IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 229 of 2015

BETWEEN : **SAHEDA KHAN AKA SAHEDA BARDEN** of 42 Jinnu Road, Waiyavi, Lautoka .

PLAINTIFF

A N D : **ANJILA DEVI** of 42 Jinnu Road, Waiyavi Lautoka.

DEFENDANT

(Ms.) Jyoti Sangeeta Singh Naidu for the Plaintiff
Mr. Michael Konnie Fesaetu, Legal Aid Commission, For the Defendant

Date of Hearing : - 23rd September 2016
Date of Ruling : - 07th December 2016

RULING

(A) INTRODUCTION

(1) The matter before me stems from the Plaintiff's Originating Summons, dated 16th December 2015, made pursuant to **Section 169** of the **Land Transfer Act**, for an Order for Vacant Possession against the Defendant.

(2) The Defendant is summoned to appear before the Court to show cause why she should not give up vacant possession of the Plaintiffs property comprised in **Housing Authority Sub-lease No- 454426 which contains Crown Lease No. 5037, Lot 92 on DP 4961 situated in the province of Ba, Vuda having an area of 16.2 perches.**

(3) The Originating Summons for eviction is supported by an affidavit sworn by the Plaintiff on 04th December 2015.

(4) The Originating Summons for eviction is strongly contested by the Defendant.

(5) The Defendant filed an 'Affidavit in Opposition' opposing the application for eviction followed by an 'Affidavit in Reply' thereto.

(6) The Plaintiff and the Defendant were heard on the 'Originating Summons'. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff filed a careful and comprehensive written submission for which I am most grateful.

(B) THE LAW

(1) In order to understand the issues that arise in the instant case, I bear in mind the applicable law and the judicial thinking reflected in the following judicial decisions.

(2) 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]

(3) 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.'

(4) 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."*

(5) 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

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

(2) The Plaintiff in her **'Affidavit in Support'** deposed *inter alia;*

Para 1. *I am the Plaintiff herein.*

2. *THAT this Affidavit is on my own belief and personal knowledge and all the information containing in this Affidavit is true to the best of my knowledge information and belief.*

3. *This is my application by way of summons supported by my Affidavit filed herein seeking an order for vacant possession against the Defendant pursuant to section 169 of the Land Transfer Act.*

4. *I am the registered proprietor of the property known as Housing Authority Sub-Lease No. 454426 Lot 92 DP 4961 in the Tikina of Vuda and Province of Ba situated at 42 Jinnu Road, Waiyavi Lautoka containing an area of 16.2 perches being residential property. Annexed herewith and marked as "SK1" is a true copy of the said lease.*

5. *THAT I became the registered proprietor of the said Lease No. 454426 on or about 28th day of April 2015.*

6. *I am the last registered proprietor and have indefeasible title over the said land.*

7. *The Defendant is in possession of the land and they do not have any consent or permission from the registered owner or me to be there.*

8. *The Defendant is occupying and unlawfully staying on the premises without any right whatsoever at the said property.*

9. *The Defendant is a nuisance to me and continues to interfere with the quiet possession of my land.*

10. *On the 12th August, 2015 I through my Solicitor, Qoro Legal served a notice dated 12th August, 2015 on the Defendant. Annexed herein and marked as "SK2" is a copy of the said Notice.*

11. *The Defendant failed refused and/or neglected to vacate the premises despite several request. The Defendant is trespassing on said land and continues to do so blatantly and forcefully in spite of warning and demands by me.*

12. *The Defendant is in possession of the property and she does not have any consent or permission from me to be there.*

13. *The Defendant is occupying and unlawfully staying on the premises without any rights whatsoever at said property.*

14. *That after I became the registered proprietor of the said Lease, I am paying for the Council rate and Housing Authority ground rents.*

15. *By the reasons of the matters aforesaid, I have been deprived of the use and enjoyment of the said premises and suffered loss and continue to suffer loss and damage.*

16. *I need the premises for my own use and for upgrading purposes and to carry out renovation and upgrading works.*

17. *I therefore ask for Order in Terms of the Summons with costs on a Solicitor Client Indemnity basis.*

(3) The Defendant for her part in seeking to show cause against the Summons, filed an **"Affidavit in Opposition",** which is substantially as follows;

Para 1. *I am the Defendant in these proceedings and I make this Affidavit from the facts within my own knowledge.*

2. *My Legal Aid Counsel has read and explained to me the Plaintiff's Affidavit in Support filed on 16th of December, 2015 and I have understood its meaning and effect.*

3. *In order for me to respond to the Plaintiff's affidavit, I will have to set out the background to the events of how I came to reside in the said property and what I believe incidentally gave rise to the Plaintiff making such an application against me.*

4. *The Plaintiff's father namely Ali Sher Khan and I had a traditional Muslim wedding on 27th day of December, 2001 held at 87 Vomo Street, Lautoka. The traditional Muslim ceremony known as "Nikah" was performed by a Pesh Imam named Haji Hafiz Musa Patel.*

5. *I moved in to live with the Plaintiff's father at 42 Jinnu Street, Waiyavi, Lautoka and I have since been residing at the said property for 16 years now.*

6. *Sometimes in 2014, the Plaintiff's father and I had a family dispute in which I filed a Domestic Violence Restraining Order Application against him in the Lautoka Magistrate's Court, Application No. 44 at 2014. The final order with only standard non-molestation orders was sealed by the Magistrate's Court on 14th of March, 2014.*

7. *The Plaintiff's father travelled to Australia sometime after our Domestic Violence Restraining Order case without informing me and without my knowledge he had transferred the property situated at 42 Jinnu Street, Waiyavi, Lautoka to the Plaintiff.*

8 *I have financially contributed to the maintenance and well being of the property. I have spent money towards the property for the past 16 years and I continue to do so. The money spent by me have been used for repair works done to the house like changing of the roofing irons, painting of the house, changing of the window louvers', changing of taps and pipes and cementing of the back porch. I also have spent on purchasing of the household items. My son namely Ashnil Kumar also known as Shafil had paid for a digger to level the compound. I have treated the said property as my own with care and protection of the property and I continue to do so since I moved in to live at the property 16 years ago.*

