IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court

CIVIL APPEAL NO. ABU 83 OF 2020
High Court Civil Action No. HBC 205 of 2016

BETWEEN	:	1.	**THE DIRECTOR OF LANDS**
		2.	**THE ATTORNEY GENERAL OF FIJI**
		3.	**REGISTRAR OF TITLES**
			Appellants
AND	:	1.	**JOHNSON SUI SEEN CHEER**
		2.	**MICHAEL CHEER**
		3.	**JOSEPH CHEER**
			Respondents

Coram : **Jitoko, P**
Qetaki, JA
Andrews, JA

Counsel : **Ms S Taukei and Ms P Singh for the Appellants**
Mr N Vakalakau for the First Respondent

Date of Hearing : **10 November 2023**

Date of Judgment : **30 November 2023**

JUDGMENT

Jitoko, P

[1] I have read the judgment in draft of Andrews, JA and totally agree with her reasons and conclusions.

Qetaki, JA

[2] I have had the opportunity of considering the judgment of Andrews, JA in draft. I am in agreement with it, the reasoning and the proposed orders.

Andrews, JA

Introduction

[3] This is an appeal against the judgment of his Honour Justice Amaratunga, delivered in the High Court at Suva on 19 August 2020 (the High Court judgment).[1] The High Court judgment was concerned with the legality of the cancellation by the Registrar of Titles ("the Registrar") of two long-term leases of land after the Director of Lands ("the Director") re-entered the land, and the consequences that followed from the Judge's finding that the cancellation was unlawful. The appellants contend that the Judge erred in law and in fact in making findings against them, in favour of the first and second respondents, Johnson Sui Seen Cheer, and Michael and Joseph Cheer (collectively "the respondents").

[4] The Attorney-General ("the Attorney") is a party to the proceeding pursuant to s 12 of the State Proceedings Act 1951. The Attorney carried the conduct of the proceeding on behalf of the Registrar and the Director, and made submissions on their behalf both in the High Court and in this Court.

[5] As recorded above, Mr Vakalakau appeared in this Court for the first respondent, only. Accordingly, I will refer to his submissions on behalf of the first respondent, only. The first and second respondents will be referred

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[1] *Cheer v Director of Lands* [2020] FJHC 667; HBC205.2016 (19 August 2020).

to as "Johnson Cheer" and "Michael and Joseph Cheer" where it is necessary to refer to them individually.

Relevant facts

[6] Pursuant to leases dated 21 April 1961, the Director granted 99-year State Leases numbered CL3300 and CL3301 of commercial land at Samabula, Suva (the land), to Lem Kue. Two permanent structures were constructed on the land. Johnson Cheer is one of Lem Kue's children, and is the administrator and trustee of his estate. A Transmission by Death memorial was registered on the leases on 13 February 1996. Michael and Joseph Cheer are sons of Tse Chey Ming, a beneficiary of Lem Kue's estate. At the time of the events giving rise to this proceeding they were operating a business in one building, and living in the other.

[7] Arrears of rental notices ("breach notices") were issued pursuant to s 105(1) of the Property Law Act 1970 ("the PLA") at various times between 2001 and 2010 to either Johnson Cheer, or Michael Cheer. In early 2005, there were negotiations (through their respective solicitors) between Johnson Cheer and Michael Cheer as to Michael Cheer buying the leases. A purchase price of $700,000 plus payment of outstanding land and city rates of approximately $40,000 was agreed, but the sale was never completed.

[8] On 13 November 2010 the Director re-entered the property. Notices were affixed to the outside of the buildings, recording that the Director had that day entered into and taken possession of the land, on non-payment of rent. On 29 December 2011 Michael and Joseph Cheer were sent an eviction notice, requiring them to vacate within three months.

[9] On 18 January 2011, the solicitors for Michael and Joseph Cheer wrote to the Director applying for new leases, upon payment of all ground rent owed, all rates owed to the Suva City Council, and a "reasonable premium". The Director did not respond until 28 May 2012, at which time the Director advised that the leases "had been cancelled by way of re-entry". The Director

referred to "breaches of the lease conditions and non-payment of rent for years" which "were not attended to despite the various letters of reminders". The Director further advised that Michael and Joseph Cheer's request could not be granted, as the leases had been "issued to someone else who has paid all outstanding arrears of rent and city rates".

[10] In the meantime, on 23 January 2012 the Director applied to the Registrar to cancel registration of the leases, under s 57 of the Land Transfer Act 1971 ("the LTA"). The applications stated that on 1 January 2010 the rental for the leases had been in arrears for more than one calendar year and was still due and owing. Copies of breach notices were attached to the applications. An endorsement was entered on each of the leases recording that it had been cancelled on 1 March 2012, by re-entry.

The High Court proceeding

[11] On 11 August 2016 Johnson Cheer and Michael and Joseph Cheer issued proceedings against the Director, the Attorney-General and the Registrar,[2] seeking declarations and orders that:

[a] the Director acted in breach of s 105 of the PLA and his actions were therefore null and void and of no effect;

[b] the Registrar acted in breach of s 57 of the LTA and her actions were therefore null and void and of no effect;

[c] improvements constructed by the respondents on the land continued to belong to them;

[d] the appellants should reinstate the leases in the respondents' name;

[e] (in the alternative) the appellants should pay damages to the respondents at the current value of the land, and assessing such damages; and

[f] for costs.

