IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 10 of 2015

IN THE MATTER of the **LAND TRANSFER ACT**

AND

IN THE MATTER of Section 169 of the **LAND TRANSFER ACT CAP 131.**

BETWEEN : **DELUXE FOOTWEAR FASHIONS LIMITED** a limited liability company having its registered office at the Offices of GH Whiteside & Co, 211 Ratu Sukuna Road, Suva.

PLAINTIFF

A N D: **ANGCO COMMERCIAL COMPLEX LIMITED** a limited liability company having its registered office at Lot 60 McElrath Place, Namaka, Nadi.

FIRST DEFENDANT

A N D : **THE OCCUPIERS** of Shop No. 6 of Dee Mall situated on Lot 13 Vodawa Subdivision, Nadi

SECOND DEFENDANT

Mr. Ronal Jaswindra Singh for the Plaintiff
(Ms) Adi Qisa Vokanavanua for the Defendants

Date of Hearing :- **19th May 2015**
Date of Ruling :- **30th June 2015**

RULING

(A) INTRODUCTION

(1) Before me is the Plaintiff's Originating Summons pursuant to Section 169 of the Land Transfer Act for an order for vacant possession against the Defendants.

(2) The Defendants are summoned to appear before the court to show cause why they should not give up vacant possession of the Plaintiff's property comprised in Native Lease No: 27668 (previously contained in lease No. 7179), situated at Lot 13, Vodawa Subdivision, Nadi.

(3) The application for eviction is supported by the affidavit of "Dharmendra Parmar", a Director and a Shareholder of Deluxe Footwear Fashions Ltd. (Plaintiff).

(4) The application for eviction is strongly resisted by the Defendants.

(5) The Defendants filed an affidavit in opposition opposing the application for eviction followed by an affidavit in reply thereto.

(6) The Plaintiff and the Defendants were heard on the Originating Summons. They made oral submissions to court. In addition to oral submissions, they filed careful and comprehensive written submissions for which I am most grateful.

(B) THE LAW

(1) Sections from 169 to 172 of the Land Transfer Act (LTA) are applicable to summary application for eviction.

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) .....;

(c) ...

Section 170 states;

"The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of the summons."

Section 171 states;

"On the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the judge of the due service of such

summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in Ejectment.

Section 172 states;

"If the person summoned appears he may show cause why he refuses to give possession of such land and, ***if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor,*** *mortgage or lessor 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 entitled:

Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons.

[Emphasis provided]

(2) The procedure under Section 169 was explained by Pathik J in **Deo v Mati** [2005] FJHC 136; HBC0248j.2004s (16 June 2005) as follows:-

The procedure under s.169 is governed by sections 171 and 172 of the Act which provide respectively as follows:-

"s.171. On the day appointed for the hearing of the Summons, if the person summoned does not appear, then upon proof to the satisfaction of the Judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in ejectment."

"s.172. If a person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit."

It is for the defendant to 'show cause.'

(3) The Supreme Court in considering the requirements of section 172 stated in **Morris Hedstrom Limited v. Liaquat Ali** (Action No. 153/87 at p2) as follows and it is pertinent:

"Under Section 172 the person summoned may show cause why he refused to give possession of the land and if he proves to the satisfaction of the judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced."

(4) The requirements of section 172 have been further elaborated by the Fiji Court of Appeal in ***Azmat Ali s/o Akbar Ali*** *v* ***Mohammed Jalil s/o Mohammed Hanif*** *(Action No. 44 of 1981 – judgment 2.4.82) where it is stated:*

"It is not enough to show a possible future right to possession. That is an acceptable statement as far as it goes, but the section continues that if the person summoned does show cause the judge shall dismiss the summons; but then are added the very wide words "or he may make any order and impose any terms he may think fit" These words must apply, though the person appearing has failed to satisfy the judge, and indeed are often applied when the judge decides that an open court hearing is required. We read the section as empowering the judge to make any order that justice and the circumstances require."

(C) THE FACTUAL BACKGROUND AND ANALYSIS

(1) It is necessary to approach the case through its pleadings/affidavits, bearing all those legal principles in my mind.

(2) I shall set out the main averments/assertions of the pleadings/affidavits.

(3) In the affidavit in support, "Dharmendra Parmar", on behalf of the Plaintiff, deposes *inter alia* that;

*(a) Deluxe is the registered lessee of the Property. A copy of the Native Lease no. 27668 is annexed and marked "**DP 1**". Deluxe is also the proprietor of a commercial building complex situated on the Property called "Dee Mall" which comprises 6 shops.*

(b) *In early 2013, Deluxe entered into an agreement to lease Shop No.6 of Dee Mall to Angco in exchange for monthly rental payments. The rental period up to June 2014 is in arrears for a sum of $38,825.00.*

