully exercised its power of sale under the Mortgage and the said Sitiveni Karikari was not a party to the proceedings herein.*

4. *The Learned Judge erred in fact and in law when finding that the Respondent (Original Second Defendant) may have an equitable claim to possession without specifying the basis upon which such an equitable claim may arise in view of the fact that as between the Housing Authority and the Respondent (Original Second Defendant) there was no written agreement complying with the provisions of section 59 of the Indemnity Guarantee and Bailment Act Cap 232".*

[6] As sections 169 and 172 of the Land Transfer Act play a pivotal role in this case I shall reproduce both sections of the Land Transfer Act. Section 169 states:

> *"The following persons may summon any person in possession of land to appear before a Judge in Chambers to show cause why the person summoned should not give up possession to the applicant:-*
>
> *(a) the last registered proprietor of the land;*
>
> *(b) a lesser with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or not any previous demand has been made for the rent;*
>
> *(c) a lesser against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired".*

And Section 172 states thus:

> *"If the person summoned appears he may show cause why he refuses to give possession of such land and, <u>if he proves to the satisfaction of the judge a right to</u> <u>the possession of the land</u>, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lesser or he may make any order and impose any terms he may think fit;*

> *Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitles:"*

[7] It is very clear that the plaintiff is entitled to institute action under 169 (a) as he is the last registered proprietor of the land. Even the defendant (respondent) does not dispute this position. When the Housing Authority advertised the land for mortgagee sale it was the plaintiff who bought it from the Housing Authority. When documentary evidence exists to suggest beyond doubt that the plaintiff is the last registered proprietor the onus is on the defendant to prove to the satisfaction of the Judge that a right to the possession of the land exists in favour of the defendant and upon such proof section 172 stipulates that the judge shall dismiss summons with costs against the proprietor.

[8] Hence it is relevant to consider whether there exists persuasive grounds for the Judge to be satisfied as to the existence of a right to possession, on the facts revealed in this case. In the instant case the defendants had been in possession of the land in question since 1992. This land was initially registered in the name of Sitiveni, the brother of the defendants who having migrated to New Zealand in year 2002 left possession of the house and premises in the hands of his brothers, the defendants. At one stage it appears that even the parents of the defendants were also in occupation of the house (as per affidavit of the defendants). Possession of the land by the defendants and extension of the house by the defendants are facts not in dispute.

[9] However long possession alone would not give rise to a right as envisaged in section 172 nor does it create a good arguable appeal. According to the mortgage details and Account details found in Annexure J and Annexure K it is crystal clear that Sitiveni had always been in arrears in regard to repayments. There had been numerous e-mail correspondence between the Housing Authority and the defendants or their agents (as per Annexure G page 55-65) from 11/09/2008 to 10/11/2010.

[10] All these e-mails are testimonies to the position in relation to payments made by the defendants. Even though the affidavit filed by the defendants explained their plight and the circumstances surrounding them it does not disclose any substantial re-payments they made, other than a paltry payment of FJD$1100.00 over the whole period. In their e-mails they had only disclosed their interest, intention and keenness to purchase the property but had failed to take any positive step in that direction. When they were in arrears of repayments the Housing Authority had informed the defendants by e-mail and significantly of this fact the e-mail dated 9th September 2008 (page 61) the Housing Authority had specifically informed the defendants on the steps taken by the Housing Authority and the position prevailing at that time. According to this e-mail it is evident that even after the property was advertised for mortgagee sale, the Housing Authority was still willing to withdraw its actions if the defendants were ready to settle the arrears in full or in the alternative were willing to enter into an arrangement acceptable to the Housing Authority.

[11] Therefore it was the duty of the defendants to discuss and arrive at an arrangement acceptable to both sides. If the accounts were confusing as stated by the defendants in their affidavit they ought to have approached the Housing Authority and discussed the pertinent details of such confusion. However without availing themselves of these opportunities they have slept over a more pressing matter vital to their survival. Immediately after the house was advertised for mortgagee sale on 19th and 23rd August 2008 they kept on sending e-mails in September 2008 and thereafter up to September 2010 for almost 2 years they were dormant. Again when they received the notice to quit dated 26/08/2010 by the Housing Authority they woke up from a deep slumber and started negotiations. Even if the defendants had an equitable claim to title as the learned High Court Judge had found, a cardinal maxim of equity is that ‘equity aids the vigilant’ and not those who sleep over their rights if rights existed.

