IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CIVIL APPEAL NO: ABU0102 OF 2020

[Lautoka High Court: HBC 230 of 2017]

BETWEEN : **CHANDAR LOK**

Appellant

AND : 1. **I-TAUKEI LAND TRUST BOARD**

2. **HARI NARAYAN and VIKASH VENTESH NAIDU**

Respondents

Coram : **Jitoko, P**

Andrews, JA

Clark, JA

Counsel : **Mr V. M. Mishra for Appellant**

Mr J. Cati for the 1st Respondent

Mr M. Degei for the 2nd Respondent

Date of Hearing : **5 February, 2024**

Date of Judgment : **29 February, 2024**

JUDGMENT

Jitoko, P

Background

[1] The Appellant is the registered owner of agricultural lease (Lease No.44656) ("*the lease*") comprising some 25 acres 2 rod 8 perches, land described as "*Toko*" (part of) in the

District of Tavua, Vitilevu. The land is native land belonging to the landowning units, Mataqali Tilivasewa and Mataqali Navusabalavu of Tavualevu. At the time of the issuance of lease on 24 March 1950, the lease had 957 year 8 months, 8 days more to run.

[2] The lease was previously owned by the Appellant's father Ballaiya (f/n Chinsaiya) which the Official Receiver had transferred to him on 11 August 1978.

[3] In a Deed of Family Settlement executed in September 1982, Ballaiya distributed the land among his five (5) children. Ballaiya died on 3 July, 1999.

[4] Under a Power of Attorney executed on 16 June, 1988 by Ballaiya in favour of his son the Appellant, the Appellant transferred on 10 June, 1994 to himself Lease 44656 (Transfer 360347).

[5] The Appellant thereafter permitted one Chandar Wati, the daughter of his elder brother, and her husband to reside on the property as caretakers.

[6] On or around 2001, the first-named second Respondent, and his son the second-named second Respondent erected a residential home on the property without the approval either of the Appellant (as lessee) nor the iTaukei Land Trust Board (ITLTB), as the landlord. The second Respondents lived on the property and cultivated approximately 5 acres of the land comprised in Lease 44656.

[7] On 19 April 2004, the Appellant by Originating Summons (HBC 106/2004), sought the following reliefs from the Registrar of Titles (defendant):

> *"(a) For an Order that the above-named defendant do note Transfer Number 360347 in respect of Lease Number 44656 in favour of the above-named plaintiff on the defendant Copy of Lease Number 44656;*
>
> *(b) For an Order that the above-named defendant do issue a new and/or Provisional Lease Number 44656 to the plaintiff."*

[8] The High Court, with the consent of the parties, on 28 May 2004 ordered:

> *"(a) The above-named first defendant do note Transfer Number 360347 in respect of Lease 44656 in favour of the above-named plaintiff on the first defendant's Copy of Lease Number 44656;*
>
> *(b) The above-named first defendant to issue a new and/or Provisional Lease Number 4456 to the plaintiff."*

[9] With lease No.44656 issued and registered by the Registrar of Titles under the Appellant's name, by virtue of the Court Order of 28 May 2004, the Appellant was able to successfully eject the second Respondent under a section 169 Land Transfer Act application on 22 February 2008, in the Lautoka High Court: Civil Action No.033 of 2005 (**Chandra Lok v Hari Narayan**).

[10] In another section 169 application of 26 May 2015, by Appellant for ejectment an "*illegal*" occupier of Lease 44656, one Mr Alipate Vuki, (**Chandra Lok v Alipate Vuki; HBC 79/2015**), the Master refused the application for vacant possession on the ground that the Appellant had not shown that he was the registered proprietor of Lease 44656. The Lautoka High Court upheld the Master's decision in its Ruling of 11 April, 2017. There is an appeal by the Appellant pending before this Court in this matter.

[11] On 22 December, 2015 the iTLTB, as the landlord of land in Lease 44656, issued a Notice to Chandra Wati and her husband to vacate the land on the ground that the purported lessee Chandra Lok was found by the Lautoka High Court "*not the registered proprietor*" of the land (Lease 44656). They were given seven (7) days to vacate the residence they were occupying in favour of Mr Hari Narayan and Mr Vikash Yenktesh Naidu who, according to ITLTB, had already applied to lease the same land claiming equitable interest in it. The ITLTB Notice to Vacate was hand delivered to Chandra Wati and her husband by one Ratoto and accompanied by four other members of the land-owning Mataqali, even although the iTLTB claimed that Ratoto and company were not acting as its agents.

