

JUDGMENT

INTRODUCTION

1. The Director of Lands (DOL) has issued Protected Crown Leases No. 17769, 17770 and 17771 in favour of the Applicant and the same were registered with the Registrar of Title (ROT). The ROT canceled the registration of said three crown leases granted by DOL. The purported cancellation of the Crown Leases were in pursuant to re possession and re entry Notice for alleged breaches of Sections 4 and 16 of the Crown Lands Act (Cap 132) by the lessee. The Applicant who was the lessee seeks certiorari against the decision of the DOL to re possess and re enter the land on 8th February, 2010.

FACTS

2. The Applicant and the 4th Respondents are related companies and the latter is currently in receivership since 2009 and the receivership is also challenged in a civil suit pending in the High Court.
3. The 4th Respondent inter alia was involved in the land development and the DOL had issued an Approval Notice of Lease No 64531 LD Ref 60/552 for a land comprising 3.2037 hectares. Initially it was granted for a period of 5 years from 1999 and from time to time it was extended till **31.3.2009**.
4. The special conditions of the said Approval Notice for Lease inter alia state as follows

'1. The lessee shall not transfer, sublet, mortgage, assign or part with the possession of the demised land or any part thereof without the written consent of the lessor first had and obtained.

.....

*Upon satisfactory completion for the development the lessor undertakes to grant Industrial leases for ninety-nine (99) years at economical rentals not exceeding six (6) per centum of the unimproved capital value of the land and subject to the provisions of the State Land Act and Regulations made thereunder, **to the lessee and or /nominee who should be acceptable to the Director of Lands.***

.....

Default by the lessee in the fulfillment of any covenant or condition expressed or implied herein shall render this lease liable to cancellation

by re entry and possession by the lessor or to the imposition of a penal rent. (emphasis is mine)

5. The Approval Notice for Lease was operational at all time material to the grant of Crown Leases to the Applicant. It should be noted that the above mentioned conditions contained in the Approval Notice for Lease would facilitate DOL to grant of Protected Crown Leases (Crown Leases) to third parties including the Applicant, who were not the lessees under the said Approval Notice for Lease issued by the DOL, upon the request of the 4th Respondent-lessee.
6. The said Approval Notice was extended from 2004 to 2009 in order to facilitate 4th Respondent to subdivide and develop the land and the DOL issued Crown Leases for such developed subdivision. The subdivision is known as Nukutuke Subdivision on SO 5866. The property is located at Lot 21, Queens Road, Lami.
7. Though there is no dispute as to the land, the date and terms and conditions of the said Approval Notice for Lease issued to the 4th Respondent there seems to be some dispute as to the number as both stamping numbers 64531 and 64532 relate to same contents, but two documents. At this stage it should be noted that though the Applicant tried to make an issue regarding the two documents, it had filed documents that relied on both (ie, 64531, 64532) and estopped from denying either of them.(See annexed PB4 and PB5 to Peni Bano's affidavit in response).
8. The 4th Respondent had purportedly obtained a loan from the 3rd Respondent over the said Approval Notice of Lease No 64532 by mortgaging the same on 27th February, 2007 and once the subdivision works were completed the leases were to be issued to the 4th Respondent and this was again secured by the mortgage to the 3rd Respondent. I used the word purportedly, as neither party had submitted consent of the DOL prior to the execution of the said lease. This **prior written consent** of DOL is a *sine qua non* for the legality of the mortgage in terms of Section 13(1) of the Crown Lands Act (Cap132).

9. The Applicant deny mortgaging the entire land comprising 3.2037 ha and state that only Lot 21 comprising 0.33538 ha was mortgaged. I could not find the written consent.
10. There is no letter of consent from the DOL before execution of the said mortgage dated 27th February, 2007 annexed to the affidavit in opposition of the 3rd Respondent as well as the mortgage of Lot 21 of Plan 505866 stated above, and the legality of the said mortgages will depend on such written consent being obtained prior to the execution.
11. The 3rd Respondent states that it had sought prior consent of the DOL but this is not the same as obtaining prior written consent, which is mandatory in law. Seeking prior consent is quite distinct from obtaining prior written consent as required by law in terms of Section 13(1) of the Crown Lands Act (Cap 132) and reiterated in the clause 1 of the conditions to the Approval of Notice for Lease dated 3rd November, 1999.
12. The DOL has issued Protected Lease Nos 17769, 17770, and 17771 for a period of 99 years subject to the conditions contained in the said leases to the Applicant relating to Lot Nos 2, 3, and 5 of Plan No SO 5866 which were subjected to the Approval Notice for Lease dated 3rd November, 1999 in terms of the conditions attached to it.
13. The said Protected Crown Leases contained *inter alia* following conditions