(c) *On 29 May 2014, Deluxe, through its then solicitors – Sherani & Co, issued to Angco a Notice to Evict ("**Notice**") after Angco failed to settle its outstanding rental payments. Pursuant to the Notice, Angco was given till 30 June 2014 to vacate the Property. Annexed and marked "**DP 2**" is a copy of the letter. Inadvertently, the letter refers to NL number 7179 but I confirm that it is in relation to the subject \Property. A copy of Native Lease No. 7179 is annexed and marked "**DP 3**", this lease was the old lease that was surrendered and replaced with NL 27668 (see DP 1).*

(d) *Angco continued to occupy the property but did not pay the agreed rent. On Sherani & Co's advice, Deluxe instructed Sherani to levy a distress for rent.*

(e) *The distress for rent was attempted by the bailiff, Mr. Anil Chandra. However this was unsuccessful. Deluxe subsequently instructed Munro Leys as its lawyers.*

(f) *On 11 July 2014, Angco obtained Interim Orders in Civil Action No. 114 of 2014 ("**the injunction proceedings**"). The proceedings were filed against Deluxe and Mr. Anil Chandra.*

(g) *The interim orders were granted by his Lordship Justice Tuilevuka ex parte. Among other things, Justice Tuilevuka restrained Deluxe from:*

- *"preventing, interfering and/or restraining" Angco from having unrestricted access to the Property; and*
- *Levying distress for rent.*

(h) *Justice Tuilevuka ordered Angco to file and serve its Statement of Claim to Deluxe and Mr. Anil Chandra. The matter was then adjourned to 14July 2014 for a mention. A copy of the Interim Orders is annexed and marked "**DP 4**".*

(i) *In reaching his decision to grant the Interim Orders, Justice Tuilevuka noted that in the absence of the regulatory consent of the iTLTB, neither Deluxe nor Angco could derive any right from an illegal informal arrangement, including any right of occupation to Angco. Justice Tuilevuka also stated that nothing in his orders were to be misconstrued as giving Angco a right to remain in occupation of the Property*

(j) *The Interim Orders were filed by Justice Tuilevuka on 14 July 2014. A copy of the Order of 14 July 2014 is annexed and marked "**DP 5**".*

(k) *On 24 July 2014, Munro Leys on instructions from Deluxe issued to Angco another notice withdrawing any implied or express consent that may have been given to Angco to occupy Shop No. 6. The notice expired on 31 July 2014. A copy of the notice is annexed and marked "**DP 6**".*

(l) *All parties including the Defendants have proceed until very recently on the basis that the relevant lease was NL 7179. However, NL 7179 was surrendered and replaced with NL 27668 in July 2005. It is not in dispute that the Plaintiff is the registered lease holder that the iTLTB have never consented to a sublease to the Defendants or any other party.*

(m) *Despite the notices issued and the reasons given by Justice Tuilevuka in the Order of 11 July 2014, Angco has refused to leave the Property and give vacant possession to Deluxe. On 25 July 2014, Mr Caezar Angco replied to Deluxe's lawyer, Ronal Singh of Munro Leys, stating that he will not leave the property and will protect their interest till the end of time. He further stated his lawyer has advised that they have a cross claim against Deluxe. This position was taken by Angco despite his Lordship Justice Tuilevuka stating that neither party could derive any right from the arrangement.*

(n) *Deluxe's lawyer then requested Mr Angco for his lawyer's name to discuss the matter in detail and save legal costs for both parties. Mr Angco did not respond to his e-mail. Deluxe is now put to a cost of applying to Court for an eviction order. A copy of the email is annexed and marked "**DP 7**".*

(o) *As stated in the Order of 14 July 2014, Angco has no right to occupy the Property as the purported sublease under which Angco claim to occupy*

- *does not have iTLTB consent (as required pursuant to the iTLTB Act) and*
- *is not even executed.*

(p) *Angco cannot derive any benefit from any prior agreement between Deluxe and Angco for the lease of the Property. Likewise no other occupant of Shop No. 6 has any right to occupy the Property.*

(q) *The Defendants continue to illegally occupy the Premises despite having no rights of occupation.*

(4) In the affidavit in opposition, "Raymond Caesar Angco", on behalf of the Defendants, deposes *inter alia* that;

(a) ***THAT*** *as to paragraph 5 of the said Affidavit, I admit that we entered into an oral agreement with the Plaintiff on or about the 5th day of April 2013 wherein the Plaintiff agreed to lease us the said property for the agreed monthly rental of $5,000 plus VAT per month for a period of 3 years. I deny and strongly dispute owing the Plaintiff the sum of $38,825.00.*

- *The Defendant primary objective of leasing the said property so he could set up his business consisting of a Restaurant, Supermarket, internet Shop and a Retail Shop. Attached herewith marked "**RC2**" is a copy of photos showing the physical interior of the said property before Defendant carrying out the renovation, repairing and improvements on the said property.*

- *The Defendant spent substantial amount of money, effort and resources in the said property to start his business. Annexed marked "**RC3**" photos clearly showing the major renovations, repairs and improvements he has done to the said property. Defendant installed specific designed counters and shelves such as desks for the Computers in the Internet Shops, Shelves for the Restaurant Kitchen. Reception Front desks, Cashier Counters, Refrigerators, Large ovens for the Kitchen and many more fittings.*

