

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 377 of 2020

BETWEEN: **ORCHID FLAT INVESTMENT LIMITED** a limited liability company duly incorporated under the companies Act having its registered office at Suva.

PLAINTIFF/ RESPONDENT

AND: **CONSTRUCTION EQUIPMENT HIRE PTE LIMITED** a limited liability company duly incorporated under the companies Act and having its registered office at Suva.

DEFENDANT/ APPELLANT

Before: Mr. Justice Deepthi Amaratunga

Counsel: Mr. Savou J the Plaintiff - Respondent
Mr. Prakash R and Mr. Nandan S for the Defendant -Appellant

Date of Hearing: 05.10.2023

Date of Judgment: 15.03.2024

JUDGMENT

INTRODUCTION

- [1] Plaintiff is a legal entity and the last Registered Proprietor of CT 43301. Defendant is a legal entity and it was issued a notice for eviction by the solicitor for Plaintiff-Respondent (Plaintiff) on 9.11.2020. Failure to vacate the land resulted filing of an action for eviction of Defendant from land described in CT 43301 and also from CT 42542. In the affidavit in opposition Defendant did not contest the eviction from CT42542.
- [2] After hearing of originating summons for eviction, Master on 16.3.2023 handed down decision evicting Defendant from both parcels of land. This was in terms of extended jurisdiction of Master¹.
- [3] At the outset Defendant-Appellant (Defendant) informed that the appeal is only confined to land described in CT 43301 which is only one part of Master's judgment as the eviction from CT42542 was never contested.
- [4] Plaintiff filed action for eviction of Defendant in terms of Section 169 of Land Transfer Act 1972.
- [5] Plaintiff's counsel was initially under wrong apprehension that this application was made in terms of Order 113 of High Court Rules 1988, but when Master heard the matter all parties were aware of the correct position. This cannot be re-agitated in this Appeal as Defendant had filed written submissions before Master on the basis that this was an application in terms of Section 169 of Land Transfer Act 1969.
- [6] Defendant had admitted the title of Plaintiff, hence the burden is with Defendant to show a right to possession. Defendant is relying on proposed settlement between beneficiaries of late Gopal Pillay, but that settlement did not grant any right to possession of the land. There was no agreement as to the consideration for the said transfer and it is yet to be ascertained. There is no right to possession granted to Defendant pending determination of consideration.
- [7] There is no 'beneficial ownership' to Defendant for CT 43301, as contended by counsel for Defendant.

ANALYSIS

- [8] Plaintiff filed this action by way of originating summons in terms of Section 169 of Land Transfer Act 1971

¹ Extension of Jurisdiction to the Master to hear contested applications under O.59 r.2(k), O.88, O.113 and Land Transfer Act §169 granted by the Chief Justice: 5 October 2009 .

[9] Section 169 of Land Transfer Act 1971 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) 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.'(emphasis added)

[10] Plaintiff is the last registered proprietor of CT 43301 and this is an admitted fact. Defendant contend that this property was purchased by late Gopal Pillay and Sophia Khan who is presently sole Director of Plaintiff. CT 43301 belongs to Plaintiff which is a legal entity. It is trite law shareholders do not own properties of legal entities and lifting of corporate veil has no application to the facts of this action.

[11] In ***Fels and another v Knowles and another*** [\(1907\) 26 NZLR 604](#) Stout C.J (dissenting judgment) at p 613 in the interpretation of the New Zealand Land Transfer Act is based on Torrens system, held follows

'If the words of a statute in their ordinary meaning are clear, effect must be given to them, however inequitable they may be, and however they may infringe private rights. But the meaning must be clear.'