Under threat of a forceful eviction, the wife and husband took flight immediately after, and the residential building was taken over and occupied by the Second Respondents.

Present Proceedings

[12] In his Writ of Summons filed into court at Lautoka on 31 October 2017, the Appellant sought 3 specific causes of actions which can be summarised as follows:

(1) In respect of this First Respondent:

A. Breach of statute and its contractual duties as the landlord;

B. Trespass.

(2) In respect of the First Respondent and Second Respondent:

A. In defiance of the Court Order for the delivery of possession of the property by the Second Respondent, the Second Respondent re-entered and took possession with the encouragement and assistance of the First Respondent;

B. The purported termination of the Appellant Lease 44656 by the First Respondent and the intention to grant portion of Lease 44656 to the Second Respondent such action amounted to Contempt of Court.

(3) In respect of the Second Respondents:

A. Contempt of Court in pursuing possession of part of Lease 44656, in separate court action at the Tavua Magistrates Court, notwithstanding the Lautoka High Court judgment against the first-named second Respondents, ordering vacant possession.

[13] The Honourable Mr Justice Nanayakkara at the Lautoka High Court on 18 September 2020 dismissed the Appellant's claim and ordered costs of $1,500.00 to each of the Respondents.

[14] On 10 November 2020, the Appellant filed its Notice of Appeal and set out the following six (6) grounds of appeal:

> *"1. The Learned Judge erred in law and in fact in holding that the absence of consent to transfer by iTaukei Land Trust Board (TLTB) vitiated the transfer from Ballaiya to Chandra Lok (Clause 17 & 18 on pages 16 and 17 of the Judgment) and that the Appellant was not tenant at any time of TLTB when:-*
>
> *a. The case of **Chandra Lok v Bal Ram and Registrar of Titles SC; Civil Appeal No. CBV 001 of 2013** held that the transfer to the Appellant by power of attorney was in order.*
>
> *b. When other decisions by the High Court such as the **Chandra Lok –v- Dewanamma & Another, Civil Action No. HBC 203 of 2010, Chandra Lok –v- Hari Narayan, Civil Action No. HBC 033 of 2005** have held that the Appellant is the lawful registered proprietor of Lease No. 44656.*
>
> *c. When the same had not been properly and/or adequately pleaded.*
>
> *d. When the First Respondent was accepting rental for the Appellant.*
>
> *2. The Learned Judge erred in law and/or in fact in holding that the Appellant had no legitimate lease No.44656 or tenancy when:*
>
> *a. The land was Agricultural land and when the case of **Ajmat Ali –v- Mohammed Jalil FCA 111 of 1985** held that iTLTB consent is not a pre-requisite for a tenancy or a declaration of tenancy.*
>
> *b. When the First Respondent itself had accepted the Appellant as a tenant.*
>
> *c. And in ignoring the provisions and protections for tenants contained in the Agricultural Landlord and Tenant Act.*
>
> *3. The Learned Judge erred in law and/or in fact in not holding that the registration of Lease No.44656 under the Land Transfer Act was indefeasible except for fraud (which has to be pleaded with particulars) and in not following the principles set down in **Frazer –v- Walker All ER 1967 (1) 649 and Subaramni & Maria –v- Dharam Sheela and 3 others Civil Appeal No. 56 of 1981**.*

4. *The Learned Judge erred in ignoring and refusing to follow:*

   a. *the earlier decision of **Chandra Lok –v- Hari Narayan**, Civil Action No. 33 of 2005 and the law of precedent as Justice Jiten Singh had already ordered possession against Second Respondent Hari Narayan in favour of the Appellant.*

   b. *and in not taking into account that although initially it was a summary possession action under section 169 of Land Transfer Act, it ended up as full trial by Justice Singh and the issues of iTLTB concern was litigated.*

   c. *and in following the principle that the High Court is bound by decision of Supreme Court and earlier decisions of the High Court and erred in holding that transfer No.360347 could not be validly registered even though iTLTB has not endorsed its consent on the transfer and in holding the Plaintiff is not entitled to the benefit of holding the registration.*