(b) ***THAT*** *we had to obtain a loan from the Bank of Baroda to finance my business to which large amount of money was used for the renovations and improvements of the said property, purchasing of stocks for the supermarket, buying furniture and other fittings and paying other expenses for the property. Annexed herewith marked "**RC5**" is a copy of Bank of Baroda letter of Offer for Loan to 1st Defendant's name and annexed marked "**RC6**" is a Statement of Account for the above loan. The Business is still making repayments to the Bank for the Loan.*

(c) ***THAT*** *we have spent so much money, effort and resources in the investment of our Business at the said property. Attached herewith marked "**RC7**" are copies of receipts for the renovation and other improvement expenses and "**RC8**" is a copy of table for expenses breakdown.*

(d) ***THAT*** *sometimes on or about May 2013 the Plaintiff provided us a Draft copy of Lease Agreement Annexed marked "**RC9**" is a copy of the Draft Lease Agreement.*

(e) ***THAT*** *after perusing the Draft Agreement and seeking Legal Advice on the agreement, I informed the Plaintiff that the Agreement needs to be amended as the Directors did not agree to certain terms of the Lease Agreement as we felt that our Business interests were not being protected and that the Lease Agreement ought to be further negotiated between the parties before executing the final Agreement.*

(f) ***THAT*** *whilst the agreement was being negotiated parties both agreed that Defendant will continue to pay the rental sum of $50,000.00 plus VAT to Plaintiff. The Defendant paid the rent from April 2013 to February 2014. Annexed marked "**RC10**" are copies of Bank Deposit to Plaintiff's Bank Account No. 7885270 for payment of rents.*

(g) ***THAT*** *whilst parties were still negotiating on the terms of the lease and Defendant faithfully paying the rents, the Plaintiff on or about March 2014 demanded the Defendants to pay the sum of $7,475.00 to the Plaintiff as rental for the month of March 2014. The sum that was not agreed in the contract by the parties. Further we were threatened to eviction if we do not pay the new rental sum which Defendants have been forced into.*

(h) ***THAT*** *fear of being evicted from the said property, we paid the sum of $7,475.00 to the Plaintiff as rental for March 2014.*

(i) ***THAT*** *we strongly dispute owing the Plaintiff the rental arrears of $38,825.00 and puts Plaintiff to strict proof of the same.*

(j) ***THAT*** *after entering into the contract with the Plaintiff, we have invested so much not only financially from renovating, repairing and improvement of the said property to employing more than 50 staff to operate our Business. Most of these staff are the sole breadwinners in their families.*

(k) ***THAT*** *we submit with respect to this Court considering the relevant circumstances of the Defendants from above, we Defendants have a right to Possession to the said property as we have entered into a binding agreement for the agreed monthly sum of $5000 plus VAT effective for 3 years with the Plaintiff and at no time did the parties agreed for monthly rental to increase.*

(l) ***THAT*** *further, we have made a substantial amount of investment on renovating, repairing, installation, construction on the said property in order to set up our Business. We have also spent large sum of money in the day to day running of the different business setting up the Supermarket such as buying stocks and buying computers, desks, tables and chairs for the Internet Shop and the Restaurant Shop in order to operate. With less than a year of operation, the Plaintiff now wants us to vacate.*

(m) ***THAT*** *I respectfully submit that I have shown tangible evidence as stated above supporting my right to possession and an equitable interest to the said property and therefore, we respectfully submits that Plaintiff's application be dismissed with costs.*

(5) The Plaintiff filed an affidavit in rebuttal deposing *inter alia* that;

(a) I understand that from Justice Tuilevuka's orders of 11 July 2014 neither Deluxe nor the First Defendant can derive any rights from the lease agreement in the absence of regulatory consent from the iTLTB.

(b) Accordingly the First Defendant has no right to remain in occupation of the Property. I understand that any claims that the First Defendant is making in respect of costs incurred cannot be dealt with in this application as the current application is concerned purely with rights of occupation or more accurately the lack of the Defendant's right to occupy.

(6) This is an application brought under section 169 of the Land Transfer Act, (Cap. 131). Under Section 169, certain persons may summon a person in possession of land before a judge in Chambers to show cause why that person should not be ordered to surrender possession of the land to the claimant.

For the sake of completeness, Section 169 of the Land Transfer Act, is reproduced below.

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) .....;

(c) .....

Reference is made to paragraph 04 of the Affidavit of "Dharmendra Parmar", one of the Directors and shareholders of the Plaintiff's Company;

"Deluxe is the registered lessee of the Property." .....

In support of the above averment, the Plaintiff annexed to its Affidavit a certified copy of the Native Lease No: 27668. The lease is registered with the Registrar of Titles on 27.09.2005.