[12] Land Transfer Act 1971 is based on the same principles and provisions are analogous as both NZ and Fiji statues are based on Torrens system. The language contained in Land Transfer Act 1971 and the provisions relating to indefeasibility of the title and the meaning is clear. The advent of Torrens system and need for such system was explained in ***Fels and***

another v Knowles and another (supra) in the joint majority judgment (delivered by Edwards J) at p 619 as follows:

'In the course of centuries of our English history there had grown up a complicated system of rules regulating dealings with and transfer of real property. The result was that every dealing necessitated a minute and careful inquiry into the preceding title, attended by great expense, and never resulting in absolute certainty to title. More especially the rules affecting the administration of trusts and the fact that notice, direct or constructive, of a breach of trust might result in grievous loss to wholly innocent persons were felt to bear very hardly, without sufficient compensating advantages. Impressed by this view of the matter, it occurred, now many years ago, to an ingenious gentleman in South Australia, Mr. Torrens, that the Merchant Shipping Acts supplied a model for which a scheme of land registration could be devised, by which all trusts should be excluded from the register, and under which a person dealing honestly with the registered proprietor should not be called upon to look further than the register, and should be entirely unaffected by any breach of trust committed by the registered proprietor with whom he dealt. From this genesis sprang the system of land registration which now prevails in all the Australian Colonies and is now represented in this colony by "The Land Transfer Act 1885" and its amendments.'

- [13] Above brief history and the reason behind the Land Transfer Act in Australia and New Zealand is equally applicable to Fiji as the Land Transfer Act 1971, which came in to operation on 1.8. 1971 in Fiji is based on Torrens system and provisions in issue are analogous to the Land Transfer Act in New Zealand and Australia.
- [14] So, when the law contained in Land Transfer Act 1971, has to be applied and interpreted, it is important to keep in mind the rationale behind the indefeasibility in title. The words in the said Act is clear and unambiguous as to the rights of the last proprietor of property to seek eviction of person in possession in terms of said Act.
- [15] Defendant's contended that in terms of Section 169 an order for vacation of the possession cannot be sought is without merit. This is a trite law in Australia, New Zealand and also in Fiji, where identical statutory provision interpreted to allow a positive order for eviction by way of originating summons in terms of Land Transfer Act 1971. Such interpretation would make Section 169 of Land Transfer Act 1971 superfluous.

[16] Plaintiff's position is that Section 170 of Land Transfer Act 1971 does not contain an order for eviction as necessary particulars. This contention cannot hold water as Section 169 read with section 170 , 171 and 172 of Land Transfer Act 1971 is clear that person summoned under Section 169 must 'prove to the satisfaction' of the court, that such person has a right to possession in order to dismiss the summons. If that person fails to do so it is axiomatic, such person can be evicted through positive orders contained in originating summons without protracted hearing of evidence and prolonging eviction. This is the rationale in indefeasibility of title under Torrens System.

[17] The utility of originating summons in terms of Section 169 of Land Transfer Act 1971 is for 'ejectors' as stated on the heading, of it. Summary eviction is the essence of originating summons in terms of special provisions contained in Land Transfer act 1971. This is a special originating summons in terms of Land Transfer Act 1971.

[18] Section 170 of Land Transfer Act 1971 states,

'170. 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.'

[19] There is no need to state order for eviction in the above provision as it is self-evident fact in this type of an application as Section 171 deals with 'order for possession' and Section 172 confer jurisdiction to court to make 'any order' under 'terms' the court consider fit and that includes an order for eviction with or without suitable terms.

[20] Without an order for eviction an order for possession cannot be made when there is already a party in possession. If the land in question is not in possession there is no need to seek an order by way of originating summons and seek show cause the person in possession prior to orders for possession of the registered proprietor.

[21] Section 171 of Land Transfer Act 1971 deals with order for possession, states,

'Order for possession

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.'

[22] So, an order for possession is not made without proof of some vital facts stated in Section 171. In this appeal there is no dispute as to proof of title. Defendant admits that Plaintiff is the registered owner of CT 43301, but state that Defendant cannot be evicted by originating summons in terms Land Transfer Act 1971 and or Defendant is a 'beneficial owner' of CT 43301 and or summary procedure is not suitable for eviction of Defendant.

[23] Plaintiff who is last registered owner can seek eviction of Defendant who is admittedly in possession of the land described in CT 43301.

[24] In ***Fels and another v Knowles and another*** (supra) further at p 620 the following appears:

'The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute.'

[25] There is no allegation of fraud against Plaintiff in obtaining registered ownership.

[26] Plaintiff is the registered proprietor and this is not disputed in the affidavit in opposition. Defendant had admitted that CT 43301 belongs to Plaintiff which is a legal entity. It also admit possession.

[27] By the same token Defendant contend that this action is not suitable for determination for 'summary procedure'. The procedure contained in part 24 of Land Transfer Act 1971 confers special jurisdiction to deal with evictions relating to lands registered under Land Transfer Act 1971. This is a special procedure by way of originating summons and such application for possession by Plaintiff can be ejected in terms of Section 172 of Land Transfer Act 1971. So, any objection for eviction application by last registered owner needs to satisfy requirements stated in Section 172 of Land Transfer Act and failure is an order for eviction.

[28] Section 172 of Land Transfer Act 1971 states,

'Dismissal of summons

172. 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, mortgagee or lessor or he may make **any order** and impose **any terms he may think fit**' (emphasis added)

- [29] In this Appeal Master had stayed the execution for six months granting Defendant sufficient time to move out. This is within jurisdiction of Master to 'impose any terms' that is suitable under the circumstances. Master had also granted order for possession for Plaintiff.
- [30] In terms of Section 172 defendant must establish a 'right to the possession to' CT 43301 and this is mandatory to dismissal of summons of Plaintiff. So any dispute or litigation that does not give 'right to the possession' to Defendant, cannot be a reason to dismiss Plaintiff's summons for eviction of Defendant.
- [31] It is the Defendant's 'right to possession' that is considered in Section 172 to dismissal of the summons, in order to allow possession of Defendant.
- [32] Defendant had failed to 'prove to the satisfaction' of the court such a right.
- [33] Contention of Defendant regarding shareholding of Plaintiff does not give Defendant a right to possess an asset belonging to Plaintiff. According to Defendant it is going to institute an action against sole Director and shareholder, but this will not give a right to possession to Defendant.
- [34] Defendant admits that sole shareholder of Plaintiff at the moment of filing this action is Sophia Khan, who had sworn an affidavit in support of this summons.
- [35] Defendant is a legal entity and could not state how it acquired a right to possess the land described in CT 43301. Proposed litigation about shareholding of sole shareholder does not prove a right to possession. The unregistered interest it allegedly derived from terms of settlement was that CT 43301 is to be transferred to third party 'after the consideration value for the transfer of Certificate of Title No 43301 is determined to gather with the value of stamp duty and capital gains payable'. As there was on evidence that consideration was determined

between the parties to settlement despite more than two years had lapsed at the time of the institution of this action on 15.12.2020. When it was heard before Master on 23.3.2022 another two years lapsed. There was no determination of consideration at the time of delivery of decision on 16.3.2023 or even at hearing of this appeal on 5.10.2023 indicating no beneficial ownership to any party regarding CT 43301 in terms of the said terms of settlement.

[36] Defendant is relying on a terms of settlement between third parties which had not materialized due to disagreement as to the amount of consideration. Defendant was not a party to said settlement of properties belonging to Estate of late Gopal and there was no determination of consideration in this settlement, so no 'beneficial ownership' gained by Defendant.

[37] Hinde McMorland & Sim Land Law in New Zealand states under The Effect of Registration'² as follows,

*'on registration the instrument has the effect to create or transfer or otherwise affect the estate or interest specified in the instrument.'*³

*Even when the instrument is registered, it is not the instrument which passes the estate or interest, but the state itself.'*⁴

