

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. 458 of 1993

BETWEEN : RESOLUTION TRUST CORPORATION  
*First Plaintiff*

AND : THE CADLE COMPANY  
*Second Plaintiff*

AND : LEINANI K. BORTLES and LARRY LYNEL BORTLES  
*First Defendants*

AND : A. MITCHEL GAY  
*Second Defendant*

AND : ALAN C. BEALL  
*Third Defendant*

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr W Clarke for the First and Second Plaintiffs.  
Ms S Shameem (Ms D Gandhi with her) for the 2<sup>nd</sup> named First Defendants.

Date of Hearing : 27<sup>th</sup> October 2016  
Date of Decision : 1<sup>st</sup> November 2016

**DECISION**

1. At the outset of the hearing, Mr H. R Nagin of Counsel for the Second and Third Defendants asked to be excused from attending and said he would rely on the submission of Counsel for the First Defendants.
2. This is the First and Second Plaintiffs' Summons to register a Court Order. It is supported by the affidavit of Denise Harkless (Harkless).
3. The Application is opposed by the Second named First Defendant (Bortles) who has affirmed an affidavit in response to Harkless's affidavit.
4. Counsel for the Plaintiffs in his oral submission said the judgment has been registered on the title concerned. He was asking for an order under section 105(2) of the Land Transfer Act (LTA). The Summary Judgment had been registered at the Registry of Titles. He was only asking for order 2 of the Summons.
5. Counsel for the First Defendants then submitted. She asked how could the Plaintiffs register an order against the title when it is not proved that Bortles is the owner and he had not been given an opportunity to prove that he is a trustee. She referred to the rulings of Fatiaki J and Master Rajasinghe. She submitted the judge had said that ownership cannot be proved on affidavits and did not allow caveats to be lodged.
6. Plaintiffs' Counsel replied they were only seeking to register a money order against the title.
7. He said Section 38 of the LTA confirmed that the instrument was conclusive evidence of title. They were only asking for an extension of 6 months.
8. At the conclusion of the hearing I said I would take time for consideration. Having done so, I now deliver my decision.

9. The root of this summons is the order of Master Udit dated 31 March 2009 (the judgment). He ordered summary judgment to be entered against the First Defendants for:
- (a) Damages in the amount of **US\$2,878,910.65** and interest at the rate of 7.02% per annum from 4 May 1991 and late charges in the amount of **US\$742,002.39** and costs; and
  - (b) Damages in the amount of **US\$954,375.00** and **\$18,213.00** representing costs and Attorney's fees and interests at the rate of 3.14% from 26 August 1992; and
  - (c) An order that the Plaintiffs retain caveat on the title of the properties of the First Defendants and each of them have sole ownership and control being CT 6684 being Lot 1 on DP 1277 pending realization of the judgment debt.
10. Subsequently Acting Master Rajasinghe (as he then was) ruled on 2 June 2014, that the First Defendants' application to set aside the 1<sup>st</sup> and 2<sup>nd</sup> orders in the Judgment is dismissed and the 3<sup>rd</sup> order is set aside. These are (a) and (b) and (c) in the judgment. The master said at para 46, he was satisfied the first 2 orders made in the judgment were entered regularly. It is therefore incorrect for Counsel for Bortles to say in paras 1.0.2 and 4.0 of her written submission that the summary judgment has been set aside.
11. It is also not correct for Bortle's Counsel to say at para 2.4(iv) that "The issue of actual ownership of CT 6684 has never been determined." This is because Fatiaki J in the 2<sup>nd</sup> para on page 3 of his Ruling dated 14 September 1994 said "Quite simply on the face of the Transfer and C.T. 6684 the second defendant (Larry Lynel Bortles) is the sole registered proprietor of an indefeasible estate in fee simple of the land comprised in the title."
12. Plaintiffs' Counsel submits they are not seeking to lodge caveats upon the title but to register the judgment thereon. This requires me to peruse the title concerned a photocopy of which is annexed to Bortles' affidavit. This shows that indeed Larry Lynel Bortles is

registered as the owner as a result of a transfer to him on 13 September 1984. There is no notation on the title that he is holding as a nominee or as a trustee.

13. I shall now consider the authority cited by Bortles' Counsel. This is the decision of the Court of Appeal, Fiji in Paul Nagaiya v James Subhaiya: [1969] 15 FLR 212. In page 5, Marsack J.A. said there must be cogent and compelling evidence of the existence of a trust, how it came into existence and who are the persons on behalf of whom the property is held by the trustee, if it is sought to establish that the registered proprietor is in fact holding the lands as trustee and not as a beneficial owner.
14. No such evidence at all is to be found in Bortles' affidavit. From start to finish, he never mentions even once that he is holding the property as a trustee.
15. I think it is necessary to express a final view on an argument which was strenuously urged on the 1<sup>st</sup> Defendants' behalf. This argument was to the effect that the Plaintiffs had failed to prove that CT 6684 was owned by Bortles.
16. Bortles' Counsel also referred to protection of ownership and interest in land provided for under section 29 of the Constitution.
17. If I may say so, Counsel for Bortles has so ably argued her case, that I am able to conclude that I do not entertain any doubt whatsoever that Bortles is indeed the owner of the property concerned. By resorting to the Constitution, Counsel has succeeded in proving that her client is indeed the owner of the land and has thus fortified the Plaintiffs' contention based on section 38 of the LTA that the title is irrefutable proof of Bortles' ownership as owner, period.
18. Section 38 of the LTA states "No instrument of title registered under the provisions of this Act shall be impeached or defeasible by reason or on account of any informality or in any

application or document or in any proceedings previous to the registration of the instrument of title." In other words under the Torrens System in Australia and Fiji *etc.* it is title by registration.

19. Section 105(2) of the LTA provides that every judgment shall cease to bind any estate or interest in land in respect of which it is registered unless a transfer upon sale under such judgment shall be presented for registration within 6 months or such extended period as the court by order shall determine.
20. This is precisely what the Plaintiffs are seeking from this Court.
21. At the end of the day I am satisfied that the Plaintiffs have succeeded to the requisite standard of proof in showing their entitlement to the order sought.
22. In fine, I hereby order that the period within which a transfer, of the land held under Certificate of Title No. 6684, by sale under the judgment, shall be presented to the Registrar for registration, be extended by six (6) months from today until 1 May 2017.
23. The Second named First Defendant shall pay costs which I summarily assess at \$1,500.00 to both Plaintiffs.

Delivered at Suva this 1<sup>st</sup> day of November 2016.



David Alfred  
**JUDGE**  
High Court of Fiji