On the question of whether a lessee can bring an application under Section 169 of the Land Transfer Act, if any authority is required, I need only refer to the sentiments expressed by Master Robinson in "**Michael Nair v Sangeeta Devi**", Civil Action No: 2/12, FJHC, decided on 06.02.2013. The learned Master held;

> *"The first question then is under which ambit of section 169 is the application being made? The application could not be made under the second or third limb of the section since the applicant is the lessee and not the lessor as is required under these provisions. But is the applicant a registered proprietor? A proprietor under the Land Transfer Act means the registered proprietor of any land, or of an estate or interest therein". The registration of the lease under a statutory authority, the iTLTB Act Cap 134, creates a legal interest on the land making the applicant the registered proprietor of the land for the purposes of the Land Transfer Act. He can therefore make an application under section 169 of the Land Transfer Act".*

The same rule was again applied by Master in "**Nasarawaqa Co-operative Limited v Hari Chand**", Civil Action No: HBC 18 of 2013, decided on 25.04.2014. The learned Master held;

> *"It is clear that the iTLTB as the Plaintiff's lessor can take an action under section 169 to eject the Plaintiff. This is provided for under paragraphs [b] & [c]. For the lessor to be able to eject the tenant or the lessee it must have a registered lease. It is not in dispute that the Plaintiff holds a registered lease, the lease is an "Instrument of Tenancy" issued by the iTLTB under the Agricultural Landlord and Tenancy Act. It is for all intents and purposes a native lease and was registered on the 29 November 2012 and registered in book 2012 folio 11824. It is registered under the register of deeds. There is nothing in section 169 that prevents a lessor ejecting a lessee from the land as long as the lease is registered. How will the lessee then eject a trespasser if the lessor in the same lease can use section 169? The lessee under section 169 can eject a trespasser simply because the lessee is the last registered proprietor. The Plaintiff does not have to hold a title in fee simple to become a proprietor as long as he/she is the last registered proprietor. A proprietor is defined in the Land Transfer Act as "proprietor" means the registered proprietor of land, or of any estate or interest therein". The Plaintiff has an interest by virtue of the instrument of tenancy and therefore fits the above definition and can bring the action under section 169."*

It is also noteworthy that the Defendants conceded that the Plaintiff is the last registered proprietor of the land in question. The onus of proof is therefore upon the Defendants to show on affidavit evidence some right to possession which would preclude the granting an order for possession under section 169 of the Land Transfer Act.

In the case of **Vana Aerhart Raihman v Mathew Chand**, Civil Action No: 184 of 2012, decided on 30.10.2012, the High Court held;

> *"There is no dispute between parties as to the locus standi of the Plaintiff, and once this is established the burden of proof shifted to the Defendant to prove his right to possession in terms of the Section 172 of the Land Transfer Act."*

In this regard, I would like to refer to the decision in the following case.

In the case of **Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87, the Supreme Court said that:-

> *"Under Section 172 the person summoned may show cause why he refused to give possession of the land and if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure.* ***That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right must be adduced."*** (Emphasis is mine)

Also it is necessary to refer to section 172 of the Land Transfer Act, which states;

"If the person summoned appears he may show cause why he refuses to give possession of such land and, ***if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor,*** *mortgage or lessor 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 entitled:

Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons.

[Emphasis provided]

Being acutely aware of the need for the Defendants to show on affidavit some tangible evidence establishing a right or supporting an arguable case for such a right, I approach the evidence with that principle uppermost in my mind.

(7) The Plaintiff's argument runs essentially as follows: [Counsel in his submissions writes....]

> *"It is submitted that since there is no consent from the iTLTB, the informal lease agreement between the Plaintiff and the Defendants is null and void, and the Defendants occupation of the |Property is unlawful. The payment of rent and any improvements to the Property made by the Defendants under a void agreement does not give them any rights in law or equity to possession of the Property. To allow the Defendants to continue in occupation of the Property would be in breach of the iTaukei Lands Trust Act."*

In *adverso,* the Defendants forcefully submit that;

> *An "equitable interest" on the property arose out of the improvements made on the property by virtue of the agreement.*

(8) It is necessary to examine section 12 of the Native Land Trust Act closely.

I should quote Section 12, which provides;

> *"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 in his lease or any part thereof, whether by sale, 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 of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected 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."*

Reading as best, I can between the sections of Native Land Trust Act, it seems to me, that Section 12 prohibits any dealing in land which is comprised in Native Lease without the consent of the Board as lessor.

Moreover, unlawful occupation of Native Land is an offence under Section 27 of the Native Land Trust Act.

On a strict reading of section 12 and 27, it is perfectly clear that the two sections are clearly designed for the control and protection of the Native Land.

(9) After an in-depth analysis of the totality of the affidavit evidence in this case, I now summarise my understanding of the salient facts as follows;

- The first Defendant was let into the possession of the property (shop), on 30th April 2013; by virtue of an oral arrangement which is prima facie illegal due to the absence of consent of the Native Land Trust Board.

- The first Defendant did pay rent as a monthly tenant under an oral agreement, from 30th April 2013 to May 2014.

- The oral agreement was executed to the full by the first Defendant going into possession of the land and making improvements to the shop on the land on its own account. The Defendant has spent approximately $121,000.00 on renovations.

- The Plaintiff has been accepting monthly rental payments for about 12 months. A total of over $70,000.00 in rent including deposit.