[38] Further, under 'Beneficial owner' stated,

² Hinde McMorland & Sim Land Law in New Zealand

³ Registration of an instrument under the Land Transfer Act [1952] is the event which creates or transfers a legal interest in registered land ...": Duncan v McDonald [1997] 3 NZLR 669 at 681, (1997) 3 NZ ConvC 192,623 CaseBase document for this case at 192,635 (CA) per Blanchard J for the Court, cited in Ballance Agri-Nutrients (Kapuni) Ltd v The Gama Foundation [2006] 2 NZLR 319 CaseBase document for this case, (2006) 6 NZCPR 678 at [49] (CA) per Robertson J, noted (2006) 12 BCB 46 (Harrop). In Half Moon Bay Ltd v Crown Eagle Hotels Ltd [2002] UKPC 24 at [34] Lord Millett said that the section in the Jamaican Torrens statute corresponding to the Land Transfer Act 2017, s 22(1) and (2), "merely operates to prevent the instrument of transfer from having any effect in itself to pass any estate or interest; the estate or interest passes only upon registration ...". It is stated in Baalman 2nd ed, 1974, p 170, that s 24(1) of the land Transfer Act 1952 "makes the acquisition of an estate or interest a statutory consequence rather than the result of a re-valued instrument".

⁴ "It is not the parties who effectively transfer the land, but it is the state that does so, and in certain cases more fully than the party could": Commonwealth v State of New South Wales (1918) 25 CLR 325 at 342 per Isaacs and Rich JJ dissenting, but not on this point. (Emphasis in original.) This statement of principle was cited with approval in relation to the 1952 Act by Barker J in Merbank Corp Ltd v Cramp [1980] 1 NZLR 721 at 728, by Kirby P in Hemmes Hermitage Pty Ltd v Abdurahman (1991) 22 NSWLR 343 at 345 (CA) and by Allan J in Warin v Registrar-General of Land (2008) 10 NZCPR 73 at 95. See also the comment in H, M & S, 1978, vol 1, at [2.050], n 3, on the statement made by Lord Wright in Abigail v Lapin [1934] AC 491 at 500 (PC) and in relation to the Real Property Act 1900 (NSW) by Kirby P in Hemmes Hermitage Pty Ltd v Abdurahman (1991) 22 NSWLR 343 at 345 (CA).

'A beneficial owner is a single estate owner (either an individual or a corporation) who owns the whole of the legal and equitable interest in the property for his own benefit' (footnotes deleted)

[39] Without ascertainment of consideration for the transfer of CT 43301 which was a requirement in terms of the Terms of Settlement entered by beneficiaries of the Estate of late Gopal Pillay no beneficial ownership had accrued to Defendant for CT43301.

[40] So the Master had considered this summons for eviction in terms of the law as this was a matter suitable for summary eviction of Defendant. There is typographical error on the number of Certificate of Title and that can be rectified in this appeal. Subject to said rectification decision of Master is affirmed.

[41] The Appeal grounds are considered below separately

Appeal Ground 1

[42] *'The Learned Master erred in fact and in law by dealing with the Respondent's application in a summary manner when in all circumstances of the present case, it would have been in appropriate to deal with the said application in a summary manner.'*

[43] CT 43301 is registered in the name of Plaintiff and Defendant admits this fact. So the burden is with the Defendant to show a right to possession and no such right shown in the affidavit in opposition for reasons given earlier in this decision. This is an action suitable for summary determination by way of originating summons. The documentary evidence are not disputed and Defendant relied on terms of settlement between beneficiaries of the estate of late Gopal Pillay, which had not granted any right of possession to Defendant.

Appeal Ground 2

[44] *'The Learned Master erred in fact and in law in holding that the Appellant had failed to show cause to the standard required under Section 172 of the Land Transfer Act for the following reasons:*

- a) *The Respondent did not summon the Appellant to show cause pursuant Section 169 of the Land Transfer Act;'*

Defendant was served with the summons and it had failed to show cause as to its occupation on the land described in CT 43301. Defendant was served with originating summons that satisfied the details required in terms of Section 170 of Land Transfer Act 1971, as it contained description of the land and it was served to Defendant on 6.1.2021 and summons indicated 15.2.2021 for Defendant to show cause. So Defendant was allowed more than 16 day time period to reply.