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[2] The entity to which the new leases were issued was initially named as fourth defendant in the proceeding. The claim against the fourth defendant was struck out pursuant to a Ruling of his Honour Kamal Kumar J, on 21 February 2019.

The High Court judgment

[12] The Judge first recorded that the respondents were abandoning their claim against the Director under s 105 of the PLA, and their claim seeking reinstatement of the leases in their name.

[13] The Judge then considered an objection raised by the appellants, that as Michael and Joseph Cheer were neither the registered lessees nor executors of the estate of the registered lessee of the two leases, they did not have standing to bring the proceeding. The Judge overruled the objection, on the grounds that as occupiers and carrying on business on the land, Michael and Joseph Cheer had an interest in the land, of which they had been deprived, and thus had standing to bring the proceeding pursuant to ss 57 and 140 of the LTA.

Indefeasibility of Title

[14] The Judge recorded that the transmission of the leases to Johnson Cheer after the death of Lem Kue had been registered on the titles to the land. He held that indefeasibility of Johnson Cheer's interest could thereafter only be taken away from him in accordance with the provisions s 37 of the LTA (which provides that until registered in accordance with the provisions of the Act, no instrument will create, vary or extinguish or pass any estate or interest in land). The Judge recorded that Johnson Cheer's indefeasible interest was lost not as a result of the Director's re-entry under s 105 of the PLA, but as a result of the Registrar's cancellation of the leases. He held that if the Registrar exercises her power to cancel a lease (and thus eliminate a person's property rights) in excess of jurisdiction, or *ultra vires*, such cancellation is illegal and may be challenged in judicial review to quash the illegal action and be subject to claims for damages and declarations in civil proceedings.[3]

[3] High Court judgment, at paragraphs [39]-[48].

Compliance with s 57 of the LTA

[15] The Judge said that cancellation of a registered interest in land is a deprivation of rights enshrined in the Constitution of the Republic of Fiji,[4] and thus requires the Registrar to act in accordance with the provisions of the LTA.[5] He rejected the appellants' submission that the Registrar in the present case was not required to comply with proviso (b) of s 57 of the LTA, describing it as "a misconception of law".[6] He referred to the judgment of this Court in *Forum Hotels Ltd v Native Land Trust Board*,[7] and held that it is clear from s 57 of the LTA that while the Registrar has authority to cancel leases upon re-entry by lessor, that authority is not unfettered.

[16] The Judge held that in exercising the authority to cancel a lease, the Registrar was required to be satisfied that the lessor's re-entry and recovery, whether by formal process of law or in accordance with the provisions of the lease as to re-entry, was lawful. He stated that there "was no dispute that re-entry was not pursuant to any sort of formal court process", which he described as "through an action filed and through orders of court".[8] He noted the Registrar's evidence that the leases were cancelled after she was satisfied of lawful re-entry, based on the Director's statutory declaration in support of the application to cancel, and found that the re-entry was founded only on non-payment of arrears of rent.[9]

[17] The Judge rejected the appellants' argument that the Registrar was only required to give notice of the application to cancel to persons with registered interests. He distinguished notice under s 57(a) (which is restricted to persons with registered interests) from notice under s 57(b) (which refers to notice to all persons interested under the lease). He further referred to a contention by the Registrar that she was not aware of parties who had no registered interests

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4 cf s29 of the Constitution of the Republic of Fiji.
5 At paragraphs [53]-[57].
6 At paragraph [51].
7 *Forum Hotels Ltd v Native Land Trust Board* [2013] FJCA 24; ABU0083.2020 (13 March 2013).
8 At paragraphs [68] and [81].
9 At paragraphs [67]-[70].

and said that this was the reason for the provision in s 57(b) as to publication in the Gazette and a newspaper. He also found that Michael and Joseph Cheer occupied the land and were doing business there, so could have been given notice by the Director of the application for cancellation.[10]

[18] The Judge found that the Registrar could not rely on the notices of re-entry given by the Director on 13 November 2010, as these were neither notices given by the Registrar, nor notices of applications for cancellation of the leases. He found that the Registrar was required to comply with both s 57(a) and (b), and could not "seek refuge under one of them for non-compliance of the other".[11]

[19] The Judge further found that there had been no notice of an application to cancel the leases given to the respondents on or around the time the application to cancel was made, before the leases were cancelled. He held that under s 57, the Registrar was required to be satisfied that there had been a lawful re-entry by the Director, hence only the Registrar could give notice in terms of the provisos to s 57. He found the separation of powers under s 57 is clear.[12] In the circumstances, the Judge granted the application for a declaration that the Registrar had breached s 57(b).[13]

Ownership of improvements

[20] The Judge refused to make a declaration that the respondents retained ownership of the improvements on the land. He found that the improvements were permanent structures affixed to the land, thus ownership of them could not be separated from the holder of the leases, and the respondents had abandoned their claim for reinstatement of the leases. [14]

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10 At paragraphs [82]-[85].
11 At paragraph [86].
12 At paragraph [88].
13 At paragraph [89].
14 At paragraphs [90]-[92].