'22. Default by the lessee in the fulfillment of any covenant or condition expressed or implied herein shall render this lease liable to cancellation by re-entry and possession by the lessor or to the imposition of a penal rent.

23. the lessee hereby covenants that he will fulfill and be bound by all the terms and conditions set out herein and in the Crown Lands (Leases and Licenses)Regulations , 1980 in so far as the same are not modified or contained in this lease'(emphasis added)
14. The said Protected Crown Leases were registered with the ROT, who is the 2nd Respondent in this Application on 8th July, 2009.

15. These Protected Crown Leases (Lot 2, 3 and 5 of Plan SO 3866) along with such other leases for Lot 1 and 4 of the Plan No SO 3866 were issued to the Applicant and some third parties respectively, upon the request of the 4th Respondent in pursuant to the Approval Notice for Lease issued dated 3rd November, 1999.
16. It should be noted that though Crown Leases for Lot Nos 2, 3 and 5 of No SO 3866 were issued to the Applicant, the initial application for such leases were for the 4th Respondent. Without making a fresh application in favour of the Applicant, the 4th Respondent had requested the DOL by a letter, to issue the leases for the said three lots in favour of the Applicant and the DOL had complied with that. There is no explanation for such change of mind. The explanation given at this hearing by DOL was that it was a 'mistake', but there is no evidence that this 'mistake' being informed to the Applicant prior to this application for Judicial Review. It is also strange for the DOL to initially prepare the leases for Lot 2, 3, and 4 of Plan SO 5866 in favour of the 4th Respondent and had requested for the execution of the same by a letter of 28th April, 2009 and the same were not executed by the 4th Respondent. The DOL again issue Crown Leases for Lot 2,3 and 5 of SO 5866 to Applicant and state it was a 'mistake' due to similarity in the names of the Applicant and 4th Respondent. Why DOL issued to fresh Crown Leases to Lot 2,3 in the name of Applicant, again was not explained.
17. On 21st May, 2009 the 4th Respondent had requested the DOL to issue Lot Nos 2, 3 and 5 of Plan No SO 5866 to the Applicant. On the same day similar letters were written regarding the issuance of Crown Leases for Lot Nos 1 and 4 of Plan No SO 5866 to third parties. All these leases were issued to respective parties directly without recording of any mortgage interest on the land leased by the DOL. The Crown Leases No 17769, 17770 and 17771 issued to the Applicant on 5th July, 2009 were registered with ROT on 8th July, 2009.
18. After the issuance of the said leases to the Applicant, the 3rd Respondent who relied on the purported mortgage of the entire land contained in the Approval of Notice for Lease

had written to the DOL, through its lawyers, to note the mortgage interest in the title on 16th January, 2009.

19. The said letter stated inter alia;

'As you are aware, we act for Dominion Finance Limited who is the Mortgagee over all the land comprised and described in Approval notice dated 3rd November, 1999.

*We understand that your office is in the process of issuing new Crown Leases over Lots 1, 2, 3 and 5 on Plan SO 5866. **Please ensure that our client's interest as Mortgagee is noted and registered over the new Crown Leases and forward them to us.**' (emphasis added)*

20. The DOL had replied to this letter in the following manner

'I refer to your letter dated 16th January, 2009 and to clarify that registering of mortgages over the subject lots is the responsibility of the mortgagees which in this case is the Dominion Finance Limited.'

21. Upon the purported mortgage with 3rd Respondent, and due to the alleged default of the same by the 4th Respondent the 3rd Respondent had appointed a Receiver/Manager in terms of a Debenture which was a security for the said mortgage on 10th July, 2009. The manner in which the appointment of the Receiver and the legality of that and enforceability of the appointment of receiver are issues of pending action instituted by way of writ of summons filed by the Applicant against the 3rd Respondent.