9. *I believe that the Plaintiff's father secretly transferred the property to the Plaintiff to defeat my claim for property distribution since I have informed him on numerous occasions of my interest in the property.*

The Plaintiff's Affidavit in Support

10. *I will respond to the substantive parts of the said affidavit and where no response is made to a particular paragraph that non response is not to be taken as an admission by me.*

11. *I admit to paragraphs 4, 5 and 6 and further state that the property was transferred to the Plaintiff by her father without my knowledge and I had known earlier that he would be transferring the property to the Plaintiff I would have taken action to stop the transfer and also would have sought a property distribution through the Family Court.*

12. *I deny paragraph 7, that I do not have any consent or permission from the registered owner or the Plaintiff. Before the property was transferred to the Plaintiff, I was already living in the property with her father who was then the registered owner and is my de-facto partner. The Plaintiff at all times has known of my relationship with her father and my occupation of the property from the time I moved in to live with her father 16 years ago.*

13. *I deny paragraph 8 that I am staying at the property unlawfully without any right whatsoever. I have a right having an interest in the property as a de-facto partner of her father who was then the registered owner and having substantially contributed financially and physically to the maintenance and care of the property.*

14. *I deny paragraph 9 that I am being a nuisance to the Plaintiff who does not reside in Fiji, she has been residing in Australia since I moved in to live at the property.*

15. *I admit to paragraph 10.*

16. *In response to paragraph 11 I agree to the extent that I have refused to vacate the premises however I did so on the basis that I have an interest in the property. Moreover, I deny that I am trespassing on the property. My continuous occupation of the property is in view of my legitimate interest in the property.*

17. *I deny paragraph 12 that there is a need to take consent or permission from the Plaintiff since she is already aware of my occupation of the property.*

18. *In response to paragraph 13 I deny that I do not have any rights whatsoever to stay in the property.*

19. *I am not aware of paragraph 14.*

20. *In response to paragraph 15 I deny that the Plaintiff had suffered a loss and continues to suffer or has as a result been deprived of the use and enjoyment of the property.*

21. *I disagree with paragraph 16 that the Plaintiff needs the premises for her own use and to carry out renovation and upgrade works.*

(4) The Plaintiff filed an **Affidavit in rebuttal** deposing *inter alia*;

Para 1. *THAT I am the Plaintiff herein.*

2. *THAT I depose this Affidavit with my own belief and personal knowledge and all the information containing in this Affidavit is true to the best of my knowledge information and belief.*

3. *THAT this affidavit is in reply to the Affidavit of the Defendant (herein after referred to as the "said affidavit") filed on 18th March, 2016.*

4. *THAT I take note of the contents of paragraphs 1 to 3 of the said Affidavit and make no comments on the same.*

5. *THAT in response to paragraphs 4 to 6 I state that the contents therein are only best known to the deponent and therefore I deny the same.*

6. *THAT in response to paragraph 7 I state that I am not aware what transpired between the Defendant and my Father, however I am aware that upon arrival in Australia my Father did contact the Defendant to advise his safe arrival.*

7. *THAT I deny the contents of paragraph 8 and further state that my Father had contributed to the maintenance of the property and I have also helped him on several occasions to keep up with the maintenance of the house since the property holds sentimental values to me.*

8. *THAT I deny the allegation of paragraph 9 of the said Affidavit and further state that the said property is a Housing lease and sometime in 2014 the Housing Authority had given notice to my Father for none payment of Housing rent. (Annexed herein and marked as "SK1" is a copy of the said letter). As per the said letter if the*

pending rent was not paid then the lessor could re-enter the property and/or cancel the lease.

9. *THAT my Father then advised that he does not have funds to pay the rent due and neither anybody else living with him wanted to contribute and he also advised he is having difficulty keeping up with the property and therefore suggested I pay the rent and he will give me the property under love and affection.*

10. *THAT I note the contents of paragraph 10 of the said affidavit.*

11. *THAT I accept the admission of the Defendants as per paragraph 11 and further sate that what transpired between my Father and the Defendant I am not aware.*

12. *THAT I also wish to state the property was built by my Mother and Father and when my Mother had passed away I had shares in the property and since I value the property immensely my Father decided to give the property to me thus I do not want to lose it at any cost due to any none payment of rent of lack of care.*

13. *THAT in response to paragraph 12 I state that I am the registered proprietor of the said Lease and I have not consented to the Defendant and/or her partner/family members staying there and therefore I deny the contents of the said paragraph.*

14. *THAT I deny paragraph 13 of the said property. I note there is no evidence provided of any maintenance or renovation done by the lady. I further state I have been contributing in the property ever since my Mother passed away in order for it to be in good condition and it is for that reason my Father has gifted it to me.*

15. *THAT I deny paragraph 14 and further state that I wish to live in the property when I visit Fiji next and further wish to develop the property which I am unable to do so while the Defendant is residing there, thus I am not able to enjoy my property fully.*

16. *I accept the admission of the Defendant as per paragraph 15.*

17. *THAT I disagree with the contents of paragraph 16 and further sate that I have been paying all the pending rent which the Defendant and my Father showed no interest to pay and it is only when the property is under my name the Defendant is showing interest. Annexed herewith are the copies of receipts for payment of the housing rent and the statement which are marked as "SK2" and "SK3" respectively.*

18. *THAT in response to paragraph 17 I state that I am the registered owner of the property and do not consent for the Defendant and her de facto partner/my father staying there. The property needs substantial renovation work which I intend to carry out upon eviction.*

19. *THAT I repeat paragraph 14 of my Affidavit in support and further state that the City rate had been pending for a considerable amount*

of years which the Defendant was aware or ought to be aware of. On previous occasion I had also advised the Defendant to pay the rate to which in response the Defendant stated they do not need to since they don't own the property. Annexed herewith and marked as "SK4" is the Statement of Lautoka City Council.