Damages

[21] The Judge considered his decision not to make a declaration that the respondents retained ownership of the improvements as a factor in assessing damages. He found that the Registrar's violation of her statutory duty under s 57 is liable in damages,[15] and that Johnson Cheer's registered interest after Lem Kue's death had been lost due to the Registrar's cancellation. The two leases were valuable assets of the estate, and all beneficiaries of the estate (including Michael and Joseph Cheer) were deprived as a result.[16] The Judge held that a person deprived of land may claim damages under s 140(a) or (b) of the LTA.[17]

[22] The Judge referred to the evidence given by Michael Cheer, that the two leases were worth more than $1 million. He noted that no valuation had been presented, but Michael Cheer's evidence had not been challenged on cross-examination. The Judge also referred to evidence that in 2005 Michael Cheer had accepted an offer from Johnson Cheer pursuant to which he would have purchased the leases for $700,000.[18] The Judge also referred to the submission for the Director and the Registrar that any arrears of rent should be set off against any award of damages. He found that such set-off could not occur, as they had advised Michael and Joseph Cheer that all arrears had been paid by the new holder of the leases.

[23] The Judge concluded that the cancellation of registration of the leases had deprived the estate of Lem Kue of very valuable assets. In the circumstances of the case, the Judge was not inclined to "take the path of least resistance" to deny what the respondents were entitled to under s 140(b) of the LTA, on the grounds that no valuation had been produced. He found that although a valuation would have helped the respondents, the failure to provide one should not deprive them of adequate compensation on the basis of the

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15 At paragraph [101].
16 At paragraph [104].
17 At paragraphs [103]-[108].
18 At paragraphs [109]-[112].

available evidence. The Judge was satisfied that Johnson Cheer was entitled to damages in the sum of $800,000.[19]

[24] Finally, the Judge ordered costs of $4,500 (summarily assessed) to be paid by the appellants.

Grounds of appeal

[25] The appeal was on the grounds (in summary) that the Judge erred in law and fact by:

[a] holding that Johnson Cheer lost his interest in the leases because of the Registrar's cancellation of the leases and:

(i) failing to consider that the leases were determined by the Director's re-entry on 13 November 2010, and that re-entry meant that all rights and the estate of Johnson Cheer were determined by the re-entry not cancellation;

(ii) failing to consider that any claim for loss or damages by Johnson Cheer for deprivation of the land was waived when the respondents did not challenge the re-entry and abandoned their claim under s 105 of the PLA;

(iii) failing to consider that because all rights and estate of Johnson Cheer had been determined by the re-entry, not the cancellation of the leases, the respondents could only claim for loss or damages or compensation under s 105 of the PLA, not s 140 of the LTA; and

(iv) failing to consider that the respondents were not entitled to any damages in terms of s 140(b) of the LTA, and incorrectly awarding damages in the sum of $800,000;

[19] At paragraphs [117]-[121].

[b] misconstruing and misapplying s 57(b) of the LTA when declaring that only the Registrar can give the required notice and that the Registrar had acted *ultra vires* in cancelling the leases without giving such notice, and:

(i) incorrectly imposing a statutory requirement on the Registrar to herself give notice to persons interested in the lease before cancellation;

(ii) failing to consider that s 57(b) of the LTA does not require the Registrar to give such notice, but only requires the Registrar to be satisfied that notice has been served on all persons interested under the lease;

(iii) misconstruing the intention of s 57(b) of the LTA, which is not to give parties an opportunity to challenge re-entry on the grounds of non-payment, given that s 57(a) only gives that opportunity to registered interested persons (other than the lessee);

(iv) failing to consider that the Registrar is only obligated to publish a notice in the Gazette and a newspaper if she is not satisfied that such notice has already been served;

(v) failing to consider that the notices given by the Director to the respondents had satisfied the Registrar as to service of the notices required under s 57(b) of the LTA; and

(vi) failing to consider that once the Registrar was satisfied as to service of the notices under s 57(b) of the LTA, the Registrar was no longer required to publish notice in the Gazette and a newspaper;

[c] failing to distinguish *Forum Hotels*, where the appellant had challenged the re-entry and no evidence was produced of a notice being served under s 57(b);

[d] awarding $800,000 damages and:

(i) failing to consider that there was no evidence to support the respondents' claimed value of $1m, when they had not produced any valuation report to prove value;

(ii) failing to consider that evidence of the offer of sale of the leases between Johnson Cheer and Michael and Joseph Cheer was not reliable evidence, and could not be construed as the loss arising from the purported deprivation of the land; and

(iii) failing to consider that Johnson Cheer owed substantial rent which remained unpaid until the day of re-entry, and that Michael and Joseph Cheer had benefitted from the leases by illegal subletting and trespass; and

[e] granting summarily assessed costs of $4500.

[26] The parties' appeal submissions focussed on the core issue of the requirement for notice under s 57 of the LTA, and addressed the following broad issues:

[a] Whether the leases were determined at the time of the Director's re-entry on 15 November 2010 and the respondents' abandonment of their claim under s 105 of the PLA, such that all rights and the estate of Johnson Cheer were determined by the re-entry rather than by cancellation of the leases by the Registrar. If yes, whether the respondents could only claim for loss or damages under s 105 of the PLA and not under s 140 of the LTA.