22. On 2nd November, 2009 for the Acting DOL a letter was issued to the Applicant requesting surrender of Crown Leases 17769, 17770, 17771 without stating any reason for such surrender. The Applicant did not surrender the said Crown Leases issued in its name.

23. On 8th February, 2010 the DOL had issued a purported notices in terms of Section 57 of the Land Transfer Act (Cap 131) and also Section 105 of the Property Act (Cap 130) and also Crown Lads Act (Cap 132) and stated that he had entered and had taken possession

of the possession of the land on behalf of the DOL. The alleged breaches according to the said notices were breaches of Section 4 and Section 16 of Crown Lands Act (Cap 132)

24. On the same day the solicitors for the Applicant had denied breach of Section 4 and Section 16 of the Crown Lands Act (Cap 132) and had written a letter to the DOL. No reply to this letter was forthcoming and a reminder was also sent subsequently, but without a reply.
25. The DOL had issued new leases for the same Lot Nos 2, 3 and 4 of SO 5866 in favour of the 4th Respondent on 22nd December, 2009. The ROT had registered new leases to the Lot Nos 2, 3, and 5 previously issued to the Plaintiff on 24th March, 2010.

ANALYSIS

26. The Notice of Motion for Judicial Review in (a) seeks an order of certiorari to remove the said decision made by the DOL on or about 8th February, 2010. The Notice dated 8th February, 2010 informed the Applicant that it had committed breaches of the provision of Section 4 and Section 16 of the Crown Land Act, hence on the same day ROT had entered and taken possession of the Crown Leases No 17769, 17770 and 17771.
27. The Applicant was deprived of all the interests in the said Crown Leases by the purported Notice issued by the ROT on 8th February, 2010 and. The Applicant was directly affected by purported Notice. (see Gunaratna JA's decision with other judges agreeing, in Fiji Court of Appeal judgment delivered on 25th September, 2014- at paragraph 32 . ***Proline Boating Company Ltd v Director of Lands*** [2014] FJCA 159; ABU0020.2013 (unreported). The leave for judicial review was granted by the Fiji Court of Appeal in this matter.
28. The said Court of Appeal judgment relating to leave for judicial review also referred to ***R v St Edmundsbury Borough Council, ex parte Investors in Industry Commercial Properties Ltd*** [1985] 3 All ER 234 in support of the findings.

29. The affidavit in opposition filed on behalf of the DOL states that the said Crown Leases were issued by a mistake due to the close similarity between the names of Applicant and the 4th Respondent, but strangely there is no evidence of such a reason stated by the DOL or by ROT at any time before this Judicial Review application and there was no documentary evidence to support such a contention. It should also borne in mind that the DOL had previously issued unexecuted Crown Leases to the 4th Respondent regarding Lots 2, 3, and 4 and also sent the same for execution by the 4th Respondent, but the 4th Respondent without executing them had requested Lots 2, 3 and 5 to be directly issued to the Applicant and Lot 1 and 4 directly issued to some third parties. The DOL had complied with said such request. It is pertinent to note that according to the Approval Notice for Lease dated 3rd November, 1999 the DOL can issue the lease either in the name of 4th Respondent (lessee of Approval Notice for Lease) or to its nominee. Since the Applicant was a nominee of the 4th Respondent lessee the DOL had issued the Crown Leases to the Applicant. The Applicant and the 4th Respondents are related companies. The Fiji Court of Appeal in the *Proline Boating Company Ltd v Director of Lands* [2014] FJCA 159; ABU0020.2013 decided on 25th September, 2014 (unreported) Gunaratna JA said,

‘[70] The fact that, both the Appellant and the 4th Respondent being admittedly Corporate entities, that the said entities were composed of the same directors is rendered immaterial in my view for it would then amount to lifting the corporate veil.

[71] The situations in which the corporate veil could be pierced have been dealt with in my judgment in an earlier case. (See: R. C. Manubhai & 2 Ors v. Herbert Construction Company (Fiji) Ltd. ABU0002 of 2010 delivered on 29 May 2014.’