5. *The Learned Judge erred in law and in fact in holding that the Appellant did not have the valid title and went beyond his jurisdiction in holding in paragraph 44 and 46 of his Judgment that the Appellant cannot have indefeasible title by registration and in holding the consent of indefeasibility of the Title under the Torrens system is inapplicable where a transfer is void.*

6. *The Learned Judge erred in holding that costs are payable by the Plaintiff and in holding that the Second Respondent re-entering and taking of possession was not an act of defiance of the High Court order by Justice Jiten Singh."*

Consideration

[15] Foremost and running through all the six grounds of appeal is the issue of whether the Appellant is possessed of a valid title to the property known as Lease 44656, through Transfer 360347, set out under Ground 1 of the appeal. The other five (5) grounds relate to the relevance of evidence on the issue of validity considered or ignored by the High Court in arriving at its decision. I will revert to them in turn later.

History of Lease 44656

[16] Lease 44656, as correctly pointed out by Counsel for the First Respondent, is in fact a sub-lease of Lease 26573, first issued by the head lessee Munia Kunna to one Trikarnji, both of Toko in the District of Tavua, on 18 March 1950 for a term of 957 years, 10

months and 8 days. On 6 April 1967, the lease was transferred to Vijendra Kumar f/n Shri Ram and on 4 December 1973 the lease was transferred to the Official Receiver who in turn on 11 August 1978, transferred the land to Ballaiya f/n Chinsaiya.

Transfer of Lease 44656 to Chandra Lok

[17] Through a Deed of Family Settlement, executed by Ballaiya in September, 1982, the shares in the Lease was distributed amongst his 5 children, the Appellant being one of them.

[18] There is no evidence provided to show how the shares and claims to the Lease by the 4 other children of Ballaiya were decided, except the legal status of the Deed as determined by the Supreme Court as unenforceable in **Chandar Lok v Bal Ram & Others** [2014] FJSC 4; CBV001.2013 (4 April 2014), but on 10 June, 1994, the Lease was transferred by Chandra Lok, acting under the Powers of Attorney (Reg.No.16019), granted to him by Ballaiya, his father, to himself.

[19] The legality of the transfer had been challenged in **Chandar Lok v Bal Ram and Others** and the Supreme Court had affirmed that the transfer was valid and legal. As found by the Court at paragraph 32 of the judgment:

> *"[32] A challenge was raised by the 1st respondent with regard to the execution of the subsequent lease by the petitioner by virtue of the powers vested in him by the Power of Attorney. A plain reading of the said Power of Attorney would make it clear that extensive powers had been granted to the petitioner as the Attorney holder. The terms embodied in an instrument such as this has to be interpreted in such a way to give effect to the words used therein by the parties and the Court cannot seek to reconstruct the words. This proposition has been clearly enunciated in the aforesaid case of* ***Luxor Eastborne Ltd. v Cooper****. In view of the above I am persuaded to conclude that the challenge raised on the basis of abuse of power granted under the Power of Attorney should fail."*

The Requirements of Section 12 of the Native Land Trust Act 1940

[20] Section 12 of the Act states:

> *"Consent of the Board required to any dealings with lease.*

12 – (1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised on his lease or any part thereof, whether by said, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding or consent shall be in the absolute discretion of the Board, and any sale, transfer, sub lease or other unlawful alienation or dealing affected without such consent shall be null and void:

> *Provided that nothing in this Section shall make it unlawful for the lessee of a residential or commercial lease granted before 29 September 1948 to mortgage such lease.*

(2) For the purposes of this section, "lease" includes a sublease and "lessee" includes a sublease."

[21] On the plain reading and interpretation of Section 12 of the Act, it is evident that no native land may be alienated or dealt with, without the consent of the Board.

[22] The Respondents rely on the Privy Council decision of **Chalmers v Pardoe** [1963] 3 All ER 552 to support the proposition that the consent of the Board is a mandatory requirement and without it, any alienation or dealing, is deemed null and void. Even on the facts of the case that show that the tenant Mr Chalmers, with the approval of the lessee Mr Pardoe, had built on the property, equity, the Court concluded, "*will not lend its aid*" to Mr Chalmers.

