

**IN THE FIJI COURT OF APPEAL, FIJI ISLANDS**  
**AT SUVA**

*Appellate Jurisdiction*

**CIVIL APPEAL NO. ABU0020 OF 2006**  
*(High Court Civil Action No. HBC 268 of 2005L)*

**BETWEEN** : **CIVIL AVIATION AUTHORITY OF FIJI**  
**ISLANDS** *Appellant*

**AND** : **LIMALEVU APISAI** *Respondent*

**Coram** : Byrne, J. A.  
Shameem, J. A.

**Counsel** : R. P. Singh for the Appellant  
F. Koya & S. Eparama for the Respondent

**Date of Hearing:** 13<sup>th</sup> February 2008

**Date of Judgment:** 25<sup>th</sup> March 2008

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***J U D G M E N T***  
*of Byrne, J. A. & Shameem, J. A.*

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[1] This is an appeal from a Judgment of the High Court at Lautoka on the 3<sup>rd</sup> of February 2006 in which the Court refused to make an eviction order against the Respondent under Section 169 of the Land Transfer Act Cap. 131. The Appellant relied upon two affidavits of Jayant Singh

the Assistant Manager Administration of the Civil Aviation Authority of the Fiji Islands sworn on the 13<sup>th</sup> of September and 21<sup>st</sup> of November 2005. The Respondent (*Defendant*) opposed the application and relied upon his affidavit sworn on the 15<sup>th</sup> of November 2005.

[2] The following facts were not in dispute -

- i) **The Respondent was an occupier of the premises pursuant to a *“Tenancy Agreement”* entered into between himself and the Appellant on the 15<sup>th</sup> of July 1993.**
- ii) **The Appellant by letter dated 29<sup>th</sup> of June 2005 served a notice to quit on the Respondent with respect to *“Quarters No. 337B at Delana, CAAFI Compound, Nadi Airport.”* The notice required the Respondent to vacate within one month.**
- iii) **The Appellant furnished to the Court a consent of the Ministry of Lands and Mineral Resources to the commencement of the proceedings for possession.**

[3] **Background**

The land, the subject of the proceedings was said to be the land comprised in Crown Lease No. 3469. The lease is described as being a "*special lease*" and is between the Director of Lands of Fiji and the New Zealand Government Property Corporation of New Zealand. It commenced on the 1<sup>st</sup> of April 1961.

[4] The lease is stated to be for a term "*of 99 years or for such time as the New Zealand Government Property Corporation continues as administering authority for the South Pacific Air Transport Council whichever is the shorter ...*" The lease is a protected lease under the provisions of the Crown Lease Ordinance Cap. 138.

[5] It is apparent that the lease was transferred to Nadi International Airport Property Company Limited on the 9<sup>th</sup> of September 1975. There was no evidence before the High Court of the consent of the Director of Lands to this transfer, as required by Section 13 of the Crown Lands Act.

[6] It is further apparent, and the learned Judge so found, that the subject land was vested in the Civil Aviation

Authority of Fiji by virtue of the operation of Section 14 of the Civil Aviation Authority of Fiji Act 1979.

[7] A copy of the Tenancy Agreement was annexed to the affidavit of Jayant Singh sworn on the 13<sup>th</sup> of September 2005. The Agreement was between the Civil Aviation Authority of Fiji and the Respondent. The Agreement states that it relates to premises "*situated at Nadi Airport and known as 337D Delana*". There was no evidence before the High Court that the Director of Lands consented to this Tenancy Agreement.

[8] After reciting the above facts the learned Judge then stated the law, as he understood it, on the issue between the parties. He said that Section 169 of the Land Transfer Act enables actions to be commenced for the recovery of possession of land. The section details the persons who are entitled to commence such proceedings. They are:

***“(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.”*

[9] Section 172 of the Land Transfer Act provides that a person summoned pursuant to Section 169 may show cause to the Court why he refuses to give possession of the land and if he proves to the satisfaction of the Court a right to possession of the land, the proceedings shall be dismissed.