[12] The actions (or inactions as the case may be) of the defendants point to disinterest on their part. If they had a genuine interest or keenness to purchase the property they could have arrived at a mutually agreeable arrangement with the Housing Authority

on payment of a few instalments as the Housing Authority had made known its willingness towards such arrangement (as per page 61). During the two years since the email of 9th September 2008 the Housing Authority did not take any legally permissible action against the defendants. In my opinion this time lapse provided the defendants ample time to embark on a positive action to fulfil the obligations Sitiveni had towards the Housing Authority, which they have failed to do.

[13] Though the learned High Court Judge had observed 'impropriety' of the Housing Authority against the defendants I cannot agree with the observations since the Housing Authority had acted very fairly and almost sympathetically towards the defendants by allowing them sufficient time to explore all avenues available to them and to make some adjustments. This position is very well reflected in the e-mails of Annexure G (page 5 – 13).

The learned High Court Judge had made a serious procedural error in this case by inquiring into the appeal when it was not for trial and thereby taking the parties by surprise and depriving the parties of an opportunity to be fully armed with their facts and figures.

[14] The defendants and Sitiveni have failed to pay the instalments of the rental which Sitiveni was bound to pay under the Sub lease no. 333108. Although the learned High Court Judge had commented that the learned Master was unduly swayed by the indefeasibility of title provisions of the Act. I do not agree with the above finding. Mere long possession does not create a right or not even a tangible right and it does not support an arguable case for such a right. For the defendants to have a right created in their favour, they must fulfil the covenants or conditions contained in the lease. It is apparent that the defendants are in a pitiable situation but a Court of Law cannot be moved by sympathy alone. The defendants have not alleged any fraud on the part of the Plaintiff, not even any semblance of fraud by the plaintiff. That is the only ground upon which indefeasibility of title can be challenged.

[15] Therefore with reluctance I hold that the defendants have failed to show existence of any right against the proprietary rights of the appellant. I would allow all the grounds of appeal.

[16] Hence for the reasons enumerated above I allow the appeal and set aside the order of the learned High Court Judge dated 2nd June 2011 considering the circumstances of the defendants I order no costs.

Amaratunga G, JA

[17] I have read the draft judgment of Lecamwasam JA and agree with his conclusions. However I wish to make some further observations on indefeasibility of title.

[18] The appeal from the decision of the High Court is mainly based on the issue of indefeasibility of title and the scope of Section 169 and 172 of the Land Transfer Act (Cap 131). The Plaintiff who is the last registered proprietor of the property, in terms of the said Act, had instituted this action in High Court for eviction of the occupants of the premises. He had obtained the rights to the property from the Housing Authority after the previous lessee had defaulted payments in terms of the sub- lease, for considerable period.

[19] The Plaintiff – Appellant had instituted this action for eviction in terms of Section 169 of the Land Transfer Act after he had obtained the rights of the property from the Housing Authority. The said sub lease was earlier granted to the brother of the Defendants (Respondents).

[20] Before the said sale, adequate notice was given for the Second Defendant (Respondent) as the 1st Respondent had already vacated the property, he did not participate in this appeal. At the hearing the 2nd Respondent appeared in person and informed the court that the 1st Respondent had left the property after the action for

eviction in terms of the Section 169 of the Land Transfer Act was instituted in the High Court.

[21] The Plaintiff-Appellant is the last registered proprietor of the premises in issue. He had obtained the title from the Housing Authority and the transfer was registered. Under Torrens system registration is everything, except for the exclusions contained in the Act. For example if there is a fraud or mistake or error on the record. When the matter was considered by the Master, the Plaintiff – Appellant obtained the orders sought for eviction and for vacant possession of the premises, but this decision was set aside by the learned High Court Judge. The learned High Court Judge held that the 'learned Master had been unduly swayed by the indefeasibility of title provisions of the Act.'