30. From the above dicta I do not think that I need to consider the facts relating to the relationship between the two entities.

31. The purported Notice of surrender and re-entry dated 8th February, 2013 was issued in terms of Section 57 of the Land Transfer Act, Section 105 of the Property Law Act and Crown Lands Act by the DOL. Though there is no designation stated in the said notices,

parties were in agreement relating to the authority of the person who issued them. So I presumed that the notices were issued by DOL or a person delegated with such power by DOL or competent authority.

32. Section 57 of the Land Transfer Act (Cap 131) states as follows;

Cancellation by Registrar

The Registrar, upon proof to his satisfaction of lawful re-entry and recovery of possession by a lessor either by process of law or in conformity with the provisions for re-entry contained or implied in the lease, shall cancel the original of such lease and enter a memorial to that effect in the register, and the estate of the lessee in such land shall thereupon determine but without releasing the lessee from his liability in respect of the breach of any covenant in such lease expressed or implied, and the Registrar shall cancel the duplicate of such lease if delivered up to him for that purpose:

Provided that-

(a) where the right of re-entry is based upon the non-payment of rent only, the Registrar shall, where any person other than the lessee has a registered interest in the lease, give notice to such other person at his address appearing in the register to pay the rent in arrear and, if the same is paid within one month from the date of the said notice, then the Registrar shall not cancel the original or duplicate of such lease; and

*(b) **unless the re-entry and recovery of possession have been by formal process of law, the Registrar shall require notice of application to register the same to be served on all persons interested under the lease, or, failing such notice, shall give at least one calendar month's notice of the application by publication in the Gazette and in one newspaper published and circulating in Fiji before making any entry in the register (emphasis added)***

33. The said Notice of DOL dated 8th February, 2010 and the said re entry and recovery of possession stated that ‘ on this day entered into and taken possession of in the name of the Director of Lands of Fiji, on behalf of the Crown a’. So the re-entry and recovery was a *fait accompli* at the time of issuance of the said notice by DOL.

34. Though there was no such mandatory time period for notice either in the Crown Lands Act (Cap 132) or in the conditions of the Crown Leases issued to the Applicant, it is axiomatic that any such notice should give a reasonable time. This is evident from the fact that, if the notice is published in gazette and newspaper it should be at least, one month from such publication. When the notice is not served then it can be published but then there is one month time period for the interested parties to take any action against such re entry notice published in the manner stated. So any time period less than one month is reasonable depending on the circumstances as there was no such time period or mode of re-entry stated in the conditions of Crown Leases or in Section 57 of the Land Transfer Act (Cap 131).
35. The Crown Leases included a provision for entry for certain activities which are irrelevant to the issue before this court for Judicial review. (See clause 18 of the Crown Leases).
36. The said Notice was deficient in several other aspects, too. First the said notice was in fact not a 'notice' stipulated in the Section 57 as it was not '**notice of application for registration**' of the cancellation of the Crown Lease. Nowhere in the said notice indicated that the ROT has received an application for cancellation of the Crown Lease from DOL. The notice in terms of Section 57 of the Land Transfer Act (Cap 131) needs to be the notice of re entry and re possession, but 'notice of application to register...' in terms of proviso (b) of that section. This is the notice that must be given before the cancellation and re registering the fresh interest in the same land. I can't see such a notice being given in terms of Section 57 of the Land Transfer Act (Cap 131).
37. Apart from that the notice in terms of Section 57 of the Land Transfer Act should be served to all persons interested. I do not have evidence of such service in this matter at all as 3rd Respondent and 4th Respondents were not served with any such notice.
38. Before cancellation of the registration of crown leases under Section 57, the ROT has to be **satisfied** that lawful re-entry and recovery of possession by a lessor either

- i. by process of law, or
 - ii. in conformity with the provisions for re-entry contained or implied in the lease.
39. There was no re entry or recovery of possession by the lessor (i.e DOL) by process of law which means through a court order. Similarly, there was no provision for re-entry contained or implied in the said Crown Leases issued. Hence there was no evidence before the ROT for being satisfied with the requirements contained in the said provision of law. The only notice was the notice dated 8th February, 2010 issued by the DOL but strangely the registered Crown Leases were issued by the DOL on 22nd January 2010 even before the re possession and re-entry notices were issued!
40. Almeida JA in his judgment allowing the leave for judicial review in **Proline Boating Company Ltd v Director of Lands** [2014] FJCA 159; ABU0020.2013 (unreported).further stated

'[74] One case in the year 1863 in the United Kingdom strikes me at this point – the case of Cooper v. Wandsworth Board of Works (1863) 14 CB (NS) 180, approved in the seminal decision of the English House of Lords in Ridge v. Baldwin (1964) AC 40; Durayappah v. Fernando (1967) 2 AC 337 and Wiseman v. Borneman (1971) AC 297.

[75] In that case, it was held in effect that, even though the party affected had erected an unauthorised building he was entitled to a hearing at an inquiry. Earle, CJ in that case said:

"I think the board (the authority concerned – the interpolation is mine), ought to have given notice to the plaintiff and to have allowed him to be heard."

[76] In the instant case, a day's notice of cancellation was no doubt sent to the Appellant but the Appellant was never heard prior to it.'

41. The said notice dated 8th February, 2010 also stated that it was issued in terms of Section 105 of the Property Law (Cap 130) and said provision states;

105. -(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition, express or implied, in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice -

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and

(c) in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

*(2) **Where a lessor is proceeding, by action or otherwise, to enforce a right of re-entry or forfeiture**, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.*

(3) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages, if any, all reasonable costs and expenses properly incurred by the lessor in the employment of a barrister and solicitor or a surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor, or from which the lessee is relieved, under the provisions of this section.

(4) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso or stipulation in a lease, or for non-payment of rent, the court may, on application by any person claiming as sub lessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action, if any, or in any action brought by such person for that purpose, make an order vesting, for the whole term of the lease or any less term, the property comprised in the lease or any part thereof in any person entitled as sublessee to any estate or interest in such property upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security or otherwise, as the court in the circumstances of each case may think fit, but in no case shall any such sublessee be entitled to require a lease to be granted to him for any longer term than he had under his original sublease.

(5) For the purposes of this section -

(a) "lease" includes an original or derivative sublease; also an agreement for a lease where the lessee has become entitled to have his lease granted;

(b) "lessee" includes an original or derivative sublessee, and the persons deriving title under a lessee; also a grantee under any such grant as aforesaid and the persons deriving title under him;

(c) "lessor" includes an original or derivative sublessor, and the persons deriving title under a lessor; also a person making such grant as aforesaid and the persons deriving title under him;

(d) "sublease" includes an agreement for a sublease where the sublessee has become entitled to have his sublease granted;

(e) "sublessee" includes any person deriving title under a sublessee.

(6) This section shall apply although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act.

(7) For the purposes of this section, a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(8) The provisions of this section shall not extend -

(a) to a covenant or condition against assigning, subletting, parting with the possession or disposing of the land leased; or

(b) in the case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof; or

(c) to a condition for forfeiture on the bankruptcy of the lessee or on taking in execution of the lessee's interest; or

(d) to a condition for forfeiture for breach of any liquor or distillation laws; or

(e) to any contract of tenancy of agricultural land which is subject to the provisions of the Agricultural Landlord and Tenant Act. (Cap 270)

(9) This section shall not, save as otherwise mentioned, affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

(10) This section shall have effect notwithstanding any stipulation to the contrary'

42. In terms of Section 105(1) no lease can be forfeited unless the lessor had given the lessee notice of the breach of the specific covenants in the lease. There was no such breach of any covenant in the lease and the Respondents had not alleged such a breach and this section cannot be resorted to by the DOL in the circumstances in this matter as the purported cancellation was not based on the breach of any condition express or implied in the Crown Lease but due to an alleged mistake by the DOL and or the alleged breaches of Section 4 and 16 of the Crown Lands Act (Cap 132).

43. The lessor (DOL) had issued a notice dated 2nd November, 2009 to the Applicant requesting surrender of Crown Leases issued in the name of Applicant. This letter dated 2nd November, 2009 was silent on the reason for such request but stated that it was a directive. The said letter stated;

'Lots 5, 2, 3 SO 5899 Nukutuku Subdivision (PT of) Suva, Rewa CL 17771, 177769, 17770.