[10] Section 13 of the Crown Lands Act provides:

*“(1) Whenever in any lease under this Act, there has been inserted the following clause:*

*This lease is a protected lease under the provisions of the Crown Lands Act” ... it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever ... without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law ...*

*Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void”.*

[11] The consent of the Director of Lands to commence proceedings can be obtained anytime before the land is

actually "*dealt with*" by the Court - Mohammed Rasul -v- Jeet Singh and Hazara Singh - 10 F.L.R. 16.

- [12] We interpolate here that this was a decision of Hammett Acting C. J. who held that land is not dealt with by the Court until an order has been made or a judgment of the Court delivered.
- [13] Section 14 of the Civil Aviation Authority Act 1979 vested in CAAF all real and personal property which immediately before the appointed day was vested in or belonged to the Nadi Airport Property Company Limited.
- [14] The Civil Aviation Reform Act 1999 had the effect of creating the Appellant, that is the Civil Aviation Authority of Fiji islands. Section 71 of that Act provides:

***"71(1) - A reference (express or implied) to the Civil Aviation Authority of Fiji in any written law, in any contract, instrument or register, in any other public or private document, or in any court proceedings is, unless the context otherwise requires, to be read and construed as a reference to the Civil Aviation Authority of the Fiji Islands".***

[15] On this material the Judge came to the following conclusions:

- (1) There being no consent to the tenancy to the Respondent as required by Section 13 of the Crown Lands Act, such tenancy is illegal, being illegal the tenancy agreement between the Appellant and Respondent is void ab initio - from the beginning. In Archbalds (Freightage) Ltd. -v- Spanglett Ltd. [1961] 1 Q. B. 374 at p. 384, Pearce L. J. with whom the two other members of the Court, Sellers L. J. and Devlin L. J. concurred said:

*“If a contract is expressly or by necessary implication forbidden by statute, or if it is ex facie illegal, or if both parties know that though ex facie legal it can only be performed by illegality or is intended to be performed illegally, the law will not help the Plaintiffs in any way that is a direct or indirect enforcement of rights under the contract. And for*



*this purpose both parties are presumed to know the law.”*

[16] Basing himself on Archbold's case the learned Judge concluded that the Respondent was unable to satisfy the Court pursuant to Section 172 of the Land Transfer Act that he was entitled to remain in possession of the property. He then said at paragraph 21 of his Judgment:

*“The Plaintiff only has a right to bring the proceedings if it satisfies one of the three bases detailed in Section 169 of the Land Transfer Act. If it is that there was no consent to the transfer of Crown Lease No. 3469 from the New Zealand Government Property Corporation of New Zealand to Nadi International Property Company Limited then the lease would be illegal, void ab initio and the Plaintiff would have no standing. There is no evidence before the court of the provisions of Section 13 of the Crown Lands Act having been complied with at the time of the transfer from the New Zealand Government Property Corporation to Nadi International Airport Property Limited.”*

[17] He was therefore not satisfied that the Appellant had legal standing to bring the proceedings. He considered the possibility that the Appellant might bring proceedings pursuant to Order 113 of the High Court which deals with summary proceedings for possession of land but based on the evidence before him he said he could not be satisfied as required by Order 113 Rule 3 that the Appellant had any interest in the land. He therefore dismissed the proceedings.

[18] In this Court the Appellant has made what we considered to be a very novel, if not daring submission, that the entire basis of this appeal rests on whether or not the Torrens system of title by registration can survive the requirement under Section 13 of the Crown Lands Act that all dealings with Crown Land must obtain the consent of the Director of Lands.

[19] Put another way, is disobedience of the consent requirement under Section 13 of the Crown Lands Act fatal under the Torrens system of title by registration?

[20] Alternatively, does disobedience of the consent requirement under Section 13 of the Crown Lands Act

equate to fraud under the Torrens system of title by registration?