[22] In Fels and another v Knowles and another (1907) 26 NZLR 604 Stout C.J (dissenting judgment) at p 613 in the interpretation of the New Zealand Land Transfer Act, which is based on Torrens system, held follows

> *'If the words of a statute in their ordinary meaning are clear, effect must be given to them, however inequitable they may be, and however they may infringe private rights. But the meaning must be clear.'*

[23] The Land Transfer Act is based on the same principles and provisions are analogous as both are based on Torrens system. The language contained in the Land Transfer Act and the provisions relating to indefeasibility of the title and the meaning is clear. The advent of Torrens system and need for such system was explained in Fels and another v Knowles and another (supra) in the joint majority judgment (delivered by Edwards J) at p 619 as follows:

> *'In the course of centuries of our English history there had grown up a complicated system of rules regulating dealings with and transfer of real property. The result was that every dealing*

> *necessitated a minute and careful inquiry into the preceding title, attended by great expense, and never resulting in absolute certainty to title. More especially the rules affecting the administration of trusts and the fact that notice, direct or constructive, of a breach of trust might result in grievous loss to wholly innocent persons were felt to bear very hardly, without sufficient compensating advantages. Impressed by this view of the matter, it occurred, now many years ago, to an ingenious gentleman in South Australia, Mr. Torrens, that the Merchant Shipping Acts supplied a model for which a scheme of land registration could be devised, by which all trusts should be excluded from the register, and under which a person dealing honestly with the registered proprietor should not be called upon to look further than the register, and should be entirely unaffected by any breach of trust committed by the registered proprietor with whom he dealt. From this genesis sprang the system of land registration which now prevails in all the Australian Colonies and is now represented in this colony by "The Land Transfer Act 1885" and its amendments.'*

[24] The above brief history and the reason behind the Land Transfer Act in Australia and New Zealand is equally applicable to Fiji as the Land Transfer Act (Cap 131), which came in to operation on 1st August 1971 in Fiji is based on Torrens system and provisions in issue are analogous to the Land Transfer Act in New Zealand and Australia. So, when the law contained in Land Transfer Act has to be applied and interpreted, keeping in mind the rationale behind the indefeasibility in title and the words in the said enactment is clear and unambiguous as to the rights of the last proprietor of property.

[25] In Fels and another v Knowles and another (supra) further at p 620 the following appears:

> *'The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute.'*

[26] The Section 2 of the Land Transfer Act defines the word 'instrument of title 'as follows:

> *"instrument of title" includes a certificate of title, Crown grant, lease, sublease, mortgage or other encumbrance as the case may be.*

[27] The indefeasibility can be attached to any instrument if it is allowed to be registered in terms of the Land Transfer Act. So, it is not mere registration of any instrument that attains indefeasibility but only the instruments allowed under the Land Transfer Act. In terms of the said definition, the Sub-lease of the Housing Authority is an instrument of title in terms of the Land Transfer Act which is capable of being registered under said Act, which obtains the indefeasibility of the title to the Plaintiff.

[28] Indefeasibility of title is not something explicitly found in the statute books, but a term coined by the courts, based on the principles contained in the Land Transfer Act. As stated earlier the registration of the title is everything under the Torrens system and the exceptions to this rule is Fraud. There is no definition of fraud contained in the Land Transfer Act, but again it must be interpreted in the light of the provisions contained in the Act. The indefeasibility and its exceptions are dealt in Sections 39, 40 and 41 of the Land Transfer Act.

[29] Section 41 of the Land Transfer Act deals with fraudulent entries to the land registrar and it has no application to the present appeal. The section 40 of the Land Transfer Act deals with fraud, and this is an exception that one can find in the said Act, which vitiates the rights derived from the registration of the title. Sections 39, 40 and 41 of the Land Transfer Act states as follows:

> *"Estate of registered proprietor paramount, and his title guaranteed*
>
> ***39**.-(1)Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or*

*otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall, **except in case of fraud,** hold the same subject to such encumbrances as may be notified on the folium of the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except-*

(a) the estate or interest of a proprietor claiming the same land, estate or interest under a prior instrument of title registered under the provisions of this Act; and

(b) so far as regards any portion of land that may by wrong description or parcels or of boundaries be erroneously included in the instrument of title of the registered proprietor not being a purchaser or mortgagee for value or deriving title from a purchaser or mortgagee for value; and

(c) any reservations, exceptions, conditions and powers contained in the original grant.