[b] Whether the Judge misconstrued and misapplied s 57(b) of the LTA when finding that the Registrar (being required to give notice under

s 57(b)) acted *ultra vires* in cancelling the leases without giving notice under s 57(b).

[c] Whether the Judge erred in awarding damages of $800,000, and costs of $4,500.

[27] On appeal, the appellants bear the onus of establishing that the Judge erred.

Were the leases determined by the Director's re-entry on 15 November 2010?

Appellants' submissions

[28] The appellants submitted that as a result of abandoning their claim under s 105 of the PLA, the respondents had no further interest in the leases. They submitted that the respondents no longer challenged the validity and legality of re-entry, and had thereby conceded that the Director had complied with s 105. In so doing, they submitted, the respondents waived any claim for loss or damages for deprivation of the land. The appellants further contended that the leases were determined at the time of re-entry on 13 November 2010, and that the effect of re-entry was that all rights and estate of Johnson Cheer were determined as at the date of re-entry, not at the date of cancellation of leases. They submitted that the respondents could only make a claim for damages under s 105 of the PLA, not under s 140 of the LTA.

[29] The appellants further submitted that the Judge completely disregarded the fact that the respondents were not entitled to any damages under s 140 of the LTA, because there had been no error on the part of the Registrar in executing her duties (for the purposes of s 140(a)), and therefore no error in respect of which damages could be awarded under s 140(b). It was submitted that an award under s 140(b) depends on there having been an error on the part of the Registrar. Therefore, it was submitted, the Judge erred in awarding damages of $800,000 to Johnson Cheer.

First respondent's submissions

[30] The first respondent submitted that the Judge did not err in finding that he had lost his interest in the leases because of the cancellation of the leases, and that the loss of his interest in the leases was a direct result of the cancellation of the leases. He submitted that the Registrar's cancellation of the leases was unlawful, as the Registrar had acted *ultra vires*. He referred to the Registrar's evidence, in which she confirmed that she did not give notice of the applications to cancel, and submitted that she had deliberately refused to comply with her duties under s 57(b) of the LTA.

[31] The first respondent submitted that the Judge was correct to hold that Johnson Cheer's title to the leases was indefeasible by virtue of the LTA, and that an indefeasible title can only be offset by the Act that gave it indefeasibilty: that is, the LTA, and only in accordance with the provisions and in the manner set out in the LTA. He submitted that the law accepts that the rights of a lessee or other interested persons subsist after re-entry, and requires the Registrar to notify interested persons of a notice of application to cancel a lease after a re-entry.

[32] He submitted that the Registrar cannot rely on notices of breaches given under s 105 of the PLA, as such notices will have been issued by a different office (the Director), at a different time, and for a different purpose. He submitted that an additional purpose of the requirement for there to be publication in the Gazette and a newspaper is to give notice to any other person who may have an interest in the leases, which is not registered against the title. He submitted that the rights of a lessee and other interested persons survive re-entry, and are recognised when the Registrar deals with an application to cancel a lease: it was submitted that s 57(b) could not be clearer.

[33] The first respondent submitted that the respondents' abandonment of the challenge to the Director's re-entry did not amount to a waiver of their rights as lessee and interested persons, and submitted that the PLA does not contain any provision to the effect that the absence of a challenge to validity or re-

entry is equivalent to a waiver of rights. He submitted that notices of breaches under s 105 of the PLA are different from the process of cancellation of a lease where the Registrar, having been satisfied that there has been a lawful issue of notices under s 105 of the PLA, then has a statutory duty to comply with the provisions as to notice under s 57 of the LTA.

[34] The first respondent submitted that while the challenge to re-entry under s 105 of the PLA was abandoned, the power to revoke an indefeasible title is contained in the LTA, not the PLA. He submitted that the Judge correctly held (at paragraph [36] of the High Court judgment) that his interest in the leases was indefeasible, and could only be taken away from him in accordance with the provisions of the LTA. He submitted that the appellants' submissions had ignored the Judge's emphasis on indefeasibility.

[35] The first respondent further submitted that the appellants wrongly argued that the respondents could only claim for loss or deprivation under s 105 of the PLA, not s 140 of the LTA, on the basis of the appellants' argument that all rights and estate in the leases were determined by re-entry, not cancellation: He submitted that the Judge correctly held that his indefeasible title could only be taken away in accordance with the provisions of the LTA, and that the indefeasible titles were lost by cancellation, not re-entry.

Discussion

[36] I am not persuaded that the Judge erred in making a distinction between the process of the Director issuing breach notices under s 105 of the PLA, then re-entering after a lessee's failure to remedy the breach, and the process of the Registrar dealing with an application to cancel the lease, after the Director's re-entry. That distinction is highlighted by the requirement in s 57 of the LTA that Registrar may only entertain an application to cancel after being satisfied as to a lawful re-entry. If the Registrar is not satisfied that the re-entry was lawful, the application should not proceed further. Re-entry and the application to cancel a lease are clearly separate processes.