20. *THAT I deny paragraph 20 and further state that I am the one paying for City rate. Housing Rent and despite this I am not able to enjoy the benefit of my property.*

21. *THAT I deny paragraph 21 and further state that since I have spent so much on the property by paying the pending housing rent and city rate, I now wish to have full possession of the property.*

22. *THAT I paid over $2500 for the arrears of housing rent and around $2,000 for the city rate, therefore since I made these payments, my father then only decided to give his share of the property to me including my Mother's (Sila Wati Khan's) share.*

23. *THAT I deny paragraph 22 and humbly seek order in terms of my Application for eviction with full indemnity cost.*

(D) ANALYSIS

(1) 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;

169. *The following persons may summon any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant:-*

(a) the last registered proprietor of the land;

(b) a lessor with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such

rent and whether or not any previous demand has been made for the rent;

(c) *a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired.*

I ask myself, under which limb of Section 169 is the application being made?

Reference is made to paragraph (4) of the affidavit in support of the Originating Summons.

4. *I am the registered proprietor of the property known as Housing Authority Sub-Lease No. 454426 Lot 92 DP 4961 in the Tikina of Vuda and Province of Ba situated at 42 Jinnu Road, Waiyavi Lautoka containing an area of 16.2 perches being residential property. Annexed herewith and marked as "SK1" is a true copy of the said lease.*

Section 169 (a) of the Land Transfer Act, Cap 131, requires the Plaintiff to be the last **registered proprietor** of the land.

The term "**proprietor**" is defined in the Land Transfer Act as "*the registered proprietor of land, or of any estate or interest therein*".

The term "**registered**" is defined in the **Interpretation Act**, Cap 7, as "*registered used with reference to a document or the title to any immovable property means registered under the provisions of any written law for the time being applicable to the registration of such document or title*"

According to the Housing Authority Sub-lease No- 454426 (annexure marked SK-1 referred to in the affidavit of the Plaintiff, sworn on 4th December 2015) the Plaintiff is the last registered lessee of the subject land. There is no dispute between the parties as to the *'locus standi'* of the Plaintiff. The **Housing Authority Sub-lease No-454426** is registered with the Registrar of Titles on 23rd December 1996. According to the memorial of the Housing Authority Sub-lease No- 454426, the Plaintiff obtained registered title on 28th April 2015. Thus, it seems to me tolerably clear that the Plaintiff holds a registered lease and could be characterised as the last registered proprietor.

On the question of whether a **lessee** can bring an application under Section **169 (a) 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 the learned 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."*

A somewhat similar situation as this was considered by His Lordship Justice K.A. Stuart in **Housing Authority v Muniappa** (1977, FJSC.) His Lordship held that the Plaintiff Housing Authority holds a registered lease therefore it could be characterised as the last registered proprietor.

In **Habib v Prasad** [2012] FJHC 22, Hon. Madam Justice Angala Wati said;

> *"The word registered is making reference to registration of land and not the nature of land. If the land is registered either in the Registrar of Titles Office or in the Deeds Office, it is still registered land. This land has been registered on 4th March, 2004 and is registered at the Registrar of Deeds Office, it is still registered land. The registration is sufficient to meet the definition of registered in the Interpretation*
>
> *Act Cap 7:-*
>
> *"Registered" used with reference to a document or the title to any immoveable property means registered under the provision of any written law for the time being applicable to the registration of such document or title".*

Applying the aforesaid principles to the instant case, I am driven to the conclusion that the Plaintiff is the last registered proprietor of the land comprised in Housing Authority Sub-lease No- 454426.

(2) Pursuant to Section 170 of the Land Transfer Act;

(1) **the Summons shall contain a "description of the Land"**

AND

(2) **shall require the person summoned to appear in the court on a day not earlier than "sixteen days" after the service of Summons.**

The interval of not less than 16 days is allowed to give reasonable time for deliberations and to prevent undue haste or surprise.

I ask myself, are these requirements sufficiently complied with by the Plaintiff?

The Originating Summons filed by the Plaintiff does contain a description of the subject land. The subject land is sufficiently described. For the sake of completeness, the Originating Summons is reproduced below in full.

ORIGINATING SUMMONS

(a) *AN ORDER that the Defendants do forthwith give vacant possession of the Plaintiff's Housing Authority Sub-Lease No. 454426 which contains ALL THAT PIECE OR PARCEL OF LAND known asLot 92 DP 4961 in the Tikina of Vuda and Province of Ba situated at 42 Jinnu Road, Waiyavi Lautoka containing an area of 16.2 perches being residential property.*

(b) *AN ORDER that costs of this application be paid by the Defendants.*

(c) *ANY OTHER ORDERS the Court deem just and equitable.*

This Application is made pursuant to section 169 of the Land Transfer Act Cap 131 and upon the inherent jurisdiction of the Court and upon grounds set out in the Affidavit of Saheda Khan aka Saheda Barden filed herein at the hearing of this application.

In light of the above, I have no doubt personally and I am clearly of opinion that the first mandatory requirement of Section 170 of the Land Transfer Act has been complied with.

(3) Now comes a most relevant and, as I think, crucial second mandatory requirement of Section 170 of the Land Transfer Act.

The Originating Summons was returnable on 20th January 2016. According to the Affidavit of Service filed by the Plaintiff, the Originating Summons was served on the Defendant on 14th January 2016.

Therefore, the Defendant is summoned to appear at the Court on a date earlier than "sixteen days" after the Service of Summons. Therefore, the second mandatory requirement of Section 170 of the Land Transfer Act has not been complied with.

However, on 20th January, 2016 when the matter was first called the Defendant was granted 14 days to file her affidavit in opposition. It is of interest to note that the Defendant did not raise objections to the short service of the Originating Summons. However, the short service was adequately compensated as the Defendant was granted

14 days to file her affidavit in opposition. (See; **Rokovi v Kumar , 2011, FJHC 1492.**)

(4) To sum up; having carefully considered the pleadings, evidence and oral submissions placed before this Court, it is quite possible to say that the Plaintiff has satisfied the threshold criteria spelt out in Section 169 and 170 of the Land Transfer Act. **The Plaintiff has established a prima facie right to possession.**

Now the onus is on the Defendant to establish a lawful right or title under which she is entitled to remain in possession.