In any event time stated in the originating summons was not material as order for eviction was made by Master on 16.3.2023 which was more than two years from service of the summons to Defendant. Sixteen day minimum time is given for a Defendant to prepare affidavit in opposition before hearing of summons for eviction, and in this instance, hearing was 23.3.2022 which was again more than one year from the service of the summons for eviction. So Defendant was granted more than one year to show cause, and it had filed an affidavit in opposition. Summons also contained description as CT 43301 being Lot 2 on DP 11132. So the land is properly described in summons.

- b) *'The Learned Master proceeded to hear the matters as an application under Section 169 of the Land Transfer Act despite the counsel for the Respondent having on record stated prior to the hearing date that the application had been made under Order 113 of the High Court Rules;'*

There was no misapprehension at the time of hearing before Master as well as in this Appeal. Written submission filed by present solicitors for Defendant discussed the law relating to eviction in terms of Section 169 of Land Transfer Act 1971 and not Order 113 of High Court Rules 1988.

This is clearly an afterthought after initial mistake on the part of the counsel making an error. There was no prejudice to Defendant and it had filed an affidavit in opposition and also submissions relating to Land Transfer Act 1971 as opposed to High Court Rules 1988.

- c) *'Waste Management Solutions Pte Limited was the beneficial owner Of CT 43301 and not the Respondent;'*

Defendant is not Waste Management Solutions Pte Ltd hence it cannot rely on the alleged 'beneficial ownership' as there was no evidence of beneficial ownership to Defendant.

Alleged beneficial ownership is based on amended terms of settlement dated 16.12.2019 (only to Clause 4.16.2 or terms of settlement entered on 8.8.2018) repealed, the proposed transfer from Defendant to Waste Management Solution Limited, but the consideration for the value for the transfer was to be determined in future in terms of Clause 4.16.5. This was not agreed between the parties at that time or even at the time of hearing of this action by Master.

So transfer was not executed due to want of consideration being agreed among the parties. So there was no 'beneficial interest' even to the said third party (i.e. Waste Management Solutions Pte Ltd).

According to affidavit in opposition Defendant 'the intention of the parties involved in the Estate of Gopal Pillai was just as my Company (which is the Defendant Company) currently occupies CT 43301, I would become sole shareholder of Waste Management Solutions Limited which company would then occupy CT 43301.'

This is a farfetched right of Defendant. Being a related company cannot be considered as having 'beneficial ownership' on future event.

- d) *'Waste Management Solutions Pte Limited and the Appellant were and are related entities under the effective control of the same management;'*

Management of a legal entity is again an afterthought as no such evidence before Master in the affidavit in opposition. Same management cannot derive 'right to possession' from another legal entity, which had not derived 'beneficial ownership' to CT 43301 due to reasons given earlier.

- e) *'CT 43301 was to be transferred to Waste Management Pte Limited in accordance with Terms of Distribution of the Estate of Gopal Pillai dated the 2nd day of December 2013 and the Amended Terms of Distribution of the Estate of Gopal Pillai dated the 17th of May 2018.'*

Indefeasibility of the title depend on the registration of the title and Defendant cannot claim any beneficial interest under said Terms of Distribution of the Estate of Gopal Pillai which could not

be executed due to lack of consideration being agreed between parties. Such terms cannot create beneficial ownership even to third party upon which Defendant relied for possession for reasons given earlier.

Appeal Ground 3

[45] *'The Learned Master erred in fact and in law in failing to hold that the Appellant had actually shown cause as to why it should not have to give up vacant possession of Certificate of Title Number 43301';*

Master had held that Defendant had now shown a right to possession in terms of Section 172 of Land Transfer Act 1971. There is no right to possession for Defendant shown by Defendant for reasons given earlier.