- The consent of the Native Land Trust Board was not obtained to the initial letting out.

- The Defendants are in possession and control of the land since 30th April 2013.

(10) As I see it, two questions lie for determination by this court. They are;

- **Is the oral agreement a "dealing in land" within section 12 of the Native Land Trust Act?**

- **Is there any equitable estoppel or lien arising in the Defendant's favour?**

(11) On the question, as to whether a verbal/oral agreement can be a "dealing" within the meaning of section 12, the Privy Council has held, in the case of **Chalmers v. Pardoe** [1963] 3 All E.R. 552, **that this can be so**. Sir Terence Donovan at 557 said:-

> *". . . . The Court of Appeal held, as their Lordships have already indicated, that the lease legal effect which could be given to the friendly arrangement was that of a licence to occupy coupled with possession. Their Lordships think the matter might have been put higher . . . . In their Lordships' view an agreement for a lease or sublease in Mr Chalmers's favour could reasonably be inferred from Mr. Pardoe's evidence. Even treating the matter simply as one where a licence to occupy coupled with possession was given, all for the purpose . . . . of erecting a dwelling house . . . . it seems to*

their Lordships that, when this purpose was carried into effect, a dealing with the land took place . . . . and since the prior consent of the Board was not obtained it follows that under the terms of section 12 of the Ordinance Cap. 104, this dealing with the land was unlawful. It is true that in Harnam Singh's case the Court of Appeal said that it would be an absurdity to say that a mere agreement to deal with land would contravene section 12, for there must necessarily be some prior agreement in all such cases. Otherwise there would be nothing for which to seek the Board's consent. In the present case, however, there was not merely agreement, but on one side, full performance."

Returning to the instant case, as previously noted, it is clear beyond question that the oral agreement was made into a "dealing in land" within the meaning of section 12 of the Native Land Trust Act, by the following;

- The first Defendant was let into the possession of the property (shop), on 30th April 2013; by virtue of an oral arrangement which is prima facie illegal due to the absence of consent of the Native Land Trust Board.

- The first Defendant did pay rent as a monthly tenant under an oral agreement, from 30th April 2013 to May 2014.

- The oral agreement was executed to the full by the first Defendant going into possession of the land and making improvements to the shop on the land on its own account. The Defendant has spent approximately $121,000.00 on renovations.

- The Plaintiff has been accepting monthly rental payments for about 12 months. A total of over $70,000.00 in rent including deposit.

- The consent of the Native Land Trust Board was not obtained to the initial letting out.

- The Defendants are in possession and control of the land since 30th April 2013.

There was, therefore, a dealing which, in the absence of the consent of the Native Land Trust Board first had and obtained, was unlawfully entered into, and was null and void.

The view that I have expressed is in accordance with the sentiments expressed in the following Court of Appeal decisions.

Henry J.P. in **Phalad and Sukh Raj** [Civil Appeal No. 43 of 1978, F.C.A.) said;

> *"The cases already cited show that the Courts have held that the mere making of a contract is not necessarily prohibited by section 12. It is the effect of the contract which must be examined to see whether there has been a breach of section 12. The question then is whether, upon the true construction of the said agreement the subsequent acts of appellant, done in pursuance of the agreement, "alienate or deal with the land, whether by sale transfer or sublease or in any other manner whatsoever" without the prior consent of the Board had or obtained. The use of the term "in any other manner whatsoever" gives a wide meaning to the prohibited acts. For myself I have no doubt but that the true construction of the said agreement and the said agreement and the substantial implementation of such an agreement for sale and purchase, under which possession is completely parted with to the purchaser and immediate mutual rights and liabilities are created in respect of such exclusive possession, is a breach of section 12 if done before the consent is obtained."*
>
> *The words "alienate" and "deal with" as elaborated in section 12, are absolute and do not permit conditional acts in contravention. If before consent, acts are done pending the granting of consent, which come within the prohibited transactions, then the section has been breached and later consent cannot make lawful that which was earlier unlawful and null and void. This does not cut across the cases already cited which deal with the formation of the contract as contrasted with an immediately operative agreement and substantive acts in performance thereof."*

Gould V.P in **Jai Kissun Singh v Sumintra**, 16 FLR p 165 said;

> ***". . . .it is not necessary that the agreement between the parties should have progressed to a stage at which formal documents of lease or assignment has been executed before the transaction became a dealing requiring prior consent.*** *That, having regard to the objects of the section, is only common sense. Otherwise, a purchaser under agreement could remain indefinitely in possession and control, exercising the rights of full ownership and even protecting himself by caveat."*
>
> *(Emphasis added)*

(12) Now I pass to the second issue namely, the Defendant's claim for an equitable charge or lien over the land because of the improvements made to the shop on the property.