[23] The Second Respondents' Counsel reiterated the law as set out in Chalmers in the Court of Appeal's judgment in **Prasad v Singh** [2018] FJCA 60. In that case, the tenant had built a house on the property for his family without the formal approval of the landlord, relying on the Privy Council case. The Court stated:

> *"I fail to appreciate the Appellant's reliance on the authority of **Chalmers v Pardoe** in which their Lordship were unequivocal in holding that a manifestly unlawful act, namely their contravening Section 12 of the Native Land Trust Ordinance will not allow equity to "lend its aid" to the seeker of equity, even in the circumstances of him having improved the property."*

[24] In this case there is no evidence to show that the iTLTB had formally consented to the Transfer of Lease 44656 from Ballaiya to the Appellant.

[25] This Court notes however, that, the transfer (Transfer 360347) and its registration by the Registrar of Titles was pursuant to a Court Order of 28 May 2004, which Order was duly registered and appears as a Memorandum on Lease 44656 dated 11 June, 2004.

Are there Exceptions to Section 12(1) of the Act?

[26] **Chalmers v Pardoe** (supra) is authority for the proposition that any arrangements between a head lessee and sub-lessee, including a licence, for the latter to occupy the land, is a "*dealing*" within Section 12(1) and do require the consent of the iTLTB.

[27] Nonetheless, as recognized in Chalmers case, and reiterated in **NLTB and Ponipate Lesavua v Subramani** (Civil Appeal No: ABU0076 of 2006) the Court is still free to apply general equitable principles in all dealings under Section 12 where the iTLTB consent had not been obtained.

[28] The facts of **NLTB and Lesavua** case are similar to the present case, in that whilst the Board had not consented to the sub-lease, the tenant, who had acquired the property by transmission, at the expiry of the term of lease, had sought and successfully obtained the consent of the head of the land-owning Mataqali in the traditional manner, payed $1,000.00 to the owners, and in turn also paid the lease renewal application fees to the Board. The Court of Appeal, in affirming the decision of the Court below agreed that it had correctly summarized that the conduct of the Respondent *"was unconscionable and sufficient to give rise to an estoppel preventing it from denying the plaintiff's right to renewal of his lease . . . . . ."*

[29] The Court below had found as undisputed fact, that both the landowners and the iTLTB had actively encouraged the tenant to renovate the buildings on the land whilst accepting lease renewal, application fees, with the assurance from the landlord's official that the

renewal of the lease will be considered. In such circumstances the Court of Appeal said, at paragraph [33]:

> *". . . . In such a case the general equitable principle affirmed by the Privy Council in **Chalmers v Pardoe** (supra) must apply and the NLTB and the landowners cannot deny the plaintiff had an equity in the land for which he is entitled for compensation if they are unable or unwilling to re-convey the land to him."*

[30] Of particular relevance too are the court's conclusions at paragraphs [34] and [35] of its judgment as follows:-

> *"[34] Further we think **Chalmers v Pardoe** (supra) is distinguishable from the present case because of the facts. In that case, in contrast to the present case, the NLTB and the landowners played no active part in the grant of the sub lease. It is our respectful opinion that the principle in **Chalmers v Pardoe** (supra) is an exception to the general rule and is not a rule of general application to cases involving native land where Section 12(1) of the Native Land Trust Act is in issue. As we have said above, it is not time that in all cases where Section 12(1) is invoked, the Court will not assist the tenant or the sub tenant.*
>
> *[35] Having come to the view on **Chalmers v Pardoe** (supra) and the fact as found by the learned trial judge, we find that His Lordship made no errors in law in coming to the view that, the NLTB's conduct was unconscionable and sufficient to give rise to estoppel preventing it from denying the plaintiff's right to renewal of his lease and awarding damages for compensation for loss of property confiscated by the defendants. Although we think that the better view is that the plaintiff had an equity in the land in accordance with the general principle, which is compensable in damages."*

[31] The Court concluded as follows:

> *"[47] It is our respectful opinion that the decision in Chalmers v Pardoe protects the interests of the landowners because tenants who fail to notify the NLTB of dealings in the land under lease will get no assistance from the court.*
>
> *[48] However if the NLTB or the owners themselves directly involve themselves in such dealings, as was in this case, then as a matter of general equitable principle, it would be quite unconscionable, in our respectful view, for them to be able to escape the consequences of their actions when things go wrong by pleading illegality under the Act."*

[32] In this case, the Appellant has referred to conduct by the landlord, iTLTB that, may be deemed as acquiescence, if not tacit acceptance, of the Appellant's proprietorship of Lease 44656.