[37] Further, I am not persuaded that the Judge erred in finding that a lessee's interest in the lease persists after re-entry. Cancellation of a lease can only occur if the Registrar grants a lessor's application to cancel. Section 57 of the LTA provides that notice of the application must be given. If it were the case that a lessee's interest in a lease is extinguished by re-entry, notice would not be required, and the process set out for cancellation by the Registrar would be redundant. It is clear that the legislature intended that lessors' (and other interested persons') interests subsisted after re-entry, and until the application to cancel is granted.

[38] I do not accept the appellants' argument that the Director's re-entry "determined the leases" and thereby cancelled the leases. Notwithstanding the reference to s 57 of the LTA at the top of the notice of re-entry (along with a reference to s 105 of the PLA), the notices state only that the land is being re-entered for non-payment of rent. There is nothing in the wording of the notices themselves that says (or implies) that the leases are "hereby cancelled". Furthermore, s 57 provides that when a lease is cancelled *the estate of the lessee in such land shall thereupon determine*.[39] There is no basis on which it could be said that the respondents "conceded" that the leases were determined, and thereby cancelled, on re-entry.

[39] I conclude that the appellants have not established that the Judge erred in fact and law in the manner summarised at paragraph [25][a], above. Accordingly, I would dismiss this ground of the appellants' appeal.

Did the Judge misconstrue and misapply s 57(b) of the LTA?

Appellants' submissions

[40] The appellants submitted that the Judge misconstrued and therefore misapplied s 57(b) of the LTA when he found that only the Registrar can give notice under s 57(b) of the LTA, and that the Registrar had acted *ultra vires* in cancelling the leases without giving such notice.

[39] Section 57 of the LTA is set out at paragraph [49], below.

[41] They also submitted that the Judge wrongly imposed a statutory requirement on the Registrar to give notice before cancelling the leases: they submitted that the Judge failed to consider that s 57(b) of the LTA does not require the Registrar to give notice, but only requires that the Registrar is satisfied that such notice has been served. They submitted that the Judge also failed to consider that the Registrar is only required to publish notice in the Gazette and a newspaper if she is not satisfied that notice has already been served. They submitted that the breach notices given by the Director properly satisfied the Registrar as to service of notices under s 57(b), and that on the basis of the breach notices the Registrar was no longer required to publish notices in the Gazette or a newspaper.

[42] The appellants submitted that the Director's notice of re-entry was on its face sufficient proof of service of an application to cancel, entitling the Registrar to exercise her powers and cancel the leases. They submitted that the cancellation of the leases was a valid exercise of the Registrar's powers, and there was no breach of s 57(b) of the LTA.

[43] The appellants further submitted that the Judge failed to distinguish *Forum Hotels*. They submitted that in that case the appellant had challenged re-entry and there was no evidence of any notice served under s 57(b). By contrast, they submitted, in the present case the respondents abandoned all claims against the Director's re-entry, and conceded that notice under s 57(b) had been served by the Director on Johnson Cheer. They submitted that in *Forum Hotels*, it was held that the Registrar was required, first, to be satisfied on proof that the re-entry and recovery was lawful, and secondly, to require notice of application to register the application to cancel the leases to be served in accordance with s 57(b). They submitted that the legislature's intention was to enable the lessee to be heard on the application to cancel and in the present case, the respondents had been afforded numerous opportunities to be heard.

[44] The appellants further submitted that the imposition of a duty on the Registrar to give notice under s 57(b), when the lessor is proved to have done so, would

be a duplication and would defeat and/or undermine the Director's right as lessor to re-enter under s 105 of the PLA.

[45] The appellants also submitted that the Registrar's obligation to publish a notice in the Gazette and a newspaper is subject to the requirement to serve. They submitted that it is mandatory for the Registrar to publish a notice only when the party seeking cancellation has failed to give notice of the intention to cancel. They submitted that this interpretation is supported by the inclusion of word "unless" in s 57(b); that is, they submitted that the proper interpretation of s 57(b) is that unless the re-entry and recovery has been by formal process of law the Registrar shall require notice to be served or shall give notice by publication in the Gazette and a newspaper.

First respondents' submissions

[46] The first respondent submitted that the meaning of s 57(b) is clear: it imposes a statutory duty on the Registrar, and the Registrar must comply with that duty. He submitted that the appellants' argument that s 57(b) only requires the Registrar to be satisfied that notice has been given, rather than to give notice, is flawed: he submitted that the LTA stipulates the duty to publish. The first respondent further submitted that s 57 of the LTA does not provide that notice is only to be given to registered interested parties: he noted the distinction between s 57(a) (which requires notice to persons (other than the lessee) appearing in the register) and (b) (which requires notice to be given to "all persons interested under the lease").

[47] The first respondent submitted that the Director's re-entry notices could not satisfy the Registrar as to service of notices under s 57(b) of the Registrar's application for cancellation of the leases, and submitted that the Judge correctly stated that the Registrar could not seek refuge under one of 57(a) and (b) for non-compliance with the other. He submitted that notices of breaches or defaults cannot substitute for the statutory notices of applications to cancel that are required to be issued by the Registrar, and that only the Registrar can give the required notices in terms of s 57(a) and (b).