I wish to advise that Surrender Documents on the above subject lots have been prepared and forwarded for execution.

Please return all the aforesaid documents after they are fully endorsed and sealed by your Company Common Seal Stamp in order that I may pursue further action on registration. You are also required to forward CL 1771, 17769, and 17770 to effect registration.

Please note that this is a directive from the office of Solicitor General through Attorney General Office (Sic) hence your prompt attention on the above requirement will much appreciated.'

44. If there was a honest mistake due to alleged similarity in the names of the Applicant and the 4th Respondent this could have stated. If there was a violation of Section 4 and or 16 of the Crown Lands Act (Cap 132) that could have also been state. The above letter is silent about it and seeking surrender of the three crown leases for '**further action on registration**'. This letter cannot be considered as a letter in terms of Section 105 (1) of the Property Act (Cap 130). It should also be noted that DOL had initially issued unexecuted Crown Leases to 4th Respondent relating Lot 2, 3 and 4 of OS 5866 but upon

the request of 4th Respondent had issued Crown Leases relating Lot 2, 3 and 5 to the Applicant and Lot 4 to third party in terms of the Approval Notice for Lease issued to the 4th Respondent on 3rd November, 1999.

45. In case of **Forum Hotels Ltd v Native Land Trust Board** [2013] FJCA 24; ABU0046.2010 (13 March 2013) (unreported) Fiji Court of Appeal held, (Calanchini P),

'[7]. It was not disputed that the Registrar had not served a notice under section 57 proviso (b) on the Appellant. In passing I indicate that I do not accept the submission by the Second and Third Respondents that notice under section 57 proviso (b) is not necessary when the lessee has been properly served notice under section 105 of the Property Law Act Cap 130. The notices are necessary conditions precedent to (a) re-entry by the landlord under section 105 of the Property Law Act and (b) registration of the cancellation by the Registrar under section 57 of the Transfer of Land Act.'

46. In the this matter not only the ROT did not send the notice as required by Section 57 but he relied on purported notices of the DOL dated 8th February, 2010 which again was not issued in terms of Section 105 of the Property Law Act (Cap 130) as there was no breach of conditions of the Crown Leases issued to the Applicant. The alleged reasons contained in the said Notice of DOL were alleged breaches of Section 4 and Section 16 of the Crown Lease Act (Cap 132).
47. Finally the purported Notice of re possession and re entry state that it was issued in terms of the provisions of the Crown Lands Act (Cap 132). The said notice dated 8th February, 2010 stated that the Applicant had 'committed a breach of the provision of Section 4 and Section 16...' . This is the only reason given in the said notice and no mention of 'mistake' by DOL or any other party.
48. The Section 4 of Crown Lands Act (Cap 132) does not confer any obligation on a lessee and for completion the said provision is reproduced below.

PART II - LAND ACQUIRED OR LEASED BY THE CROWN

Title to land acquired by the Crown to be taken in the name of Director of Lands

4. (1) Where the freehold estate of any person in land in respect of which a Crown grant or native grant has been issued is acquired by the Crown, the title to such land shall be taken in the name of the Director of Lands of Fiji for and on behalf of the Crown.

*(2) Notwithstanding anything contained in the Land Transfer Act, upon the registration of any transfer of land to the Director of Lands for and on behalf of the Crown, or in respect of any land which is registered in the name of the Director of Lands for and on behalf of the Crown, the Registrar of Titles shall, if directed in writing by the Director of Lands, cancel, either in whole or in part, the title in respect of such land:
(Cap. 131)*

*Provided that, in respect of any title against which are registered any encumbrances, no such direction shall be given, without the written consent of the encumbrance.
(Substituted by 8 of 1974, s. 2)*

*(3) For the purpose of subsection (2), the expressions "encumbrance" and "encumbrances" shall have the same meaning as in the Land Transfer Act.
(Substituted by 8 of 1974, s. 2) (Cap. 131).*

49. Since there was no obligation for the Applicant under the above position there cannot be a breach of the above section by the Applicant. The other breach stated in the said notice was the Section 16 of the Crown Lands Act (Cap 132). The said Section 16 states as follows;

Who may not be lessee or licensee

16.-(1) No person, who at the time of making his application for a lease or licence has made any arrangement or agreement to permit any other person to acquire by transfer or otherwise the land in respect of which his application is made, or any part thereof, or the applicant's interest therein, and does not inform the Director of Lands of the existence of such arrangement, shall become a lessee or licensee under this Act.