(2) Subject to the provisions of Part XIII, no estate or interest in any land subject to the provisions of this Act shall be acquired by possession or user adversely to or in derogation of the title of any person registered as the proprietor of any estate or interest in such land under the provisions of this Act.'

Purchaser not affected by notice

40**. Except in the case of **fraud**, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest in land subject to the provisions of this Act shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such proprietor or in any previous proprietor of such estate or interest is or was registered, onto see to the application of the purchase money or any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as **fraud.

Instrument etc, void for fraud

***41**. Any instrument of title or entry, alteration, removal or cancellation in the register procured or made by **frau**d shall be*

void as against any person defrauded or sought to be defrauded thereby and no party or privy to the fraud shall take any benefit therefrom." (emphasis added)

[30] Assets Co Ltd v Mere Roihi (Consolidated Appeals) ([1905] AC 176) the principles contained in Sections 39, 40 and 41 of the Land Transport Act (in the said case analogous provisions in NZ Land Transfer Act were dealt, as opposed to indigenous people's rights to land in terms of the said Act) were described as 'unimpeachability' of the title. The same principles are most commonly described as 'indefeasibility' of title, too. In Frazer v Walker and Others [1967] 1 All ER 649 the word 'indefeasibility' was dealt by the Privy Council as regard to the analogous provisions contained in the Land Transfer Act of New Zealand and the earlier decision of Assets Co Ltd v Mere Roihi (Consolidated Appeals) ([1905] AC 176) was also considered in this later decision. In the said decision it was held that this concept of 'indefeasibility' is central to the system of registration found in the Land Transfer Act. In Fraser v Walker and Others (supra) at page 652 the following appears:

*"It is these sections which, together with those next referred to, confer on the registered proprietor what has come to be called "indefeasibility of title". **The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim** to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required; but as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.*

III. Those sections of the Land Transfer Act, 1952, which state the effect of the certificate of title. The principal section on this subject is s 75. The certificate, unless the register shows otherwise, is to be conclusive evidence that the person named

> *in it is seized of or as taking estate or interest [sic] in the land therein described as seized or possessed of that land for the estate or interest therein specified and that the property comprised in the certificate has been duly brought under the Act. This section is of a similar character to those last discussed; it creates another--a probative--aspect of "**indefeasibility**", none the less effective though, as later provisions show, there are means by which the certificate may be cancelled or its owner compelled to hold it on trust or to deliver it up through an action in personam."* (emphasis is mine)

[31] So, the indefeasibility of the title or unimpeachabillity of the title are the same principles that are commonly contained in the Land Transfer Act that grants the impunity to the title of the land upon the registration of the instruments recognized in the Land Transfer Act. The rights derived from the registration of such instruments are not absolute and the exceptions are fraud and mistake or error in terms of Sections 40 and 41 of the Land Transfer Act.

[32] Assets Co Ltd v Mere Roihi (Consolidated Appeals) ([1905] AC 176) it was held that the fraud needs to be on the part of the registered owner whose right is to be impeached or to his or her agent in order to vitiate the title or the interest registered on the instrument. This is important as mere fraud which does not involve the last registered proprietor or his agent will not affect the indefeasibility of the title. This is the interpretation that can be given to Section 39 of the Land Transfer Act, in the light of provisions contained in Sections 40, and 41 of the Act. It was also held that fraud has to be actual and not constructive fraud. The last proprietor's right to the property registered in terms of the Act will not be affected by the conduct of the previous owner, unless the present owner willfully participated in the fraud. Then there is the issue of willful blindness of the purchaser and whether it can be included in the definition of fraud or whether it can be attributed to fraud in terms of the Act, so as to defeat the indefeasibility to the title.