[48] The first respondent further submitted that the appellants' argument that *Forum Hotels* is distinguishable must fail; that rights and interests in leases are not lost on re-entry, but on cancellation of the leases.

Discussion

[49] The first issue to be considered is the proper interpretation of s 57 of the PLA. The second issue is whether, on the proper interpretation of s 57, the appellants have established that the Judge erred in holding that the Registrar was required to give notice of the Director's applications to cancel the leases, and that the Registrar failed to do so. Section 57 of the PLA provides:

> *Cancellation by Registrar*
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> *57. The Registrar, upon proof to his satisfaction of lawful re-entry and recovery of possession by a lessor either by process of law or in conformity with the provisions for re-entry contained or implied in the lease, shall cancel the original of such lease and enter a memorial to that effect in the register, and the estate of the lessee in such land shall thereupon determine but without releasing the lessee from his liability in respect of the breach of any covenant in such lease expressed or implied, and the Registrar shall cancel the duplicate of such lease if delivered up to him for that purpose:*
>
> *Provided that-*
>
> *(a) where the right of re-entry is based upon the non-payment of rent only, the Registrar shall, where any person other than the lessee has a registered interest in the lease, give notice to such other person at his address appearing in the register to pay the rent in arrear and, if the same is paid within one month from the date of the said notice, then the Registrar shall not cancel the original or duplicate of such lease: and*
>
> *(b) unless the re-entry and recovery of possession have been by formal process of law, the Registrar shall require notice of application to register the same to be served on all persons interested under the lease, or, failing such notice, shall give at least one calendar months' notice of the application by publication in the Gazette and in one newspaper published and circulating in Fiji before making any entry in the register.*

[50] The elements of s 57 are as follows:

[a] First, the Registrar is required to be satisfied, upon proof, of lawful re-entry and recovery of possession by lessor, such re-entry and recovery being either:

(i) by process of law, or

(ii) in conformity with provisions as to re-entry contained or implied in the lease.

[b] Secondly, the Registrar shall then cancel the lease and enter a memorial to that effect on the register.

[c] In so doing, the Registrar must take into account the two provisos:

Proviso (a) (s 57(a)): where re-entry is based on non-payment of rent, the Registrar must give notice to any person (other than the lessee) who has a registered interest, to pay the rent in arrears, and if the arrears are paid within one month, the Registrar must not cancel the lease.

Proviso (b) (s 57(b)): unless the re-entry and recovery have been by formal process of law, the Registrar must require notice of the application to register the re-entry and recovery to be served on all persons interested under the lease. If such notice has not been served, the Registrar must give at least one month's notice of the application by publication in the Gazette and one newspaper before making any entry on the register.

[d] Upon the entry in the register of a memorial of cancellation of the lease, the lessee's estate in the leased land is determined. However, the lessee is not released from liability in respect of the breach of any express or implied covenant in the lease.

[51] It must be noted that provisos (a) and (b) are not alternatives: the fact that they are joined by the word "and" makes it clear that the Registrar must have regard to both provisos: the word "and" is conjunctive, not disjunctive. That is, the Registrar is required to consider *both* whether the re-entry and recovery have been on the basis of non-payment of rent, *and* whether the process of re-entry has been by formal process of law or in conformity with the provisions of the lease.

[52] The appellants contended that the Judge was wrong to find that a "formal process of law" means "by a proper procedure", or in other words, "a lawful process". They submitted that it does not mean "by way of a Court process"

(for example, eviction). When s 57 is considered carefully, the appellants' interpretation cannot be sustained.

[53] The wording in the first paragraph of s 57 "upon proof to his satisfaction of lawful re-entry and recovery of possession either by process of law or in conformity with the provisions for re-entry contained ..." makes it clear that there is a distinction (which is made again in proviso (b)) between "following proper process" and "formal process of law". Accordingly, I cannot accept that "formal process of law" means "following proper process". It is clear from the first paragraph of s 57 that re-entry by "process of law" (in the first paragraph) and "formal process of law" (in proviso (b)) is different from re-entry "in conformity with the provisions of the lease".

[54] Further, it must be said that if the Registrar is not satisfied that the Director has followed the proper procedure, she should not entertain the application to register the re-entry and cancel the lease. If the Director has not followed the correct procedure, it cannot be remedied by way of publication of a Notice.

[55] In the present case, the Registrar was correct to consider whether to give notice of the application to cancel the lease on holders of registered interests. She considered earlier registrations of a mortgage and caveat, but as both had been discharged, she was not required to give notice to them. The Registrar was also correct to conclude that she was not required under proviso (a) to give notice of the application to cancel to Johnson Cheer, as he was (by the Transmission by Death) the lessee. Proviso (a) expressly excludes a requirement for notice to be given to a lessee, where the entry is based only on non-payment of rent. The reason for this is obvious: s 105 of the PLA requires a lessee to be given notices of breaches for non-payment, before re-entry can occur.

[56] However, as stated earlier, the word "and" at the end of proviso (a) means that the Registrar was also required to consider whether she had to comply with proviso (b). In this case, there was no suggestion that re-entry was by

way of a formal process of law, it was pursuant to the terms of the lease. The Registrar was, therefore, required to comply with proviso (b). I am not persuaded that she did so.