In the context of the present case, I am comforted by the rule of law expounded in the following judicial decisions.

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 the case of **Morris HedstromLimited –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]

(5) What are the Defendant's reasons refusing to deliver vacant possession?

The application for vacant possession is opposed by the Defendant on various reasons expressly set-out in the Affidavit in Opposition. There is a considerable amount of overlap between one reason and another and that it is more likely to be helpful for them to be looked at cumulatively rather than separately. The reasons fall within a very small compass.

Reference is made to paragraph (4), (5), (6), (7), (8), (9), (12), (13) and (16) of the Defendant's Affidavit in Opposition.

> *Para 4. The Plaintiff's father namely Ali Sher Khan and I had a traditional Muslim wedding on 27th day of December, 2001 held at 87 Vomo Street, Lautoka. The traditional Muslim ceremony known as "Nikah" was performed by a Pesh Imam named Haji Hafiz Musa Patel.*
>
> *5. I moved in to live with the Plaintiff's father at 42 Jinnu Street, Waiyavi, Lautoka and I have since been residing at the said property for 16 years now.*
>
> *6. Sometimes in 2014, the Plaintiff's father and I had a family dispute in which I filed a Domestic Violence Restraining Order Application against him in the Lautoka Magistrate's Court, Application No. 44 at 2014. The final order with only standard non-molestation orders was sealed by the Magistrate's Court on 14th of March, 2014.*
>
> *7. The Plaintiff's father travelled to Australia sometime after our Domestic Violence Restraining Order case without informing me and without my knowledge he had transferred the property situated at 42 Jinnu Street, Waiyavi, Lautoka to the Plaintiff.*

8. *I have financially contributed to the maintenance and well being of the property. I have spent money towards the property for the past 16 years and I continue to do so. The money spent by me have been used for repair works done to the house like changing of the roofing irons, painting of the house, changing of the window louvers', changing of taps and pipes and cementing of the back porch. I also have spent on purchasing of the household items. My son namely Ashnil Kumar also known as Shafil had paid for a digger to level the compound. I have treated the said property as my own with care and protection of the property and I continue to do so since I moved in to live at the property 16 years ago.*

9. *I believe that the Plaintiff's father secretly transferred the property to the Plaintiff to defeat my claim for property distribution since I have informed him on numerous occasions of my interest in the property.*

12. *I deny paragraph 7, that I do not have any consent or permission from the registered owner or the Plaintiff. Before the property was transferred to the Plaintiff, I was already living in the property with her father who was then the registered owner and is my de-facto partner. The Plaintiff at all times has known of my relationship with her father and my occupation of the property from the time I moved in to live with her father 16 years ago.*

13. *I deny paragraph 8 that I am staying at the property unlawfully without any right whatsoever. I have a right having an interest in the property as a de-facto partner of her father who was then the registered owner and having substantially contributed financially and physically to the maintenance and care of the property.*

16. *In response to paragraph 11 I agree to the extent that I have refused to vacate the premises however I did so on the basis that I have an interest in the property. Moreover, I deny that I am trespassing on the property. My continuous occupation of the property is in view of my legitimate interest in the property.*

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

- The Defendant in the action is the de facto wife of the Plaintiff's father namely "Ali Khan".

- The subject land was leased by the Director of Lands to the Fiji Housing Authority.

- The Plaintiff's mother namely Sila Wati and father name Ali Khan were given and held the land under a registered sublease for eighty three years, one month eleven days from the Housing Authority approved by the Board from 29th day of September 1985.

- The Plaintiff's mother and the father were the joint registered proprietors and legal owners of the property.

- The Plaintiff's mother and the father lived together in a settled relationship *ipso facto* shared the rights of ownership in the asset acquired, constructed a dwelling house in the property acquired and used for the purpose of their life together. The house has been their family home.

- After the death of the Plaintiff's mother, the Defendant moved into the house in December 2001. Thereafter, the Plaintiff's father and the Defendant lived as man and wife.

- The relations between the parties deteriorated, and in 2014 the Plaintiff's father left the house leaving the Defendant there.

- On 28th April 2015, the Plaintiff's father transferred the ownership of the property to the Plaintiff (annexure marked "SK-1" referred to in the Affidavit of the Plaintiff, sworn on 04th December 2015.)

- The Plaintiff does not consent to the Defendant's continual living on the land on which the house stands. By written notice in August 2015 the Plaintiff required the Defendant to quit. (Annexure marked "SK-2" referred to in the Affidavit of the Plaintiff, sworn on 04th December 2015)

- The Defendant has refused to vacate the property.

- The Defendant asserted that she was under the impression that her de-facto husband (the Plaintiff's father) was providing a home for her. In the same breath she asserted that the house has been her family house and she has permission and licence from her de-facto husband to live permanently in the house. Therefore, she argues that the Plaintiff is estopped from turning her out.

- Moreover, the Defendant asserted that she and her de-facto husband lived together in the land on which the house stands for 13 years (2001 – 2014). It was further asserted that she made a substantial contribution to the maintenance of the house.

  (I note that she has not exhibited proof of expenditure).

  The Defendant claims equitable interest in the property in view of her financial contribution towards the maintenance of the house and also in view of her long term occupation.

(7) One which I think worth mentioning is that the Plaintiff's mother (Sila Wati) and the father had obtained land made available by the Housing Authority which was to be for married couples only. The Policy of the Authority is to help married people. It is of interest to note that the Plaintiff's mother and the father erected a dwelling house in the property for their family. The property was house for them and their family (1985-2001). **The Defendant moved to this house about 16 years after the acquisition of the lease and the building project.**

Therefore, it seems tolerably clear that the land on which the house stands is the matrimonial property of the Plaintiff's mother (Sila Wati).

(8) Let me now turn to decide whether the Defendant has a beneficial or equitable interest in the land on which the house stands.

The law does not recognise a concept of family property, whereby people who live together in a settled relationship *ipso facto* share the rights of ownership in the assets acquired and used for the purposes of their life together. Nor does the law acknowledge that by the mere fact of doing work on the asset of one party to the relationship the other party will acquire a beneficial or equitable interest in the asset.