Appeal Ground 4

[46] *'The Learned Master erred in fact and in law in failing to uphold the objections of the Appellant to the use of the deponent Sophia Khan's defective affidavits without the Respondent seeking leave of the Honourable Court or the Honourable Court granting any such leave at the hearing of the Respondent's application for the following reasons:*

- a) The deponent did not put any evidence of particulars of the officers of the Respondent before the Honourable Court;*
- b) The deponent did not put any evidence of the Respondent authorizing the deponent to swear the affidavit in support and the affidavit in reply before the Honourable Court;*
- c) The deponent gave facts and information in her affidavit which she was unable to depose from her own knowledge and without providing the particulars of the sources of such facts and information and grounds of her belief;*
- d) The deponent did not have necessary required endorsements in her affidavits as to on whose behalf the said affidavits had been filed as mandated under Order 41 Rule 9 (2). '*

[47] Above grounds are dealt together as they all relate to technical objection regarding affidavit in support. Defendant admits that deponent of the affidavit is the sole Director of Plaintiff and she had sworn the affidavit in support of the summons as to the title. Any

person privy to the facts can swear the affidavit in terms of Order 41 of High Court Rules 1988. In this instance the certificate of title is admitted hence the burden is shifted to Defendant to prove a right to possession.

[48] Plaintiff being an incorporated entity may seek its affidavit filed through a person who can prove facts on her own knowledge in terms of Order 41 rule 5(1) of High Court Rules 1988. Order 41 rule 4, Order 41 rule 9 and Order 41 rule 10 allows using an affidavit that found wanting of the provisions in the said Order 41. So the rationale under Order 41 of High Court Rules 1988, is clear. The discretion is with the court to allow or give directions as to comply with the requirements, but not to reject an affidavit thus denying the access to justice and adopt the path of least resistance. Order 2 rule 2 of High Court Rules 1988 states

“2.–(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or **any documents**, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.”(emphasis added)

[49] Rejection of affidavit in support will invariably set aside proceedings before Master and Defendant had not taken objections for the affidavit in support in terms of Order 2 rule 2 of High Court Rules 1988 before taking any step. It had filed an affidavit in opposition and there was no prejudice to Defendant. So such irregularity cannot be raised in this appeal to set aside Master’s decision in terms of Order 41 rules 4, 5, and 9 read with Order 2 rule 2 of High Court Rules 1988.

[50] Deponent had sworn to the fact about the title and this is an admitted fact. Even if affidavit in reply is not considered the Defendant had failed to prove to the satisfaction of the court a right to possession on the facts submitted in the affidavit in opposition.

Appeal Ground 5

[51] *‘The Learned Master erred in fact and in law in failing to hold that the burden had not shifted to the Appellant as there was no admissible evidence for the Respondent before the Honourable Court at the hearing of the Respondent’s application.’*

[52] Plaintiff had established the requirements stated in Section 171 of Land Transfer Act 1971 as discussed earlier and Defendant had failed to prove a right to possession to the satisfaction of the court.

[53] There is a typographical error in Master's decision as CT 43301 was by mistake stated as CT433301. This is corrected as there was no reason to make further applications to court considering the time this summary procedure had taken including this appeal. There was no stay of execution so, Plaintiff was at liberty to exercise order of Master handed down on 16.3.2023, irrespective of this appeal.

CONCLUSION

[54] Appeal is dismissed subject to correction of title in Master's decision to read Plaintiff is granted possession of CT 43301. Defendant had failed to prove to the satisfaction of the court a right to possession. There is no beneficial ownership to Defendant regarding CT 43301 in terms of the terms of settlement relied by Defendant. The cost this appeal is summarily assessed at \$3,000 considering circumstances of this case.

FINAL ORDERS:

- a. Appeal is dismissed subject to correction of Master's order to read as CT 43301, which granted Plaintiff to possession thus evicting Defendant from it.
- b. Decision of the Master handed down on 16.3.2023 affirmed subjected to above variation.
- c. Cost of this appeal summarily assessed at \$3,000 to be paid within 21 days.

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Deepthi Amaratunga
Judge



At Suva this 15th day of March, 2024.

Solicitors:

Jiaoji Savou
Mishra Prakash & Associates