[33] The Appellant had paid and the iTLTB as the landlord, had accepted, lease rentals due and owing by the Appellant, and the receipts produced in evidence. At the bottom left corner of the receipts is what appears to be a proviso or condition stating:

> *"This payment is subject to final acceptance and certification by the Board and does not create or recognize a new tenancy or contract."*

[34] The receipts produced into court as the Appellants exhibits are dated 10 January 2018, 3 January 2019 and 6 January 2020 respectively. Yet also produced in the exhibits is a copy of "*iTaukei Land Trust Board Agreement*" that clearly states:

> *"The iTaukei Land Trust Board as Lessor had issued a tenancy to Chandar Lok (tenant) over iTaukei lane known as Tavua in the District of Ba . . . ." (subject to survey). (emphasis is mine).*

[35] Whilst the above Agreement signed by both parties on 24 June 2014 and 26 June respectively, was to pre-empt the survey of the land, and acting as instruction by the Board to one Mr. Wacokecoke, the surveyor, to proceed, upon payment of the sum of $155.00 fee by the Appellant as the tenant, as survey fees. The fees had been duly paid and signed by the Appellant as tenant on the same day.

[36] The iTLTB Agreement above, was immediately followed by a formal instruction to "*Tees Wacokecoke & Associates"* Surveyors at Lautoka station:
"You are hereby authorized to survey the undermentioned land in agreement with the lessee named below," describing the land as identical to land in Lease 44656 and the lessee's identity as Chandar Lok, the Appellant.

[37] Both the above documents were put before Mr Lui McKay, PW1, for the Appellant, who was an employee of the iTLTB at the time the documents were issued. The exchange between Counsel for the Appellant and PW1 is helpful, this Court finds, and states:

"Q: Where were you working in year 2014?
A: I was working at Native Land Trust Board.

Q: What was your position there?
A: I was GO Partial Officer 1.

Q: Can you repeat that one please?
A: I was GO's Partial Officer 1. If you look at the survey instruction, that is my old stamp. I was a Technical Officer 1.

Q: Now you deal with tenants?
A: Yes, every day.

Q: And survey instructions?
A: Yes.

Q: Did you know Chandar Lok as a tenant?
A: Yes I know Chandar Lok.

Q: Was he a tenant of NLTB?
A: Yes he is.

Q: And it was in respect of his lease that you issue survey instructions in Tavua Toko region?
A: Yes."

[38] The examination also confirmed that both the documents referred to above, namely, the iTaukei Land Trust Board Agreement and the Instructions by the Board to the Surveyor, are iTLTB documents. Mr McKay, further confirmed that both the rents and the survey fees of $115.00 had been paid by the Appellant. The witness was also able to confirm that the Surveyors had already completed the initial phase "*field work*" but he was not aware, since he had left the iTLTB, that the Surveyors have submitted a Scheme Plan of the land for the Board's approval.

[39] PW1, Lui McKay's evidence was not contradicted by either the First or the Second Respondents.

[40] It is patently clear to this Court, that the iTLTB held that Chandar Lok, the Appellant, as the tenant, of the land in Lease 44656. So much so that it submitted, and conceded, when Agreed Facts in these proceedings were drawn, to the following:

> *"1. The Plaintiff is registered as owner of an Agricultural Lease No.44656 . . .;*
>
> *2. The Plaintiff has been paying rent for the lease to the First Defendant iTLTB Ref.4/636 . . . "*

[41] In the Court's view, the actions of the iTLTB firstly, in its admission that the Appellant was the registered owner of Lease 44656 and furthermore that the Board had been receiving rents from the Appellants as tenant and lessee of the said Lease, together with instructions to the Surveyors are tantamount to unconscionable conduct on the part of the Board. This conduct to survey Lease 44656 in the name of Chandar Lok, I am of the opinion, is sufficient to give rise to an estoppel preventing the Board from denying the Appellant of the same.

[42] Counsel for the Appellant had additionally relied on the Privy Council decision of **Kulamma v Manadan** [1968] AC 1062 to support the proposition that the consent of the Board under section 12 was not necessary in some instances, including this case. However, the Privy Council in **Kulamma** dealt with a share farming agreement between the lessee and another and the agreement did not amount to alienation or dealing with the land. The decision therefore is distinguished on the facts and is not relevant to this appeal.

Contempt of Court

[43] This issue is raised under Ground 6 of the appeal and linked to the intention of the First Respondent to grant a portion of land in Lease 44656 to the Second Respondent, and claim of loss against the Second Respondent. It is without merit and is dismissed.

Other Grounds of Appeal

[44] Grounds 2 to 5 of the appeal constitute further grounds that are essentially in support of Ground 1 of the Appeal. The Court will not deal with them again as they have been adequately examined in the Court's deliberation of Ground 1 above.

Judicial Notice

[45] I turn finally to the issue of Judicial notice raised by the Counsel for the First Respondent. The principle is succinctly set out in *Mullen v Hackney London Borough Council [1977]* 1 WLR, 1103 as follows:

> *"Courts may take judicial notice of matters which are so notorious or clearly established, or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary; and local courts are not merely permitted to use their local knowledge, but are to be regarded as fulfilling a constitutional function if they do so."*

[46] The principle was raised in defence by the First Respondent referring to the High Court decision at Lautoka in **Lok v. Vuki** [2015] FJHC 998, in which the Court had upheld the Master's decision refusing the plaintiff's section 169 summons for ejectment of one Alipate Vuki, from occupying part of Lease 44656, on the ground that the plaintiff had failed to prove that the iTLTB had consented for the transfer of the lease to him.

[47] The appeal from the Lautoka High Court before this court by Mr Lok is still afoot.

[48] In the First Respondent's submission, the High Court in this present case had, properly taken judicial notice of the 2015 High Court decision in arriving at the same conclusion in the present proceedings in stating at paragraph 18 of his judgment:

> *"(18) The absence of consent to the transfer by iTLTB vitiates the transfer ab initio. The consent required from the iTLTB cannot be dispensed with by the Registrar of Titles. That being so, the plaintiff at no time was the tenant of the iTLTB. At no time was there a contract of tenancy between the plaintiff and the iTLTB…."*

[49] At no time, the First Respondent submits, in agreeing to the above statement, was the Appellant a tenant of iTLTB, and there was therefore no contract of tenancy between the Appellant and the First Respondent.

[50] This Court does not agree. It is well to bear in mind, that the Transfer of Lease 44656 to the Appellant had been made pursuant to a Court Order and for the Registrar of Titles to register the transfer in favour of the above-named plaintiff, Chandra Lok and to issue Provisional Lease" as appeared on Memorandum 55475 entered in the Lease on 11 October 2004.

[51] It was not the mere exercise of the Registrar of Titles', discretion, that Transfer 360347 had been registered, but by Order of the Court in HBC 106 of 2004. This, in the Court's view, provides an exception to section 12(1) requirement of the consent of the iTLTB. The Registrar of Titles, in this case, is acting in accordance with a Court Order.

[52] The issue of whether the consent of the iTLTB has been granted to the Transfer in the circumstances of this case, has not fulfilled the requirements set out in Mullen's case and the principle of judicial notice, therefore does not apply. In any event, the court was clearly cognizant of the Supreme Court decision, after Counsel for the Appellant had drawn its attention to it, as appeared from the record.

[53] Reliance was also made by the Respondents, and referred to by the High Court, to support the position that the iTLTB had not consented to the Lease Transfer in the letter of 12 July 2015 from the Board's Inoke Lutumailagi, its Senior Legal Officer at Lautoka, to the law firm of Nawaikula Esq. stating that:

> *"There is no record of any consent ever been given by the Board to transfer leases 26573 and 44656 to Chandar Lok"*

[54] Howsoever the meaning and intention of this may be, it is clear that the Board had failed to take into consideration, the Court Order of 2004 requires the Registrar of Tiles to transfer to the Appellant Lease 44656. This confusion was further accentuated by Inoke Lutumailagi's letter of 22 December, 2015 for the Appellant's caretakers on the land, to vacate it pursuant to the High Court decision in **Chandar Lok v Alipate Vuki** HBC 79/15.