[33] It was held in Assets Co Ltd v Mere Roihi (supra) that mere fact that more vigilance or more investigation or further inquiries would have revealed certain facts unknown to the registered proprietor would not prove be sufficient to consider as a fraud against such person. In Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 V.R 133 at 135- 136 Winneke P held:

> *"It is true, as the trial judge in this case found, that the appellant, through its officers and solicitors, was in possession of information which, if they had acted with due diligence, might have alerted them to the existence of Kandy's fraud. But a want of due diligence, resulting in a failure to make further inquiry, would not itself be sufficient to defeat the indefeasibility of the appellant's title: Vassos v State Bank of South Australia [1993] 2 V.R. 316 at 332-3."*

According to the said judgment the threshold for willful blindness is high.

[34] The Respondent in his affidavit in opposition alleges that he had carried out improvements to the property by the instigation of his brother who was the previous proprietor under the Housing Authority's sub lease. He also states that he was able to settle the arrears of lease rentals through some financing arrangements, but alleges that despite these the Housing Authority had carried out a mortgagee sale, without allowing him to settle the arrears of rent. The circumstances of the case cannot be considered as willful blindness on the part of the Plaintiff-appellant, in order to reject, the summary eviction process as there is no willful blindness on the part of the Plaintiff –Appellant that can be considered as fraud or for an arguable case for such an action against him.

[35] The Respondent is not alleging any fraud against the Plaintiff- Appellant in his affidavit in opposition and in fact sympathies for the plight of the Plaintiff–Appellant indicating that there was not even a mere allegation of fraud against the Plaintiff-Appellant. Even a mere allegation is not sufficient to disallow eviction in terms of Section 172 of the Land Transfer Act, as stated by Gates J (as his lordship then was) in Prasad v Mohammed [2005] FJHC 124; HBC0272J.1999L (3 June 2005). In that case it was further held:

> *'A threshold of evidence must be reached by the Defendant before the Plaintiff can be denied his summary remedy.'*

I cannot see from the affidavit in opposition that threshold being reached. There was, in my opinion, no evidence even to support an arguable case for a finding of willful blindness in order to indicate a form of cognisance which law and equity alike equate to subjective knowledge from which dishonesty may be inferred.

[36] The learned High Court judge held that the conduct of the Housing Authority was 'inappropriate' in this land dealing which transferred the interest of the land to the Plaintiff-appellant. The said 'inappropriateness' of the behaviour of the Housing Authority towards the occupants of the house cannot by itself be considered as a fraud against the *bona fide* purchaser, who is the Plaintiff-Appellant in this case. The said 'impropriety' of Housing Authority, who was not even a party to this action cannot disturb indefeasibility of the title to the Plaintiff-Appellant, which can only be impeached in terms of the provisions of the Land Transfer Act. Since there is no error or mistake in the registration the other ground for challenge to the title is fraud. The Respondent is not alleging fraud against the Plaintiff- Appellant and or his agent. On the facts contained in the affidavit in opposition, learned High Court Judge held 'There is no doubt that he (Master) recognized that here was a real possibility of impropriety by the Housing Authority.' I cannot find such impropriety on the part of Housing Authority, since they were not given an opportunity to explain their conduct, as they were not a party to this eviction proceeding. Even assuming that the Housing Authority acted 'improperly' this would not vitiate the rights derived from the transfer of the sub-lease to the Plaintiff-Appellant in the absence of fraud. There is no willful blindness on the part of the purchaser, as he had obtained the property from the mortgagee, the Housing Authority, when the previous mortgagor had defaulted the payments for a considerable period of time. In the circumstances the Master had correctly applied the law and the decision of the High Court Judge is set aside. I would also allow the appeal.

Orders:

1. Appeal Allowed.

2. The order of the learned High Court Judge dated 2nd June 2011 is set aside.

3. No orders as to costs.

....
Hon. Justice W. Calanchini
PRESIDENT, FIJI COURT OF APPEAL

....
Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

....
Hon. Justice G. Amaratunga
JUSTICE OF APPEAL