Spry in his "Principles of Equitable Remedies" 4th Edition 1990 page 179 sets out the basic principles of equitable proprietary estoppel as follows:

- *The Plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendants or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship.*

- *The Plaintiff has induced the defendant to adopt that assumption or expectation.*

- *The Plaintiff acts or abstains from acting in reliance on the assumption or expectation.*

- *The defendant knew or intended him to do so.*

- *The Plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled.*

- *The defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.*

Lord Kingsdown in the case of **Ramsden v Dyson** (1865) L.R. 1 H.L. 129 said at p. 140;

> *"If a man under a verbal agreement with a landlord for a certain interest in land or what amounts to the same thing under the expectation created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation with the knowledge of the landlord and without any objections by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation."*

Also at p. 140 Lord Cransworth L.C. said:

> *"If a stranger begins to build on any land supposing it to be his own and I perceiving his mistake, abstain setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land in which he had expended money on the supposition that the land was his own."*

Promissory or equitable estoppel is described in Halsburys Laws of England, Fourth Edition, Volume 16, at paragraph 1514:

> *"When one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."*

But nevertheless, the doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has enacted to be invalid. [**Chand v Prakash**, 2011, FJHC 640, HB 169. 2010]

"**Estoppel against a statute**" is discussed as follows in Halsburys Laws of England, 4th Edition, Volume 16, at paragraph 1515,

> *"The doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted is to be invalid, or to give the court a jurisdiction which is denied to it by statute, or to oust the court's statutory jurisdiction under an enactment which precludes the parties contracting out of its provisions. Where a statute, enacted for the benefit of a section of the public, imposes a duty of a positive kind, the person charged with the performance of the duty cannot be estopped be prevented from exercising his statutory powers. A petitioner in a divorce suit cannot obtain relief simply because the respondent is estopped from denying the charges, as the court has a statutory duty to inquire into the truth of a petition."*

Gates J (as then was) considered somewhat a similar situation in "**Indar Prasad and Bidya Wati v Pusup Chand**" (2001) 1 FLR 164 and said;

> ***"Section 13 of the State Lands Act would appear to be a complete bar to any equitable estoppel arising in the Defendant's favour."***

With all of the above in my mind, I think it is quite possible to say that the mandatory requirement of section 12 of the Native Land Trust Act and the legal consequences that flow from non-compliance defeat the Defendant's claim for an equitable charge or lien over the land.

(13) Finally, in the course of the argument, the counsel for the Defendants submitted;

> *"In any tenancy agreement, it is the landlord's responsibility to obtain consent prior to inviting tenants to lease or rent their properties. The Plaintiff knew and was well aware of section 12 of the Native Land Trust Act but yet proceeded with this tenancy agreement and benefitted from it."*

I cannot accept that it would be in any way proper to entertain such a bald submission which was effectively sprung on the Plaintiff and the court at the last minute. I get the distinct impression that the counsel for the Defendant's argument was formulated and perhaps conceived as the proceedings for "eviction" developed.

Be that as it may, I desire to emphasise that it was competent for the Defendants to apply for consent. It was wrong to say that it is the "sole responsibility" of the Plaintiff to obtain consent from the Native Land Trust Board regarding a "dealing" in a Native Land.

The view that I have expressed is in accordance with the sentiments expressed by Marsack J in **D.B. Watie [overseas] Ltd v Sidney Leslie Wallath**", 18 FLR 141, FCA,. Marsack J said;

> *". . . . **that it was competent for the respondent himself to apply for consent**. . The primary responsibility for applying for the Board's consent undoubtedly rests on the vendor. But, as I see it, there is no definite rule that in no circumstances is the Board entitled to grant its consent to a dealing in land except upon the application of the vendor. In **Court Brothers Limited v. Sunbeam Transport Limited** (1969) 15. F.L.R. 206 and in **Fong Lee v Mitlal** (1966) 12 F.L.R. 4 the consent of the Board to the sale was granted upon the application of the purchaser, and the legality of the contract was confirmed by this Court."*
>
> (Emphasis added)

A somewhat similar situation was considered by Byrne J. in "**Mani Lal and Others v Satya Nand**" (1994) 40 FLR 94. Byrne J said;

> *"I am satisfied that the Defendant must have known that no consent of the Director of Lands had been obtained to his occupation. Before taking possession of the land he was under a duty to make all relevant enquiries as to the Plaintiff's title and since the land in question obviously was not freehold in my judgment one of the first steps he should have taken was to enquire whether the Director of Lands had given his consent to the transaction. If the Defendant proceeded to erect a building on the land either knowing that the Director of Lands had not given his consent or oblivious to the lack of such consent he cannot hold this against the Plaintiff".*
>
> (Emphasis added)

(14) Given the above, it is clear beyond question that the Defendants have failed to show cause to remain in possession as required under section 172 of the Land Transfer Act.

Therefore, I certainly agree with the sentiments which are expressed inferentially in the Plaintiff's submissions.

(15) In this case, counsel for the Plaintiff moved for cost on an **indemnity basis**. The Plaintiff seeks indemnity cost on the following grounds, which I have reproduced as stated in the written submissions. These grounds are;

- *The Plaintiff also submits that Munro Leys had written to the Defendants by email requesting their lawyer's details so that there could be discussions with the view of reaching a cost-effective solution. A copy of Munro Ley's email is annexed to the Parmar Affidavit as "DP 7". The Defendants did not respond*

to Munro Leys' email. No attempt was made by the Defendants to explore settlement.