[55] In the end, it is this court's considered opinion, that the High Court had erred in its conclusion that the Appellant is not the registered proprietor of Lease 45656. As stated at paragraph [51] above, the lease has been registered in the Appellant's name by Order of the Court.

Indefeasibility of Title

[56] Once the transfer of the proprietorship in Lease 44656 and its registrations are found to be proper and legal, then the principle of indefeasibility of title under the Torrens System of which the Fiji Land Transfer Act comes under, applies. Our Court in **Subarmani & Others v Dharam Sidela & Others**, Civil Appeal No.56 of 1981 has already laid down the law thus:

> *"The indefeasibility of title under the Land Transfer Act is well recognized, and the principle is clearly set out in the judgment of the New Zealand Court of Appeal dealing with the provisions of the New Zealand Land Trust Act which on that point is substantively the same as the Land Transfer Act of Fiji. The case is **Fels v Knowles** (1906) 26 NZLR 604. At page 620 it is said:-*
>
> > *"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 title under which he takes from the registered proprietor, has an indefeasible title against all the world."*
>
> *The question of the indefeasibility of title of the registered proprietor is fully examined and determined with authority by their Lordship's of the Privy Council in **"Frazer v Walker** . . . ."*

[57] In this instance, it is established that, contrary to the findings of the Court below, the proprietorship in Lease 44656 had been legally transferred to the Appellant and registered in accordance with the law and therefore the Appellant in the process, this Court finds, had acquired an indefeasible title to the Lease.

Claim for Damages and Losses

[58] In his Writ of 31 October 2017, the Appellant had claimed jointly and severally from the Respondents the following:

(1) Damages for breach of Contract and/or trespass and loss of production opportunity;
(2) Damages for actions in defiance and/or in breach of Court order against the Defendant/Respondents and contempt of Court;
(3) Damages against the first-named Second Respondent for acting in defiance and/or breach of the Court Order;
(4) Mesne profit for the period the Appellant has been deprived of occupation of his premises;
(5) Damages of trespass;
(6) Damages of breach of statutory duties against the First Respondent;
(7) Aggravated damages;
(8) Interests under the Law Reform and (Miscellaneous Provisions) (Death and Interest) Act at 10 per cent per annum;
(9) Costs.

[59] The heads and particulars of the Appellant's claim for damages and/or losses against the Respondents are confusing if not ambiguous to say the least, and were not fully canvassed in the Court below. It may be useful in this regard, if the Court refers to the Appellants cause of action against each of the Respondents and the remedies sought summarized as follows:

(1) First Respondent Breach of Statutory and Contractual Duties as Landlord and Damages and Losses.
(2) First and Second Respondents, in damages for illegal re-entry to the land.

<u>Damages against the First Respondent</u>

[60] This claim is premised on breach of statutory duties trespass and loss of production opportunity. In particular, the Appellant referred to the demand made against the Appellant's relatives who were residing as caretakers to vacate the land and in so doing deprived the Appellant the right of quite enjoyment. In addition the Appellant claims that

he lost, in the process of the land being abandoned, his standing crops of sugar cane, cassava and vegetables, as well as animals including cattle and goats.

[61] As to the covenant of quite enjoyment, the First Respondent submitted that the eviction notice was premised on the High Court decision that found that the Appellant was not the registered proprietor, and in any case, the eviction notice was served by a person no authorized by them. The breach to the covenant for quite enjoyment can only be sustained if the interruption is caused by the act of the lessor, or of any person authorized by him: **Harrison Ainslie & Co. v. Muncaster** [1891] 2 QB 680. The First Respondent claimed that the Appellant's caretakers, vacated on the visit and demand a person or persons not authorized by them.

[62] The Appellant has not been evicted or dispossessed of his lease, which he confirmed at the hearing below. Further the First Respondent submitted, the Appellant had not resided on the land even though he was free to enter the property at any time.

[63] Whilst in all appearances and from the evidence, the Appellant was not at any time legally prevented by the First Respondent to enter the land, there is enough evidence to prove that the Appellant, through his relatives, was prevented from remaining on the land even if the interruption was made by a party not authorized by the First Respondent.