(2) Every person who willfully commits, or incites, instigates or employs any other person to commit a breach of the provisions of this section shall be guilty of an offence against this Act.

(3) Any lease or licence acquired by any breach of the provisions of this section shall be liable to be forfeited.

50. This is a general restriction to any lessee under Crown Lands Act (Cap 132). If such an act is done in contravention of the Section 16(1) then it is an offence and punishable by a competent court of criminal jurisdiction in terms of Section 16(2) and any lease acquired by breach of provision 16(1) '**shall be liable to be forfeited**' in terms of Section 16(3). The reading of the section implies that forfeit of Crown Lease under Section 16(3) is applicable only upon the proof of 16(1) by a competent court, and not by the Director of Land. Though the Section 16(2) is silent as to the determination of guilt, I do not think that there is a dispute that it should be determined by a competent court. By the same token determination of said Section 16(1) should be by a competent court.
51. At the hearing I directed both parties to make further submissions on the applicability of the Section 16 (3) of the Crown Lands Act (Cap 132) and whether DOL can forfeit a Crown Lease without an order of the court in term of Section 16(1) from a civil court or Section 16(2) from a Criminal Court. This matter had not been properly addressed in the written submissions filed by both parties.
52. The Section 10 of the Crown Lease Act (Cap 132) deals with a power of the DOL to impose conditions relating forfeiture and renewals '**as may be specified or prescribed**'. This relate to inclusion of conditions in the Crown Leases, but not any violation in terms of Section 16(1) of the Crown Lease Act (Cap132). This is clear from the title above the said provision (Section 10) which states 'Power to grant leases or licences of Crown Land'. This provision has no application or does not confer power to DOL to forfeit Crown Leases in terms of Section 16(3). This provision reinforce the position that DOL does not have Power to forfeit in terms of Section 16(3), as it is not stated in the Crown Lands Act (Cap 132). The powers of the DOL are specifically stated in the Crown Lands

Act (Cap 132) and the Regulations made under the said Act, and there is no power conferred to DOL in terms of Section 16 of the Act.

53. In this instance the DOL had unilaterally decided that there was a breach of Section of Section 16. The DOL had also decided that the Applicant had breached Section 4 of Crown Lands Act (Cap 132), but in this judgment I have already decided that Section 4 of Crown Lands Act did not create any obligation on the part of the Applicant-Lessee. These are all unilateral decisions by the DOL, without giving any notice to the Applicant. If the DOL could unilaterally decide breach of Section 16(1) of Crown Lands Act (Cap 132) and proceed to forfeit the Crown Leases it is manifestly unreasonable act that warrant judicial review.
54. Considering the strictures contained in the Section 16(2) and 16(3) in my judgment a breach of Section 16(1) should be determined by a competent court of law. In any event rules of natural justice have to be observed and compliance with Section 57 of the Land Transfer Act and Section 105 of the Property Act is required. Since there are non compliance of these decisions to re possess is not according to the law.
55. In Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at 414, [1984] 3 All ER 935 at 953-4, HL, Lord Roskill said,

'.....Thus far this evolution has established that executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, Wednesbury principles (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called 'principles of natural justice'. As to this last, the use of this phrase is no doubt hallowed by time and much judicial repetition, but it is a phrase often widely misunderstood and therefore as often misused. That phrase perhaps might now be allowed to find a permanent resting-place and be better replaced by speaking of a duty to act fairly. But that latter phrase must not in its turn be misunderstood or misused. It is not for the courts to

determine whether a particular policy or particular decisions taken in fulfillment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as, indeed, the decided cases since 1950 consistently show. Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken.'