The question of whether one party to the relationship acquires rights to the property the legal title to which is vested in the other party must be answered in terms of existing law of Trusts. There are no special doctrines of equity applicable in this field alone.

In a case such as the present the inquiry must proceed in **two stages.**

First, by considering whether something happened between the parties, in the nature of bargain, promise or tacit common intention, at the time of the acquisition.

Second, if the answer is 'Yes', by asking whether the claimant subsequently conducted herself in a manner which was;

(a) detrimental to herself

And

(b) referable to whatever happened on acquisition.

Put another way, if the legal estate in the joint home is vested in only one party (the legal owner) the other party (the claimant), in order to establish a beneficial interest, has to establish a constructive Trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. This requires two matters to be demonstrated;

(a) that there was a common intention that both should have a beneficial interest.

(b) that the claimant has acted to his or her detriment on the basis of that common intention.

It is these principles I apply.

There are many cases that have examined, analysed and confirmed these principles. The following are some of the well known authorities.

- **Maharaj v Chand**
  (1986) 32 FLR 119

- **Gissing v Gissing**
  (1970) 2 All ER 780

- **Eves v Eves**
  (1975) 2 All ER 768

I can see no reason why the rule of law enunciated in the aforementioned judicial decisions should not be applied in the case before me.

(9) Turning to the case before me, I conclude that the Defendant is not entitled to an equitable/beneficial interest in the house and her defence to claim for possession is without substance because;

- The association of the Defendant and her de facto husband began 16 years after the acquisition of the land and the building of the house.

- The Defendant did not finance the acquisition of the lease and the building of the house.

- **A bare assertion (without proof of expenditure)** that the Defendant financially contributed to the maintenance of the house is not sufficient to justify that she has some equitable interest in the property. (See; **Bidder v Bridges, 1884, Ch.D, Vol 26 , Page 01**)

- ❖ The evidence adduced by the Defendant utterly fails to show the existence of any common intention that she should share in the ownership of the property.

(10) Finally, the Defendant contends that there is equity or proprietary estoppel arising out of her long term occupation.

Annexure marked "SK-1" referred to in the Affidavit of the Plaintiff (sworn on 04th April 2016) shows that there were ground rent arrears of $2067.00 as at 10th March 2014.

In the circumstances, it seems that it may properly be inferred that the Defendant did not make contributions to ground rent payable under the lease. Thus, how could she have an interest in the property?

On the question of whether the Defendant's occupation of the subject land for whatever length of time, a circumstance giving rising to any form of proprietary estoppel or equity, if any authority is required, I need only refer to the sentiments of Fatiaki J in **Wati v Raji** (1996) FJHC 105; The Hon. Judge held;

> *"Turning finally to the question of* ***'proprietary estoppel', Suffice it to say that the mere occupation of a piece of land on a yearly tenancy for whatever length of time, is not a circumstance capable of giving rise to any form of 'estoppel', proprietary or otherwise, nor in my view is any 'equity' created thereby which the court would protect.***
>
> (Emphasis added)

Applying those principles to the case before me and carrying those principles to their logical conclusion, I have no hesitation in holding that the Defendant's occupation of the property for whatever length of time is not a circumstance capable of giving rise to any form of estoppel, proprietary or otherwise nor is any equity created thereby which the court would protect.

(11) To sum up, for the reasons which I have endeavoured to explain, it is clear beyond question that the Defendant has failed to show cause to remain in possession as required under Section 172 of the Land Transfer Act.

At this point, I cannot resist in reiterating the judicial thinking reflected in the following judicial decisions;

In the case of **Morris Hedstrom Limited v Liaquat Ali,** CA No, 153/87, the Supreme Court held,

> *"Under Section 172 the person summonsed may show cause why he refused to give possession of the land 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 a right must be adduced."***
>
> (Emphasis is mine)

In **Shankar v Ram,** (2012) FJHC 823; HBC 54.2010, the Court held;

> *"What the Defendant needs to satisfy is not a fully – fledged right recognized in law, to remain possession but some tangible evidence establishing a right or some evidence supporting an arguable case for such a right to remain in possession. So, even in a case where the Defendant is unable to establish a complete right to possession, if he can satisfy an arguable case for a right still he would be successful in this action for eviction, to remain in possession."*

Being guided by those words, I think it is right in this case to say that the Defendant has failed to adduce some tangible evidence establishing a right or supporting an arguable case for such a right. It is not disputed that at the time the Plaintiff

commenced the proceedings she was the registered owner of the Housing Authority Sub-lease No- 454426. Under Section 169, the Plaintiff is entitled to seek possession of the property on the **strength of her title**. Her right to possession depends on her **registered ownership**.

Thus, I disallow the grounds adduced by the Defendant refusing to deliver vacant possession.

(12) Finally, the Plaintiff moved for **'indemnity costs'.**

It is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing **"indemnity costs"**.

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.

G.E. Dal Pont, in "Law of Costs", Third Edition, writes at Page 533 and 534;

'Indemnity' Basis

"Other than in the High Court, Tasmania and Western Australia, statute or court rules make specific provision for taxation on an indemnity basis. Other than in the Family Law and Queensland rules – which define the 'indemnity basis' in terms akin to the traditional 'solicitor and client basis' – the 'indemnity basis' is defined in largely common terms to cover all costs incurred by the person in whose favour costs are ordered except to the extent that they are of general law concept of 'indemnity costs'. The power to make such an order in the High Court and Tasmania stems from the general costs discretion vested in superior courts, and in Western Australia can arguably moreover be sourced from a specific statutory provision.

Although all costs ordered as between party and party are, pursuant to the 'costs indemnity rule', indemnity costs in one sense, an order

for 'indemnity costs', or that costs be taxed on an 'indemnity basis', is intended to go further. Yet the object in ordering indemnity costs remains compensatory and not penal. References in judgments to a 'punitive' costs order in this context must be seen against the backdrop of the reprehensible conduct that often justifies an award of indemnity costs rather than impinging upon the compensatory aim. Accordingly, such an order does not enable a claimant to recover more costs than he or she has incurred."