[64] As to the losses claimed for standing crops and animals, no clear evidence was produced in Court to substantiate them. The figures of the losses to both crops and animals were, at best, guesstimates (see pages 337 – 339 of the High Court Record). There was no real documentary evidence produced by the Appellant, apart from his and his witnesses testimonies.

[65] The Court, whilst recognizing that certainly, the Appellant might have suffered some losses to both crops and animals, given the circumstances including the span of time the damages is claimed, it is of the view, that the total losses would, taking into account the figures provided by the Appellant, be no more than between $50,000 to $55,000.00.

[66] The claim for damages against the Second Respondents for breach of Court Orders and re-entry onto the land, must be based on sustainable grounds that supports for example, some personal damages to the Appellant. The Second Respondent is occupying only a small portion of the land and the best the Appellant can succeed in, is loss of enjoyment and/or use of the land. This, he has done claiming not only for the return of the portion of the land, but also for "*profit be paid for the period the Appellant has been deprived of occupation of the premises occupied by the 2nd Respondent.*"

[67] There is insufficient evidence to lend support to the Appellant's claim to the Second Respondent's occupation and premises (buildings) erected on the land. However, the fact remains that the Second Respondent has been occupying the land in defiance of the High Court Order for vacant possession as per Hon Justice Singh's judgment on 22 February, 2008.

[68] This Court is minded in the circumstances, to award only a nominal sum of $1,000.00 against the Second Respondent.

[69] As to aggravated damages, I am reluctant to award anything under this head of claim, understanding from the evidence before the court that the conduct of the Respondents was neither malicious nor oppressive.

[70] In total the Court is minded to award damages, including losses and damages against the Second Respondent, in the amount of $56,000.00.

Conclusion

[71] This is yet another instance where the administration of native lands and specifically the control and the protection of the interests of the landowners by the iTLTB, created for that singular purpose, by Native Land Trust Act 1940, have been found wanting. Wherever and whenever there are legal issues that arise affecting the proprietary interests in the

land, be they dealings or otherwise, but nevertheless affecting the control and the use of such land, the Board must be alert that its action and especially that of its officials do not exacerbate the situations further to the detriment of the landowners, for example, by continuing to accept rental payments or agreeing to improvements to the land, when the legal determination in the interests to the land are still to be ascertained.

[72] In this case, the fact that there was the legal issue to be determined as to whether the transfer of the lease title through a Power of Attorney and its subsequent registration, without the consent of the Board, was sufficient to bestow legal interest in the transferee. The determination in the end turned on conduct that the court deemed unconscionable, as highlighted above, by the Board that invested the tenant with equity in the land.

[73] The judgment of the Court below is set aside, and this Court:

(1) Affirms: that Lease 44656 is legally registered in the name of the Appellant, Chandar Lok;

(2) Orders:

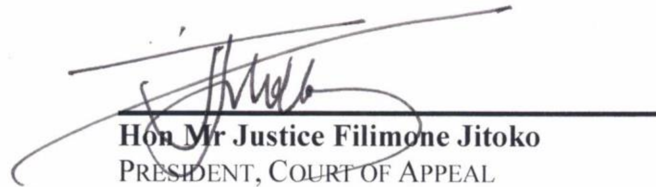
- *(i) That general damages in the amount of $55,000.00 is awarded against the First Respondent;*
- *(ii) That general damages in the amount of $1,000.00 is awarded against the Second Respondent;*
- *(iii) Interests under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act at the rate of 6 percent per annum from the date of this judgment;*
- *(iv) Costs of $2,500.00 against the First Respondents.*

Andrews, JA

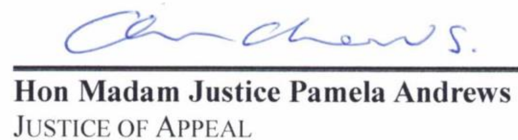
[74] I agree with the judgment of Jitoko P, and with the Affirmation and orders set out in the judgment.

Clark, JA

[75] I have read in draft the judgment of Jitoko P, and agree with the orders made for the reasons His Honour gives.



Hon Mr Justice Filimone Jitoko
PRESIDENT, COURT OF APPEAL



Hon Madam Justice Pamela Andrews
JUSTICE OF APPEAL

Hon Madam Justice Karen Clark
JUSTICE OF APPEAL