- *As a result, the Plaintiff has had to issue these proceedings which have resulted in significant costs. This may have been avoided had the Defendants responded to the Plaintiff's invitation to discuss. The Plaintiff submits that it should be allowed to recover these costs from the Defendants on an indemnity basis.*
- *In this case, the Defendants are aware of Judge Tuilevuka's Orders of 11 July 2014 in High Court Civil Aviation No. 114 of 2013 in which he clearly stated that they had no right of occupation. Upon a proper review of the law and facts, the Defendants do not have a right of occupation. Nor would they ever be entitled to occupy the Property in the absence of iTLTB consent.*

(16) Order 62, rule 37 of the High Court Rules empower courts to award indemnity costs at its discretion.

For the sake of completeness, Order 62, rule 37 is reproduced below.

Amount of Indemnity costs (O.62, r.37)

37.- (1) The amount of costs to be allowed shall (subject to rule 18 and to any order of the Court) be in the discretion of the taxing officer.

(17) The principles by which Courts are guided when considering whether or not to award indemnity costs are discussed by Madam Justice Scutt in "**Prasad v Divisional Engineer Northern** (No. 02)" (2008) FJHC 234.

As to the "General Principles", Madam Justice Scutt said this;

- *"A court has 'absolute and unfettered' discretion vis-à-vis the award of costs but discretion 'must be exercised judicially'.* ***Trade Practices Commission v. Nicholas Enterprises*** *(1979) 28 ALR 201, at 207*
- *The question is always 'whether the facts and circumstances of the case in question warrant making an order for payment of costs other than by reference to party and party';* ***Colgate-Palmolive Company v Cussons Pty Ltd*** *(1993) 46 FCR 225, at 234, per Sheppard, J.*
- *A party against whom indemnity costs are sought 'is entitled to notice of the order sought':* ***Huntsman Chemical Company Australia Limited v. International Cools Australia Ltd*** *(1995) NSWLR 242*
- *That such notice is required is 'a principle of elementary justice' applying to both civil and criminal cases:* ***Sayed Mukhtar Shah v. Elizabeth Rice & Ors*** *(Crim Appeal No. AAU0007 of 1997S, High Court Crim Action No. HAA002 of 1997, 12 November 1999), at 5, per Sir Moti Tikaram, P.Casey and Barker, JJA*

- *'. . . neither considerations of hardship to the successful party nor the over-optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs. But additional costs may be called for if there has been reprehensible conduct by the party liable': **State v. The Police Service Commission; Ex parte Beniamino Naviveli** (Judicial Review 29/94; CA Appeal No. 52/95, 19 August 1996), at 6*
- *Usually, party/party costs are awarded, with indemnity costs awarded only 'where there are exceptional reasons for doing so': **Colgate-Palmolive Co v. Cussons Pty Ltd** at 232-34; **Bowen Jones v. Bowen Jones** [1986] 3 All ER 163; **Re Malley SM**; Ex parte Gardner [2001] WASCA 83; **SDS Corporation Ltd v. Pasonnay Pty Ltd & Anor** [2004] WASC 26 (S2) (23 July 2004), at 16, per Roberts-Smith, J.*
- *Costs are generally ordered on a party/party basis, but solicitor/client costs can be awarded where 'there is some special or unusual feature of the case to justify' a court's 'exercising its discretion in that way': **Preston v Preston** [1982] 1 All ER 41, at 58*
- *Indemnity costs can be ordered as and when the justice of the case so requires: **Lee v. Mavaddat** [2005] WASC 68 (25 April 2005), per Roberts-Smith, J.*
- *For indemnity costs to be awarded there must be 'some form of delinquency in the conduct of the proceedings': **Harrison v. Schipp** [2001] NSWCA 13, at paras [1], [153]*
- *Circumstances in which indemnity costs are ordered must be such as to 'take a case out of the "ordinary" or "usual" category. . . ": **MGICA 91992) Ltd v. Kenny & Good Pty Ltd** (No.2) (1996) 140 ALR 707, at 711, per Lindgren J.*
- *'. . . it has been suggested that the order of costs on a solicitor and client basis should be reserved to a case where the conduct of a party or its representatives is so unsatisfactory as to call out for a special order. Thus, if it represents an abuse of process of the Court the conduct may attract such an order': **Dillon and Ors v. Baltic Shipping Co** ('The Mikhail Lermontov') (1991) 2 Lloyds Rep 155, at 176, per Kirby, P.*
- *Solicitor/client or indemnity costs can be considered appropriately 'whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known . . . he had no chance of success': **Fountain Selected Meats (Sales) Pty Ltd v. International Produce Merchants Ltd & Ors** (1998) 81 ALR 397, at 401, per Woodward, J."*

On 11th July 2014, the Defendants issued Civil Action No. 114 of 2014 ("the injunction proceedings") against the Plaintiff and Mr Anil Chandra. That same day, interim orders were granted by Hon. Justice Tuilevuka ex parte restraining the Plaintiff from:

- "preventing, interfering and/or restraining" the Defendants from having unrestricted access to the Property; and

- Levying distress for rent

In reaching the decision to grant the Interim Orders, Hon. Justice Tuilevuka noted that in the absence of the regulatory consent of the iTLTB, neither the Plaintiff nor the Defendants could derive any right from an illegal informal arrangement, including any right of occupation to the Defendants. Hon. Justice Tuilevuka also stated that nothing in his orders were to be misconstrued as giving the Defendants a right to remain in occupation of the Property.