[57] In order to comply with proviso (b) the Registrar had to "require" that notice of the application to cancel the leases was served on "all persons interested in the lease". It was not necessary for her to give notice herself, but she had to "require" notice of the application to register the re-entry and recovery of possession to be served on all persons interested under the lease. Proviso (b) is in wider terms than proviso (a): notice is not restricted to holders of registered interests, it extends to "all persons interested under the lease".

[58] Had she been satisfied on proper grounds that notice of the application to cancel the leases had already been given to all persons interested under the lease, the Registrar would not have been required to take any further steps as to notice. However, in the absence of being satisfied that such notice had been given, the Registrar (herself) had to "give notice... by publication". That is, if she were not satisfied that notice of the application to cancel the leases had already been given to all persons interested under the lease, she was required to publish notice of the application in the Gazette and a newspaper.

[59] On a proper analysis of s 57 of the LTA, the appellants' argument that Registrar was not required to comply with proviso (b) is wrong. The Registrar had obligations under both proviso (a) and proviso (b). For the purposes of the present case, "all persons interested under the lease" meant Johnson Cheer and Michael and Joseph Cheer.

[60] The Registrar did not take any steps under proviso (b), as she relied on the Director's breach notices and the notice of re-entry as being notice of an application to cancel the leases. That was not sufficient for compliance with proviso (b). As counsel for the appellants accepted at the appeal hearing, the Director gave no notice to any of the respondents to the effect that "I have applied to the Registrar to cancel the lease", or even "I intend to apply to the

Registrar to cancel the leases". The breach notices state only that "the lease is now liable to cancellation by re-entry", so cannot be accepted as notice of an application to the Registrar to cancel the leases

[61] The appellants contended that notice of re-entry was equivalent to notice of an application to cancel because, they submitted, once re-entry has occurred, cancellation of the lease follows naturally. However, as noted earlier, the re-entry notice records only re-entry for non-payment of rent, and contains no mention of any application to the Registrar to cancel the lease. Given the protection of rights under the Constitution, the protection of indefeasibility under the LTA, and the serious consequences of an application to cancel (deprivation of any interest in the land) the notice that is given of an application to cancel a lease must be specific, and must give the clearest of warnings of what is going to happen. It cannot be left to implication as a "natural consequence".

[62] Counsel for the appellants were asked at the appeal hearing to clarify their submission that the respondents had "conceded" that they were given notice of the Director's intention to apply to cancel the leases. Their response was that the "concession" was by virtue of the respondents' abandonment of the challenge to the re-entry process. For the reasons set out earlier, I do not accept that the respondents' abandonment of their challenge to the Director's re-entry had, or could have had, the effect of a concession as to any requirement of the application to cancel the leases.

[63] I note in passing that neither counsel for the appellants nor counsel for the first respondent referred in their submissions to a letter dated 3 August 2010 from the Director to the solicitors for Johnson Cheer. In this letter the Director stated "I am now in the process of cancelling both the leases". That letter could not in any event have been relied on as giving notice of an application to cancel the leases as (a) the Director does not have the power to cancel leases, (b) the letter was sent three months before re-entry, and (c) the letter was sent only to the solicitors for Johnson Cheer, so could not constitute notice to Michael and Joseph Cheer.

[64] I conclude that the appellants have not established that the Judge erred in fact and law by misconstruing and misapplying s 57 of the LTA, in the manner summarised at paragraph [25][b], above.

Did the Judge err by failing to distinguish *Forum Hotels*

[65] This contention by the appellants can be dealt with briefly. The appellants contended that the Judge erred in relying on this Court's judgment in *Forum Hotels*, which, they submitted, is distinguishable on its facts.

[66] As the appellants submitted, the facts were different in *Forum Hotels*, as in that case, the lessee (appellant) had not abandoned its challenge to the lessor's re-entry. That is so, but as discussed earlier, the respondents' abandonment of their challenge to re-entry did not have the consequence that they waived any rights in respect of the application to cancel the lease. Further, the second distinguishing factor put forward by the appellants, that there was no evidence in *Forum Hotels* of a notice under s 57(b) of the LTA being served on the lessee is not a distinguishing factor at all: in the light of the rejection of the appellants' argument that the re-entry notice constituted notice of the application to cancel the lease, there was no such evidence in this case, either.

[67] I conclude that the appellants have not established that the Judge erred in fact and law in relying on *Forum Hotels*.

Did the Judge err in awarding damages of $800,000 to Johnson Cheer?

Appellants' submissions

[68] The appellants submitted that no evidence was adduced to support the respondents' claim for damages: in particular, no formal valuation was produced in Court. They further submitted that no evidence was adduced as to valuation of improvements. They submitted that evidence as to the offer of sale between Johnson Cheer and Michael Cheer was neither reliable nor credible and could not support the claim for damages. They submitted that in

ordering the appellants to pay damages of $800,000 the Judge had entered into speculation.