Now let me consider what authority there is on this point.

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

As to the **"General Principles",** Hon. 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] FCA 536; (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 and 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 (1992) 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*** *[1988] FCA 202; (1998) 81 ALR 397, at 401, per Woodward, J.*
- *Albeit rare, where action appears to have commenced/continued when 'applicant ... should have known ... he had no chance of success', the presumption is that it 'commenced or continued for some ulterior motive or ... [in] willful disregard of the known facts or ... clearly established law' and the court needs 'to consider how it should exercise its unfettered discretion':* ***Fountain Selected Meats****, at 401, per Woodward, J.*
- *Where action taken or threatened by a defendant 'constituted, or would have constituted, an abuse of the process of the court', indemnity costs are appropriate:* ***Baillieu Knight Frank (NSW) Pty Ltd v. Ted Manny Real Estate Pty Ltd*** *(1992) 30 NSWLR 359, at 362. per Power, J.*
- *Similarly where the defendant's actions in conducting any defence to the proceedings have involved an abuse of process of the court whereby the court's time and litigant's money has 'been wasted on totally frivolous and thoroughly unjustified defences':* ***Baillieu Knight Frank****, at 362, per Power, J.*

- *Indemnity costs awarded where 'the defendant had prima facie misused the process of the court by putting forward a defence which from the outset it knew was unsustainable ... such conduct by a defendant could amount to a*

*misuse of the process of the court': **Willis v. Redbridge Health Authority** (1960) 1 WLR 1228, at 1232, per Beldam, LJ*

- *'Abuse of process and unmeritorious behaviour by a losing litigant has always been sanctionable by way of an indemnity costs order inter parties A party cannot be penalised [for] exercising its right to dispute matters but in very special cases where a party is found to have behaved disgracefully or where such behaviour is deserving of moral condemnation, then indemnity costs may be awarded as between the losing and winning parties': **Ranjay Shandil v. Public Service Commission** (Civil Jurisdiction Judicial Review No. 004 of 1996, 16 May 1997), at 5, per Pathik, J. (quoting Jane Weakley, 'Do costs really follow the event?' (1996) **NLJ** 710 (May 1996))*
- *'It is sufficient ... to enliven the discretion to award [indemnity] costs that, for whatever reasons, a party persists in what should on proper consideration be seen to be a hopeless case': **J-Corp Pty Ltd v. Australian Builders Labourers Federation Union of Workers (WA Branch)(No. 2)** (1993) 46 IR 301, at 303, per French, J.*
- *'... where a party has by its conduct unnecessarily increased the cost of litigation, it is appropriate that the party so acting should bear that increased cost. Persisting in a case which can only be characterised as "hopeless" ... may lead the court to [determine] that the party whose conduct gave rise to the costs should bear them in full': **Quancorp Pty Ltd &Anor v. MacDonald &Ors**[1999] WASC 101, at Paras **[6]-[7]**, per Wheeler, J.*
- *However, a case should not be characterised as 'hopeless' too readily so as to support an award of indemnity costs, bearing in mind that a party 'should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain' for 'uncertainty is inherent in many areas of law' and the law changes 'with changing circumstances': **Quancorp Pty Ltd &Anor v. MacDonald &Ors** [1999] WASC 101, at Paras **[6]-[7]**, per Wheeler, J.*
- *The law reports are replete with cases which were thought to be hopeless before investigation but were decided the other way after the court allowed the matter to be tried: **Medcalf v. Weatherill and Anor** [2002] UKHL 27 (27 June 2002), at 11, per Lord Steyn*
- *Purpose of indemnity costs is not penal but compensatory so awarded 'where one party causes another to incur legal costs by misusing the process to delay or to defer the trial and payment of sums properly due'; the court 'ought to ensure so far as it can that the sums eventually recovered by a plaintiff are not depleted by irrecoverable legal costs': **Willis v. Redbridge Health Authority**, at 1232, per Beldam, LJ*
- *Actions of a Defendant in defending an action, albeit being determined by the trial judge as 'wrong and without any legal justification, the result of its own careless actions', do 'not approach the degree of impropriety that needs to be established to justify indemnity costs ... [R]egardless of how sloppy the [Defendant] might well have been in lending as much as $70,000 to [a Plaintiff], they had every justification for defending this action ... The judge was wrong to award [indemnity costs] in these circumstances. He should have awarded costs on the ordinary party and party scale': **Credit Corporation (Fiji) Limited v. Wasal Khan and Mohd Nasir Khan** (Civil*

Appeal No. ABU0040 of 2006S; High Court Civil Action No. HBC0344 of 1998, 8 July 2008), per Pathik, Khan and Bruce, JJA, at 11

Defining 'Improper', 'Unreasonable' or 'Negligent' Conduct in Legal Proceedings as Guide to Indemnity Costs Awards: *Cases where 'wasted costs' rules or 'useless costs' principles have been applied against solicitors where their conduct in proceedings has led to delay and/or abuse of process can provide some assistance in determining whether conduct in proceedings generally may be such as to warrant the award of indemnity costs. These cases specifically relate to solicitors' conduct rather than directly touching upon the indemnity costs question; nonetheless the analysis or findings as to what constitutes conduct warranting an award of costs can be helpful. See for example:*

- ***Ridehalgh v. Horsefield and Anor****[1994] Ch 205*
- ***Medcalf v. Weatherill and Anor****[2002] UKHL 27 (27 June 2002)*
- ***Harley v. McDonald*** *[2001] 2 AC 678*
- ***Kemajuan Flora SDN Bh v. Public Bank BHD &Anor****(High Court Malaya, Melaka, Civil Suit No. 22-81-2001, 25 January 2006)*
- ***Ma So So Josephine v. Chin Yuk Lun Francis and Chan Mee Yee*** *(FACV No. 15 of 2003, Court of Final Appeal Hong Kong Special Administrative Region, Final Appeal No. 15 of 2003 (Civil)(On Appeal from CACV No. 382 of 2002, 16 September 2004)*
- ***SZABF v. Minister for Immigration (No. 2)*** *[2003] FMCA 178*
- ***Heffernan v. Byrne*** *[2008] FJCA 7; ABU0027.2008 (29 May 2008)*

Some of the matters referred to include:

- *At the hearing stage, the making of or persisting in allegations made by one party against another, unsupported by admissible evidence 'since if there is not admissible evidence to support the allegation the court cannot be invited to find that it has been proved, and if the court cannot be invited to find that the allegation has been proved the allegation should not be made or should be withdrawn:* ***Medcalf v. Weatherill and Anor****, at 8, per Lord Bingham*

- *At the preparatory stage, in relation to such allegations – not necessarily having admissible evidence but there should be 'material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it:* ***Medcalf v. Weatherill and Anor****, at 8, per Lord Bingham*
- *Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples of wasting the time of the court or an abuse of its processes resulting in excessive or unnecessary costs to litigants:* ***Harley v. McDonald****, at 703, Para* ***[50]*** *(English Privy Council)*

- *Starting an action knowing it to be false is an abuse of process and may also involve knowingly attempting to mislead the court:* ***Ma So So Josephine v. Chin Yuk Lun Francis and Chan Mee Yee*** *(FACV No. 15 of 2003, Court of Final Appeal Hong Kong Special Administrative Region, Final Appeal No. 15 of 2003 (Civil)(On Appeal from CACV No. 382 of 2002, 16 September 2004), at Para* ***[43]****, per Ribeiro, PJ (Li, CJ, Bokhary and Chan, PJ and Richardson, NPJ concurring)*
- *Lending assistance to proceedings which are an abuse of the process of the court – using litigious procedures for purposes for which they were not intended, 'as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest' or evading rules intended to safeguard the interests of justice 'as by knowingly failing to make full disclosure on ex parte application[s] or knowingly conniving at incomplete disclose rue of documents':* ***Ridehalgh v. Horsefield*** *[1994] Ch 205, at 234, per Bingham, MR*
- *Initiating or continuing multiple proceedings which amount to abuse of process:* ***Heffernan v. Byrne*** *[2008] FJCA 7; ABU0027.2008 (29 May 2008), per Hickie, J.*

Specific Circumstances of Grant/Denial Indemnity Costs: *Specific instances supporting or denying the award of indemnity costs include:*

- *Indemnity costs follow per a '****Calderbank*** *offer', that is, where a party makes an offer or offers prior to trial, which is/are refused, and that party succeeds at trial on a basis which is better than the prior offer:* ***Calderbank v. Calderbank****[1975] 3 WLR 586*
- *However, no indemnity costs awarded where* ***Calderbank*** *letter contains no element of compromise, making it not unreasonable for the party not to accept the offer. The question is '... whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs ...':* ***SMEC Testing Services Pty Ltd v. Campbelltown City Council*** *[2000] NSWCA 323, at Para[37], per Giles, JA Hence, if the* offer is not a genuine offer of compromise and/or there is no appropriate opportunity provided to consider and deal with it, then no indemnity costs follow: **Richard Shorten v. David Hurst Constructions P/L; D. Hurst Constructions v. RW Shorten** [2008] Adj LR 06/17 (17 June 2008), per Einstein, J. (NSW Supreme Court, Equity Division T&C List); **Leichhardt Municipal Council v. Green** [2004] NSWCA 341, at Paras**[21]-24], [36]**, per Santow, JA, Stein, JA (concurring); **Herning v. GWS Machinery Pty Ltd (No. 2)** [2005] NSWCA 375, at Paras**[4]-[5]**, per Handley, Beazley and Basten, JJA; **Elite Protective Personnel v. Salmon** [2007] NSWCA 322, at Para **[99]; Donnelly v. Edelsten**[1994] FCA 992; [1994] 49 FCR 384, at 396

- *Indemnity costs awarded:*
  - *upon a winding-up petition's being presented on a debt known to the petitioner to be genuinely disputed on substantial grounds;*
  - *the clearly established law being that a winding up order will not be granted in such circumstances, meaning that the petitioner 'had no chance of successfully obtaining a winding up order';*
  - *where in these circumstances the filing of the petition 'constituted a deliberate tactical manipulation of the winding up process by the [petitioner, the State Government Insurance Commission 'SGIC'] for the purposes of bringing very substantial pressure to bear' on Bond Corp Holdings 'BCH';*
  - *this in the circumstances meant that the 'filing of the petition was an abuse of process of the court in the true sense of that expression';*
  - *the discretion to stay the petition should not be exercised because this would 'cause BCH serious harm' meaning it would be 'extremely difficult for BCH to be able to conduct its business normally if the petition [were] not dismissed': citing* ***Re Lympne Investments*** *[1972] 1 WLR 523, at 527, per Megarry, J.; also* ***Re Glenbawn Park Pty Ltd*** *[1977] 2 ACLR 288, at 294, per Yeldham, J.*
  - *an abuse of process 'having been established in the circumstances outlined, justice requires the award of solicitor and client, or, rather, "indemnity" costs' so that 'the SGIC should be ordered to pay all the costs incurred by BCH except insofar as they are of an unreasonable amount or have been unreasonably incurred, so that, subject to [these] exceptions, BCH be completely indemnified by the SGIC for its costs', citing* ***Foundation Selected Meats (Sales) Pty Ltd v. International Produce Merchants*** *[1988] FCA 202; (1988) 81 ALR 397, at 410, per Woodward J.:* ***Re Bond Corp Holdings Ltd*** *(1990) 1 ACSER 350, at 13, per Ipp, J.*

- *Indemnity costs are appropriate where an applicant (in an unfair dismissal):*
  - *'insists' over a respondents' objections that an application should proceed to trial rather than await the outcome of other possible litigation (including a police investigation);*
  - *fails repeatedly, despite allowances, to meet deadlines for lodgment of a witness statement;*
  - *fails to advise her lawyers of her whereabouts so denying them of the ability to inform the court of reasons for seeking an unqualified adjournment less than a week prior to trial;*

- *fails to comply with directions to provide a current address, consult a medical specialist and obtain a report of fitness to attend the trial;*
- *fails to appear at the final hearing when on notice that the application will be dismissed in event of such failure:* ***Nicole Pender v. Specialist Solutions Pty Ltd*** *(No. B599 of 2004. 17 May 2005), per Bloomfield, Commissioner*

- *Indemnity costs denied as against a Plaintiff who discontinued a claim for a permanent injunction to restrain a Defendant's industrial action, where the Defendant had filed a chamber summons seeking to have the Plaintiff's claim struck out as an abuse of process:* ***Cooperative Bulk Handling Ltd v. Australian Manufacturing Workers Union (WA Branch)*** *(Unreported, WASC, Lib. No. 970190, 30 April 1997), per Wheeler, J.*

- *Indemnity costs cannot be awarded in a criminal appeal, albeit 'in criminal appeals, as in civil cases, unreasonable conduct by the unsuccessful party might increase a usual award':* ***Sayed Mukhtar Shah v. Elizabeth Rice and Ors*** *(Crim Appeal No. AAU0007 of 1997S, High Ct Crim Action No. HAA02 of 1997, 12 November 1999), at 4, per Sir Moti Tikaram, P., Casey and Barker, JJA*

- *Indemnity costs awarded then reversed on appeal where solicitor held liable for costs (under a 'wasted costs' order) in initiating action for clients where solicitor taken to have known that the basis of the clients' action was wholly false"*

I observed that the oral and written submissions of Counsel for the Plaintiff has not addressed why *'indemnity costs'* should be awarded **in the current proceedings for vacant possession.**

The Court has not been pointed to any "*reprehensible conduct*" in relation to the **current proceedings for vacant possession**. Indeed, as was set out by in ***Carvill v HM Inspector of Taxes*** (Unreported, United Kingdom Special Commissioners of Income Tax, 23 March 2005,Stephen Oliver QC and Edward Sadler)(Bailii:[2005]UKSPCSPC00468,http://www.bailii.org/cgibin/markup.cgi?doc=/uk/cases/UKSC/2005/SPC00468.html),"*reprehensible conduct*" requires two separate considerations (at paragraph 11):

"The party's conduct must be unreasonable, but with the further characteristic that it is unreasonable to an extent or in a manner that it earns some implicit expression of disapproval or some stigma."

I have not found, any evidence of "reprehensible conduct" by the Defendant in relation to the present proceedings before me.

In my view, the Defendant has done no more than to exercise her legal right to contest the Plaintiff's Summons for vacant possession. This simply does not approach the degree of impropriety that needs to be established to justify indemnity costs. The Defendant is not guilty of any conduct deserving of condemnation as disgraceful or as an abuse of process of the court and ought not to be penalised by having to pay indemnity costs.

In the context of the present case, I am comforted by the rule of law enunciated in the following decisions;

In **Ranjay Shandill v Public Service Commission** [Civil Jurisdiction Judicial Review No:- 004 of 1996] Pathik J held;

> *"[A party] cannot be penalised [for] exercising its right to dispute matters but in very special cases where a party is found to have behaved disgracefully or where such behaviour is deserving of moral condemnation, then indemnity costs may be awarded as between the losing and winning parties."*

In **Quancorp PVT Ltd &0020Anor v. MacDonald &Ors** [1999] WASC 101, Wheeler J held;

> *".... 'hopeless' too readily so as to support an award of indemnity costs, bearing in mind that a party 'should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain' for 'uncertainty is' inherent in many areas of law' and the law changes' with changing circumstances"*

Furthermore, is it a correct exercise of the Court's discretion to direct the Defendant to pay costs on an indemnity basis to the Plaintiff because the Plaintiff had undergone hardships during the present proceedings for vacant possession?

The answer to the aforesaid question is in the negative which I base on the following judicial decisions;

- **Public Service Commission v Naiveli**
  Fiji Court of Appeal decision, No: ABU 0052 11/955, (1996) FJCA 3

- **Thomson v Swan Hunter and Wigham Richardson Ltd, (1954) ,(2) AER 859**

❖ **Bowen Jones v Bowen Jones (1986) 3 AER 163**

In "**Public Service Commission v Naiveli**" ;(*supra*),The Fiji Court of Appeal held;

> ***"However, 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 – see the examples discussed in Thomson v. Swan Hunter and Wigham Richardson Ltd [1954] 2 All ER 859 and Bowen-Jones v. Bowen Jones [1986] 3 All ER 163."*
>
> (Emphasis added)

On the strength of the authority in the aforementioned three (03) cases, I venture to say beyond a per-adventure that neither considerations of hardship to the Plaintiff nor the over optimism of the unsuccessful Defendant would by themselves justify an award beyond party and party costs.

(E) CONCLUSION

Having had the benefit of oral submissions for which I am most grateful and after having perused the affidavits, written submissions and the pleadings, doing the best that I can on the material that is available to me, I have no doubt personally and I am clearly of the opinion that the Defendant has failed to show cause to remain in possession as required under Section 172 of the Land Transfer Act.

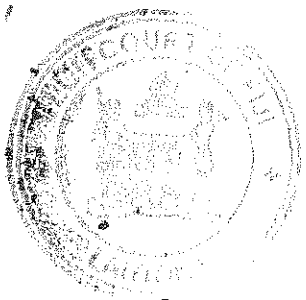
In these circumstances, I am driven to the conclusion that the Plaintiff is entitled to an order as prayed in Summons for immediate vacant possession.

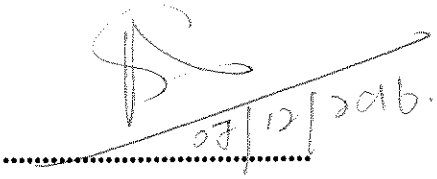
(F) ORDERS

(1) The Defendant to deliver immediate vacant possession of the land comprised in **Housing Authority Sub-lease No- 454426, Lot 92 on DP 4961.**

(2) The Plaintiff's application for indemnity costs is refused.

(3) The Defendant being legally aided there will be no order as to costs.





Jude Nanayakkara
Master

At Lautoka
07th December 2016.