On 24 July 2014, Munro Leys on instructions from the Plaintiff issued the Defendants another notice withdrawing any implied or express consent that may have been given to the Defendants to occupy Shop No. 6. The notice expired on 31 July 2014.

(18) The interim order of Hon. Justice Mr. Tuilevuka, in Civil Action No. 114 of 2014 reads as follows;

> *The purported levy of distress of rent is questionable for the following reasons:*
>
> - *the Applicant's Affidavit annexes a purported' lease agreement on NL 7179 which was not consented to by the iTaukei Lands Trust Board*
> - *the same agreement was not duly executed by the parties*
> - *while the plaintiff and the defendant may have an informal arrangement which is prima facie illegal by virtue of the absence of the regulatory consent of the iTLTB,* ***the parties may not derive any right from that illegal informal arrangement****, including the defendant's purported right to levy distress of rent, let alone any right of occupation to the plaintiff.*
> - *nevertheless, Mr Singh has drawn this Court's attention to material in the affidavit that, over the past year or so, $70,000 in rent including deposit and has spent approximately $121,000.00 in renovations on the property and the fact that the plaintiff has substantive, though yet un-quantified, stock in the premises – and accordingly, if the defendants were to pursue the distress of rent against the plaintiff – they would be unjustly enriched and be benefitting from what appears to me at this time to be an illegal arrangement.*
> - *flowing from the above, while I maintain that, from where I sit,* ***neither party can derive any benefit from their illegal arrangement****, it would seem that the balance of prejudice would favour the granting of injunction.*
> - *for the avoidance of doubt, these Orders I grant* ***are not to be misconstrued as giving the Plaintiff a right to remain in occupation****. Rather, these Orders I grant, only to stop the defendants fro pursuing the distress of rent.*
> - *for the record, the plaintiff indicates in Court that it is not interested in vacating the property. I cannot comment further on that except to say that it is for it and the defendant to regularise their arrangement.*
> - *I note that no Statement of Claim, Writ of Summons is filed but here record the undertaking of Counsel that one will be filed by 10.30 am on Monday 14 July 2014.*
> - *For the record, I grant these Orders on the condition that neither the Plaintiff nor any of its servants or agents will, except by retail sale, remove any stock in the premises until further Orders of the Court.*
>
> (Emphasis added)

(19) Despite the reasons given by Hon. Justice Tuilevuka in the order, the Defendants relied on an unlawful agreement to remain on the property and misused the process of the court by putting forward a defence which from the outset they knew was unsustainable.

To be more precise, the conduct of the Defendants in putting forward a defence which was patently unsustainable amounted to a misuse of the process of the court.

I echo the words of Powell J in "**Baillieu Knight Frank (NSW) PVT LTd v Ted Manny Real Estate PVT Ltd.**

> *"Costs are of course, a matter which lies in the discretion of the court. However, that discretion, being a judicial, rather than an unfettered one, must be exercised in accordance with established principle. The usual principle to be applied in inter partes litigation is that costs follow the event, those costs being taxed on a party and party basis.*
>
> *The circumstances in which one is justified in departing from that established principle are, as it seems to me, limited, and it seems to me that, as a general rule, an order that costs be taxed on an indemnity basis is justified only where the action taken, or the action threatened, by the defendant constituted, or would have constituted, an abuse of the process of the court, or where the* ***actions of the defendant, in the conduct of any defence to the proceedings, have involved an abuse of the process of the court, in the sense that the court's time, and the litigants' money, has been wasted on totally frivolous and thoroughly unjustified defences."***
>
> (Emphasis added)

Returning to the present case, I have no hesitation in holding that an award of indemnity costs is warranted since the Defendants have misused the process of the court.

(D) CONCLUSION

Having had the benefit of written submissions for which I am most grateful and after having perused the affidavits and the pleadings, doing the best that I can on the material that is available to me, I have no hesitation in holding that the Defendants have failed to show cause to remain in possession as required under section 172 of the Land Transfer Act.

In the circumstances, it is my considered view that the Plaintiff is entitled to an order as prayed in summons for immediate vacant possession.

(E) FINAL ORDERS

(1) I order that Defendants to deliver immediate vacant possession of the land described in the Originating Summons, dated 23rd January 2015.

(2) The Plaintiff is directed to file and serve its detailed costs for the assessment of the indemnity costs within 14 days from the date hereof.

30/06/2015

.....

Jude Nanayakkara
Acting Master of the High Court

At Lautoka
30th June 2015