56. The DOL's action, that resulted in the issuance of purported notices dated 8th February, 2010, was not only guilty of law that he did not possess, but it was exercised so unreasonably by deciding the alleged breach of Section 16(1) of Crown Lease unilaterally, and has failed to act fairly as stated by Lord Roskil, in the case of **Council of Civil Service Unions v Minister for the Civil Service** (supra) this decision was applied in a recent case of **R (on the application of Sandiford) v Secretary of State for Foreign and Commonwealth Affairs** [2014] 4 All ER 843 by Lord Carnwath and Lord Mance.

57. The Respondents relied on Section 28 of the Crown Lands Act (Cap 132) and state that DOL is not subjected to Judicial Review in this instance. The said Section 28 states as follows;

Indemnification of Director of Lands and officers

*28. Neither the Director of Lands nor any authorised officer shall be liable to any action, suit or proceeding for or in respect of any act or matter bona fide done or omitted to be done **in the exercise of the powers conferred by this Act.** (emphasis added)*

58. In my judgment Section 28 of the Crown Lands Act (Cap 132) does not preclude judicial review actions. In **R (on the application of Sandiford) v Secretary of State for Foreign and Commonwealth Affairs** [2014] 4 All ER 843 at 860 Lord Carnwath and Lord Mance (with whom Lord Clarke and Lord Toulson agree) held ,

'[52] The court's role is dependent on the nature and the subject matter of the power or its exercise, particularly on whether the subject matter is justiciable: Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935 at 955–956, [1985] AC 374 at 417–418 per Lord Roskill, R v Secretary of State for the Home Dept. ex p Bentley [1993] 4 All ER 442, [1994] QB 349. In the former case, at 418, Lord Roskill suggested as prerogative powers which would

not be justiciable those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of Ministers. Even so, it has been held that a decision to refuse to issue any pardon based on a failure to identify the possibility in law of a conditional pardon may be reviewable (see Ex p Bentley); and it has also been held that a decision to refuse to issue a passport is reviewable (R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett [1989] 1 All ER 655, [1989] QB 811).

59. In an application for Judicial Review, Section 28 of the Crown Lands Act (Cap 132) cannot be relied, but this can be relied on for an action against civil suit for damages for bona fide acts. When an authority exceeded power under the Act, or abused the power under the Act, this provision has no application.
60. Without prejudice to what was stated in the above paragraph, in this judicial review the notice issued on 8th February, 2010 by the DOL was not an act done in accordance with the provisions of the Crown Lease Act (Cap 132) as there is no provision that warrant such an act by DOL.
61. In the circumstances the purported forfeiture of Crown Leases No 17769, 17770, and 17771 was illegal. The purported Notice dated 8th February, 2010 by the DOL is illegal and void and has no legal effect and the cancellation of the Crown Leases issued to the Applicant and subsequent registration of new leases in the name of 4th Respondent and the registration mortgages relating to the new leases are void.
62. Considering the circumstances of this case I will not award any costs or damages to the Applicant.

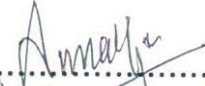
FINAL ORDERS

1. An Order of Certiorari is issued in respect of the decision made on or about 8th February, 2010 by the First Respondent purporting to re possess and re enter the Crown Leases issued by the Applicant and the said decision is quashed.

2. A declaration that the First Respondent had acted unfairly and against the rules of natural justice and exceeded jurisdiction in purporting to re enter the Applicant's Crown Lease Nos 11769, 17770 and 17771 and purporting to issue new Crown Lease Nos 18013, 18014 and 18015 in the name of the Proline Marketing Limited.
3. A Declaration that the First Respondent's Notice dated 8th February, 2010 is unlawful, invalid, void and of no effect, hence the Mortgage Nos 729939A, 729939B and 729939C in favour of 3rd Respondent are unlawful and null and void.
4. The registration by the 2nd Respondent of any document pursuant to said Notices Dated 8th February, 2010 and more specifically the Crown Lease Nos 18013, 18014 and 18015 and the mortgages No 729939A, 729939B and 729939C are wrongful and null and void.
5. Considering the circumstances of the case I will not award any cost for this application.

Dated at **Suva** this 13th day of **May, 2015**.




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Justice Deepthi Amaratunga
High Court, Suva