[21] In our opinion, with due respect to the originality of counsel's submission, the question here is not as the Appellant would have it but rather whether protected leases of Crown Land must obtain the consent of the Director of Lands? In our Judgment the answer must undoubtedly be "yes". The Appellant cites various cases dealing with indefeasibility of title under the Land Transfer Act or, as it is often called, the Torrens system of title registration. We accept that it is well established common law as stated in these cases and others similar, that a registered interest in land cannot be defeated by anything other than fraud or various statutory exceptions such as misdescription of land. We accept as an accurate statement of the law, the remarks of Barwick C. J. in Breskvar -v- Wall [1971] 126 C.L.R. 376 at paragraph 15 of his Judgment:

*"The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which*

*but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void. The affirmation by the Privy Council in Frazer -v- Walker [1967] 1 A.C. 569 of the decision of the Supreme Court of New Zealand in Boyd -v- Mayor & c., of Wellington [1924] N.Z.L.R. 1174, at p.1223, now places that conclusion beyond question.”*

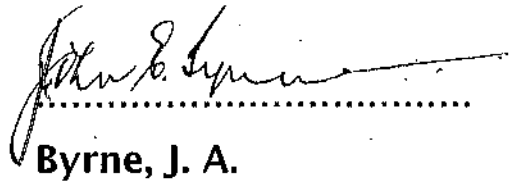
- [22] In a short Judgment concurring with that of Barwick C. J., Windeyer J. observed that the Chief Justice’s aphorism, **that the Torrens system is not a system of registration by title but a system of title by registration**, accords with the way in which Torrens himself stated the basic idea of his scheme as it became law in South Australia in 1857 in his booklet, a Handy Book on the Real Property Act of South Australia. It contains the statement that the new system introduced in South Australia substituted **“Title by Registration for “Title Deed”**.

[23] Ever since, this has been the very essence of the Torrens system, the equivalent of which in Fiji is the Land Transfer Act. However, as we said earlier, the question in this case is not about security of title which the Torrens system guarantees, but, in our judgment, whether there is anything in the Land Transfer Act which negates the requirement in the Crown Lands Act that protected leases of Crown Land must, for the sake of validity, first obtain the consent of the Director of Lands. In our judgment there is not. In our view the Land Transfer Act and the Crown Lands Act can easily run together, as they have for many years without question. In our view the purpose of Section 13 of the Crown Lands Act is to protect people such as the Respondent from arbitrary eviction from land of which they are tenants. In our view that does not run counter to anything in the Land Transfer Act.

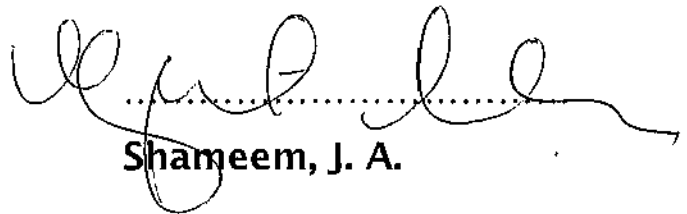
[24] The purpose of the Land Transfer Act, as we have said that of the Torrens system, is to ensure indefeasibility of title. It says nothing about not protecting leases under the Crown Lands Act. Such leases are protected under certain conditions, one of them being the consent of the Director of Lands to any dealings.

[25] In our Judgment therefore the novel or bold submission for the Appellant fails to recognize the differences between the two Acts. Accordingly, in our Judgment, Connors J. was correct in dismissing the Summons for Ejectment by the Appellant. This does not mean that the Appellant may not start proceedings again but only when it has obtained the necessary consents required by the Crown Lands Act.

[26] For these reasons the appeal is dismissed and the Appellant must pay the Respondent's costs which we fix at \$1,500.00. There will be orders in these terms.



Byrne, J. A.



Shameem, J. A.

**Solicitors:**

Messrs Patel & Sharma for the Appellant  
Koyas, Barristers & Solicitors for the Respondent