[69] They also submitted that the first respondent owed a substantial amount in rent to the Director, which remained unpaid as at the date of re-entry, and that the first respondent had benefitted by illegal subletting, such that the award of damages meant that he had derived a substantial advantage from dishonest conduct. They referred to the recent judgment of this Court in *Honeymoon Island (Fiji) Ltd v iTaukei Land Trust Board*, in which the Court ordered that rent payable be offset against a damages award.[21]

[70] Accordingly, the appellants submitted, even if the first respondent could be said to have suffered some loss as a result of unlawful cancellation of the lease, the award of damages ought to be for a nominal amount, if any. They further submitted that in order to keep the leases alive, the first respondent would have had to pay annual rent ($1,000 pa at present, but subject to re-assessment in terms of the lease) for the 49 years remaining on lease.

First respondent's submissions

[71] The first respondent submitted that in the High Court, the appellants limited their challenge to Michael Cheer's evidence to the absence of a formal valuation report, and did not challenge his evidence as to the quantum of his valuation. They also submitted that in a claim for damages under s 140(b) of the LTA a claimant is not required to prove that "loss" has been "sustained".

[72] He further submitted that the appellants cannot claim that outstanding rent owed should be offset against an award of damages, as the rent has been paid. Accordingly, he submitted, the Judge had not erred in his approach to damages.

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[21] *Honeymoon Island (Fiji) Ltd v iTaukei Land Trust Board* [2023] FJCA 130; ABU039.2020 (28 July 2023).

Discussion

[73] The Judge referred to s 140 of the LTA, which provides:

> *Damages for mistake or misfeasance of Registrar*
>
> ***140**. Any person who either before or after the commencement of this Act-*
>
> *(a) sustains loss or damages through any omission, mistake or misfeasance of the Registrar or of any of his officers or clerks in the execution of their respective duties; or*
>
> *(b) is deprived of any land subject to the provisions of this Act, or of any estate or interest therein, by the registration of any other person as proprietor of such land, estate or interest, or by any error, omission or misdescription in any instrument of title, or in any entry or memorial on the instrument of title, or has sustained any loss or damage by the wrongful inclusion of land in any instrument as aforesaid, and who by this Act is barred from bringing an action for possession or other action for the recovery of such land, estate or interest, may bring an action against the Registrar as nominal defendant for the recovery of damages.*

[74] The Judge noted the distinction between s 140(a) and 140(b): under s 140(a), a person who has "sustained loss" through any "omission, mistake, or misfeasance" by the Registrar may bring an action for damages, whereas under s 140(b), a person who has been "deprived of land … or of any estate or interest therein"… "by the registration of any other person as the proprietor of such land" may bring an action for damages. He found that proof of "sustained loss" is not necessary in a claim in relation to the deprivation of an indefeasible title under s 140(b). His conclusion that the appellants should be ordered to pay damages was supported by his finding that there was sufficient evidence available as to the value of the property of which the lessee, Johnson Cheer, had been deprived.

[75] In its judgment in *Honeymoon Island*, this Court held that the lower Court had been within its powers to exercise its discretion to evaluate and reach a conclusion from the facts before it, unless the evaluation could be demonstrated to be perverse. I am not persuaded that the Judge's evaluation in the present case can be said to be "perverse".

[76] However (and as was found to be the case in *Honeymoon Island*) it must be said that while the Registrar was at fault in failing to comply with s 57(b) of the LTA, this Court should not ignore the fact that the application to cancel the leases was before her after many years of the first respondent failing to comply, or intermittingly complying, with breach notices issued by the Director. While the arrears were paid before the application to cancel, they were not paid by the respondents. An award of damages which failed to take account of the breaches would enable the first respondent to benefit both from not paying rent over several years and from the award of damages.

[77] Further, I accept the appellants' submission that, as leaseholder, had the Registrar not cancelled the leases, the first respondent would have been required to pay the arrears of rent and rates, and to make the annual rental payments for the balance of the lease term (49 years). While the rent at the time of re-entry was $1,000 per annum on each lease, the leases provided that rent was to be re-assessed in 2011 and 2036. The new leases issued following cancellation of the first respondent's leases recorded rent of $6,000 per annum.

[78] In all of the circumstances, I have concluded that while compensation should be paid in respect of the deprivation of the first respondent's rights as leaseholder as a result of the Registrar's unlawful cancellation of the leases, it should be at a much lower level. The Judge's order should be quashed and replaced by an order that the appellants pay the first respondent $5,000 in compensation.

Costs

[79] As the appellants have not succeeded in their appeal on the core issue as to cancellation of the leases, I would leave the costs order in the High Court unchanged. The parties should bear their own costs in this Court.

ORDERS

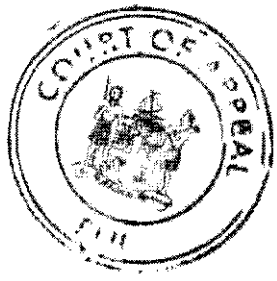
(1) The appellants' appeal is allowed to the extent, only, that the order made in the High Court that the first respondent was granted the sum of $800,000 as damages for deprivation of property is quashed.

(2) The order as to damages is replaced by an order that the first respondent is granted the sum of $5,000 as damages for deprivation of property, to be paid by the appellants.

(3) The costs order made in the High Court is sustained.

(4) Each party is to bear its own costs in this Court.

Hon. Mr. Justice Filimone Jitoko
PRESIDENT, COURT OF APPEAL



Hon. Mr. Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL