

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**[CIVIL JURISDICTION]**

**Civil Action No. HBC 159 of 2018**

**IN THE MATTER** of an application under section 169 of the Land Transfer Act (Cap 131)

**BETWEEN** : **MUSKET COVE RESORTS LIMITED** a limited liability company having its registered office at Dick's Place, Malolo Lailai Island, Nadi.

**Plaintiff**

**AND** : **FRANK YEATES** of Malolo Lailai Island, Malolo Lailai.

**First Defendant**

**RESHMI NAICKER** of Malolo Lailai Island, Malolo Lailai.

**Second Defendant**

Before : Master U.L. Mohamed Azhar

Counsels : Mr. C. B. Young for the plaintiff  
Mr. K. Chambers for the Defendants

Date of Judgment : 24<sup>th</sup> July 2020

**JUDGMENT**

Summons for eviction – nature and scope of remedy under section 169 of Land Transfer Act – orders the court can make – contents of the summons – Order 7 rule 3 (1) and Order 1 rule 8 of the High Court Rules – burden of the defendant - contract/agreement – sections 6 (1) and 7 (1) of Land Sales Act – pendency of civil suit.

01. The plaintiff summoned both defendants pursuant to section 169 of the Land Transfer Act Cap 131 to show cause why they should not give up vacant possession to the Plaintiff of all that piece or parcel of land comprised in Lease No. 233046 being part of Certificate of Title No. 17202 Lot 2 on DP 5633 Malolo Lailai containing an area of 33.7843

hectares upon which there are 18 resort type concrete bures including the ones with the numbers 137/138 thereon (hereinafter called and referred to as the **subject property**). The summons is supported by an affidavit sworn by Josephine Smith-Moffat, a director of the plaintiff company. A copy of the lease duly certified by the Registrar of Title is marked as 'JSM 1' and annexed with the affidavit. Other two documents annexed with that affidavit are the letters sent to both defendants requesting to vacate the property. They are marked as 'JSM 2' and 'JSM 3'.

02. Both defendants filed their affidavits before the returnable date of the summons. The affidavit of the first defendant contains documents marked as 'FY1' to 'FY4'. The second defendant filed an affidavit and stated that, she relies on the legal basis set out in the affidavit of the first defendant. The affidavit in reply filed on behalf of the plaintiff company is sworn by the same director. The affidavit in reply contains another set of documents marked as 'JMS 1' to 'JMS 8'.
03. At hearing of the summons, both counsels made oral submission in addition to their written submission. The plaintiff company brought this summons as the registered proprietor of the subject property and moved for an order on the defendants to immediately deliver the vacant possession of the subject property. On the other hand the first defendant whilst putting forward his defence raised the preliminary objections too in relation to contents of the summons. It is appropriate to deal with those objections when discussing the requirement of a summons under section 170 of the Land Transfer Act Cap 131.
04. The law and procedure on the summary eviction under the Land Transfer Act (Cap 131) have been settled in many cases by this court and the appellate courts and there is quite number of decisions in this area which does not need much elaboration. However, it is necessary to briefly note the nature of the summary procedure enshrined in the Land Transfer Act (Cap 131) and the duty of each party under that procedure. The Land Transfer Act (Cap 131) was introduced to Fiji in 1971 and it repealed the Land (Transfer and Registration) Ordinance (see: section 178 of the Land Transfer Act). However, the other two legislations, namely Crown Land Act (now known as State Land Act), Native Land Act (now known as iTaukei Land Act) continue to govern the lands fall under their purview. Both legislations were amended to bring them in line with the Land Transfer Act (Cap 131) which is based on the well-known Torrens System of Registration. The effect and application of the said system of registration, that was generally applied in certain countries in Pacific, was explained in **Breskvar v. Wall** (1971-72) 126 CLR 376 and Barwick C.J stated at page 385 that:

*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. (Emphasis added).*

05. In that same case Windeyer J. concurring with the Chief Justice stated at pages 399 and 400 that:

*I cannot usefully add anything to the reasons that he and my brothers McTiernan and Walsh have given for dismissing this appeal. I would only observe that the Chief Justice's aphorism, that the Torrens system is not a system of registration of 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 1862 he, as Registrar-General, published his booklet, *A Handy book on the real Property Act of South Australia*. It contains the statement, repeated from the *South Australian Handbook*, that:*

*".....any system to be effective for the reform of the law of real property must commence by removing the past accumulations, and then establish a method under which future dealings will not induce fresh accumulations.*

*This is effectuated in South Australia by substituting 'Title by Registration' for 'Title by Deed'...*"

*Later, using language which has become familiar, he spoke of "indefeasibility of title". He noted, as an important benefit of the new system, "cutting off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder is in the same position as a grantee direct from the Crown". This is an assertion that the title of each registered proprietor comes from the fact of registration, that it is made the source of the title, rather than a retrospective approbation of it as a derivative right. (Emphasis added).*

06. It was equally held in **Fels and another v Knowles and another** (1907) 26 NZLR 604 by Stout C.J at page 620 as follows:

*'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.'*

07. Accordingly, the registration is everything and it is the registration that confers the title to a person so registered. It is the title by registration and not registration of title. This system of registration cuts off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder or proprietor is in the same position as a grantee direct from the Crown/state. The registration is made the source of the title, rather than a retrospective approbation of it as a derivative right. The only exception is the actual fraud, and in absence of such fraud as provided in sections 39 to 41 of the Land Transfer Act, the registered proprietor shall have an indefeasible title. This was established by the Fiji Court of Appeal in Subaramani v Sheela [1982] 28 FLR 82 (2 April 1982) where the court held that:

*The indefeasibility of title under the Land Transfer Act is well recognised; and the principles clearly set out in a judgment of the New Zealand Court of Appeal dealing with provisions of the New Zealand Land Transfer Act which on that point is substantially the same as the Land Transfer Act of Fiji. The case is Fels v. Knowles 26 N.Z.L.R. 608. At page 620 it is said:*

*"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."*

08. Thus, the Land Transfer Act (Cap 131) provides for title by registration and makes such title indefeasible except in case of actual fraud. As a result of this guarantee given to a registered proprietor, there was a need for a mechanism by which a registered proprietor could enforce his or her or its indefeasible right against any illegal occupant. This need was fulfilled by the special jurisdiction given to this court under the sections 169 to 172 of the Land Transfer Act. The underlying principle of this summary procedure is to protect the last registered proprietor, who has an indefeasible title, from illegal occupation by others at a minimal cost. Thus, having a summary procedure for eviction under those sections of the Land Transfer Act is the logical consequence of Torrens system of registration, which safeguards the title of last registered proprietor. The Fiji Court of Appeal concisely stated that, it is a speedy procedure for obtaining possession when the occupier fails to show cause why an order should not be made (per: Mishra JA in Jamnadas v Honson Ltd [1985] 31 FLR 62 at page 65). Further the summary procedure under section 169 is applicable to all the instrument of title as meant by section 2 of the Land Transfer Act, as section 5 of this Act covers both freehold and leasehold lands.
09. The *Locus Standi* of the person who seeks order for eviction is set out in section 169. The requirements of the summons, namely the description of land and the time period to be

given to the person so summoned, are mentioned in section 170. The other two sections namely 171 and 172 provide for the two powers that the court may exercise in dealing with the applications. The burden to satisfy the court on the fulfillment of the requirements under section 169 and 170 is on the plaintiff and once this burden is discharged, it then shifts to the defendant to show his or her right to possess the land. The exercise of court's power, either to grant the possession to the plaintiff or to dismiss the summons, depends on how the said burden is discharged by the respective party to the proceedings. However, dismissal of a summons shall not prejudice the right of a plaintiff to take any other proceedings to which he or she may be otherwise entitled against any defendant. Likewise, in the case of a lessor against a lessee, if the lessee, before hearing of the summons, pays or tenders all rent due and all costs incurred by the lessor, the summons shall be dismissed by the court.

10. The *locus standi* of the plaintiff company is averred in paragraph 2 of the supporting affidavit and it states that the plaintiff is the lessee of the subject property, being registered as such on 8 August 1996. A true copy of the Lease No 233046 certified by the Registrar of Title is the document marked as “**JSM 1**” and annexed with that supporting affidavit. The first defendant conveniently omitted to respond the above mentioned paragraph 2 of the supporting affidavit, in his affidavit in opposition. He does not dispute the Certified True Copy of Instrument of Title marked as “**JSM 1**”. However, his counsel in his submission stated that, the plaintiff company is not the last registered proprietor, but Pine Limited is the last registered proprietor of Sub-Lease No. 288423. The Lease No 233046 (Head Lease) was issued to Kobe Trading Company Limited. Kobe Trading Company Limited then sub-leased it to Pine Limited by Sub-Lease No. 288423. Thereafter, Kobe Trading Company Limited transferred the Head Lease No. 233046 to the plaintiff company on 08.08.1996. Since then, the plaintiff has been the Last Registered proprietor of the Head Lease No. 233046, which includes the Sub-Lease No 288423. The certified copy of the Instrument of Title (**JSM 1**), which is the conclusive proof according to section 18 of the Land Transfer Act Cap 131, is evident that, the plaintiff company is the last registered proprietor of the Head Lease No. 233046. Accordingly, the plaintiff company has the locus to summon the defendants under section 169 of the Land Transfer Act Cap 131.
11. The next issue is the particulars to be stated in the summons as required by section 170 of the Land Transfer Act (Cap 131). The first defendant, in his affidavit, did not dispute the requirements under this section. However, his counsel, like he did in relation to the locus of the plaintiff, submitted that, the plaintiff's summons failed to comply with the mandatory requirements mentioned under that section. In addition, the counsel raised a preliminary issue in relation to contents of the summons and stated that, the plaintiff's summons failed to comply with Order 7 rule 3(1) of the High Court Rules, because it did not include the question for determination and particulars to identify the cause of action against the defendants. The counsel relied on the decision in **Tuidraki v Seasea** [2015] FJHC 952; HBC148 (4 December 2015) in support of the preliminary issue.

12. The Order 7 of the High Court Rules deals with the general provisions of the Originating Summons. In the olden days, the civil suits were commenced by a bill in the Court of Chancery and it gave many opportunities for delay and expense. In order to avoid this delay and expense the system was devised of a summons originating proceedings in chambers for the purpose of quick determination of simple points. **Lord Esther, M.R.** in **Re Holloway, Ex P.Pallister**, (1894) 2 QB 163 C.A briefed the genesis of this procedure at page 166 that:

It was found that the old mode of commencing a suit in the Court of Chancery by a bill gave many opportunities for delay and expense, and in order to avoid this delay and expense the system was devised of a summons originating proceedings in chambers, which in the course of time came to be called an “originating summons.” This procedure was invented for the purpose of quickly determining simple points. When these “originating summonses” had been used for some years in the Court of Chancery and the Chancery Division, it was decided to extend them to the other Divisions of the High Court

13. As a result, the Order 7 rule 3(1) requires a person who brings an originating summons to briefly state the question to be determined by the court. The question is whether this provision applies to the summons under section 169 of the Land Transfer Act. The Order 1 rule 8 of the High Court Rules provides that, if any statute or law specifically prescribes a particular practice or procedure, the rules shall not apply or shall have limited application in so far any such practice or procedure imports the application of the rules. That rule reads:

Proceedings to which these Rules do not apply (O.1 r.8)

8.-(1) Where, for the time being, by or under any law in force in Fiji, specific provision is made for regulating the practice and procedure in, or in relation to, any particular form of proceedings in the High Court, these Rules shall not apply thereto except in so far as any such provision applies, incorporates, or imports the application of these Rules, whether by express reference thereto or by reference to the rules of Court of, or the practice or procedure in, the High Court.

14. The Part XXIV (from section 164 to 174) of the Land Transfer Act Cap 131 deals with special jurisdiction of the High Court which includes the special procedure for ejectment. This procedure is *sui generis* and the relevant sections of Land Transfer Act specifically provide for such procedure which includes the locus of the person who can take out the summons, requirement of the summons, mode of hearing and the orders that can be made by the court. A handful of sections in Part XXIV of the Land Transfer Act specifically set

out both substantive and procedural law in relation summary eviction and do not warrant application of the rules of the High Court. The rules of the High Court need not to be employed, even in relation to writ of possession, unless any person resists possession of the proprietor, because section 173 provides that, once the order for possession is obtained, the plaintiff or his bailiff may enter the property without writ if no person in possession or the person or persons in possession voluntarily gives and surrenders possession to such plaintiff or his bailiff. Thus, the rules of the High Court relating to the originating summons have no or little application to this special procedure under the Land Transfer Act. The section 170 of the Land Transfer Act specifically and mandatorily requires the summons to contain certain particulars, and as such the Order 7 rule (3) (1) has no application for summons under section 169 of the Land Transfer Act, by virtue of Order 1 rule 8 of the High Court Rules mentioned above.

15. The case (Tuidraki v Seasea [supra]) cited by the counsel in support of his argument was decided under Order 113 of the High Court Rules. Unlike section 170 of the Land Transfer Act, the Order 113 rule 2 provides that, the originating summons for purpose of this rule shall be in Form No. 3 in Appendix [1]. This Form No. 3 is the general form of originating summons. Hence the above case cited by the counsel for the defendants is not relevant to application under section 169 of the Land Transfer Act. Therefore the real question is whether a summons under section 169 complies with the section 170 of the Land Transfer Act or not. It follows that, neither the Order 7 rule 3, nor the case cited by the counsel for the defendants is relevant to the summons filed under section 169 of the Land Transfer Act. As a result, I am unable to accept the argument of the counsel for the defendants that, the instant summons does not comply with Order 7 rule 3(1). I now turn to consider whether instant summons complies with the mandatory requirements of section 170 of the Land Transfer Act.
16. The first requirement is that the summons should contain the description of the land. However, the section (170) does not specify what description of land entails and what adequate or full description of the land is. It appears from the said section that, it actually requires the description which can give full knowledge to the persons, so summoned, of the land and premises from which he or she ought to be evicted, without causing misunderstanding or misidentification of it. If there is any misunderstanding of premises which is the subject matter of the proceeding, it should be brought by the person, so summoned, to show cause. In the absence of any such allegation of misunderstanding, the description given by any applicant would be sufficient and adequate under the section 170 of the Land Transfer Act. This observation is supported by the decision of High Court in Wati v Vinod [2000] 1 FLR 263 (20 October 2000) and the decision of Court of Appeal in Premji v Lal [1975] FJCA 8; Civil Appeal No 70 of 1974 (17 March 1975).
17. The plaintiff's summons gives the description of the subject property occupied by the defendants. The defendants, as mentioned above did not complain in their affidavit of any such misidentification or misunderstanding of the subject property, because they are well

aware or could not be unaware of the same property occupied by them. Further the returnable date of the summons was 30.08.2018 and it was served on them on 02.08.2018 as per the affidavit of service filed by the solicitors for the plaintiff. In fact the defendants filed their affidavits in opposition on 28.08.2018 – two days before the returnable date. The section 170 mandates to give clear 16 days for a person so summoned under this procedure for him to prepare the defence. In this case, the defendants were given 28 days after service on the summons to appear and show cause, and they prepared and filed their affidavit in opposition. For these reasons, the defendants did not raise any objection in relation to the mandatory requirement mentioned in section 170. Therefore, the submission of the counsel for the defendants, that the plaintiff's summons failed to comply with the procedural requirements of giving adequate description of the property and sufficient time (16 days), lacks the merits and I reject the same.

18. It follows that, the plaintiff in this matter passed the threshold under sections 169 and 170 of the Land Transfer Act Cap 131. The burden now shifts to the defendants to show cause their right to remain in possession of the properties. The Supreme Court in **Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87 explained the duty of a defendant in application of this nature and held that:

*"Under Section 172 the person summonsed may show cause why he refused to give possession of the land if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right must be adduced." (Emphasis added)*

19. The duty on the defendants as per the above authority is, not to produce any final or incontestable proof of their right to remain in the properties, but to adduce some tangible evidence establishing a right or supporting an arguable case for their right to remain in possession of the properties in dispute. **Black's Law Dictionary** defines "tangible evidence" as "physical evidence that is either real or demonstrative" (10<sup>th</sup> Edition, page 678). Thus, duty of the defendants is to produce some real or demonstrative physical evidence and not bare assertions. A bare assertion is not sufficient for this purpose.
20. Furthermore, the Fiji Court of Appeal in **Ali v Jalil** [1982] FJLawRp 9; [1982] 28 FLR 31 (2 April 1982) explained the nature of the orders a court may make in terms of the phrase used in section 172 of the Land Transfer Act, which says "*he (judge) may make any order and impose any terms he may think fit*". The Court held that:



*“..but the section continues that if the person summoned does show cause the judge shall dismiss the summons; but then are added the very wide words "or he may make any order and impose any terms he may think fit". These words must apply, though the person appearing has failed to satisfy the judge, and indeed are often applied when the judge decides that an open court hearing is required”. (Emphasis added).*

21. According to above decisions, the duty of the court is to decide whether a defendant or a person so summoned has adduced any real or demonstrative physical evidence establishing a right or supporting an arguable case for such a right, or even he failed to adduce such evidence whether an open court hearing is required or not, given the circumstances of a case.
22. On perusal of the affidavit filed by the first defendant it reveals that, the first defendant submits two grounds to stay in possession of the subject property. First ground is that, the first defendant reached an agreement with one Richard (Dick) Smith, the proprietor of the plaintiff company in 1990, that Kobe Trading Company Limited would sub-lease the subject property to Pine Limited on the rental of lump sum of NZ\$ 15,000 for 150 years. Further to get the lease in the name of Pine Limited, the first defendant had to pay sum of NZ\$ 365,000. The part of that amount was paid to the digger and off-loader which were on Malolo Island. The balance amount was paid by one Brian Gallager. Secondly, the first defendant states that, he entered into a Trust Agreement with Pine Limited on 15.05.1990 whereby, Pine Limited agreed to act as his nominee. The first defendant further states that, Pine Limited is the Sub-Lessee of the subject property and it holds it as his nominee as per the above mentioned Trust Agreement. The first defendant marked a copy of the said Trust Agreement as “FY 1” and the Sub-Lease No. 288423 issued to Pine Limited as “FY 2” and attached them with his affidavit. It is the argument of the first defendant that, he has the right to possess the subject property, under and by virtue of above agreements as Pine Limited is his nominee and holds the Sub-Lease No 288423 for his benefit.
23. The counsel for the plaintiff, on the other hand, submitted that, the defendants are in breach of both section 6 (1) and 7 (1) of the Land Sales Act and therefore, they cannot claim any right to possess the subject property. Two questions arise here in relation to the claim of the defendants. First is whether the purported agreements of the first defendant are valid in law to confer a right to him to possess the subject property? The second is whether the first defendant can benefit from the Sub-Lease issued to Pine Limited and remain in possession of the subject property, pursuant to that Sub-Lease?
24. The first agreement claimed to have been entered was the one that he reached with one Richard (Dick) Smith of Plaintiff Company. The second one is the Trust Agreement – FY 1. The first defendant claims that, he entered into both agreements for the purpose of taking the subject property on lease. There is no dispute that, the first defendant was not a

resident at the time he entered both agreements. The section 6(1) of the Land Sale Act in its unequivocal language prohibits the non-residents from entering into any contract to purchase or take on lease any land. The said section reads that:

Purchase of land by non-resident

6.-(1) No non-resident or any person acting as his agent shall without the prior consent in writing of the Minister responsible for land matters make any contract to purchase or to take on lease any land:

Provided that nothing contained in this subsection shall operate to require such consent or prevent a non-resident from making any such contract if the land together with any other land in Fiji of such non-resident does not exceed in the aggregate an area of one acre.

25. It is obvious that, the consent of the Minister under the above section is sine qua non of any contract purported to either purchase or take on lease any land and as such any contract or agreement which entered without such consent is illegal and unenforceable. Even though the consent was obtained later, the contract cannot be enforced as Palmer J held in **Hunter v Apgar** [1989] 35 FLR 180 (15 September 1989). Having extensively discussed the authorities and compared the other legislations such as Native Land Trust Act, His Lordship Palmer J said at page 193 that:

The consent is required prior to the making of the contract. What this envisages in my view - and I see no difficulty with it - is that if a non-resident minded to purchase a property in Fiji is made an offer by a potential vendor or estate agent he can then apply to the Minister for consent to enter into that transaction and upon such consent being received he may then sign the contract. Or if a non-resident were looking for a property to purchase in Fiji and let this be known, upon receiving a reply or offer which he would be minded to accept, again he may apply to the Minister advising him of the necessary details and that he is minded to accept the offer if the consent is forthcoming. At that stage there would be no agreement. The whole purpose of the legislation is to ensure that no contract is made without first giving the Minister the opportunity of permitting or prohibiting it and in the former case of imposing conditions upon it.

26. The Supreme Court of Fiji in its unanimous decision in **Gonzalez v Akhtar** [2004] FLR 156 affirmed the decision of **Hunter v Apgar** (supra) and held that:

It was clear under s 6(1) of the Land Sales Act that no non-resident is permitted to make a contract to purchase land without the minister's

assent. Thus, when the making of a contract is expressly prohibited by law, the contract is illegal unless the statute itself indicates that the prohibited contract is enforceable. While s 17 prescribes penalties on willful breaches, so are non-willful breaches under s 6(1) making it neither directory, nor regulatory. Not only is consent required but also prior written consent. There were no distinctions between an innocent failure to obtain the requisite consent and willful failure to do so under s 6(1). Nor was there any distinction between speculators and genuine developers. The Act allows contracts in breach of s 6(1) unenforceable while deliberate breaches of the subsections are criminally sanctioned.

27. There is no evidence that, the Minister in charge of the land consented to the first defendant to enter into such contracts or agreements to take lease of the subject property. The Minister had consented only to sub-lease the subject property to Pine Limited as it is evident from the annexure marked as “JSM 3” and attached with the affidavit in reply filed on behalf of the plaintiff company. The purported agreement contravened the section 6 (1) of the Land Sales Act. It is the settled law that no equity will arise if to enforce the right claimed would contravene some statute, or prevent the exercise of a statutory discretion or prevent or excuse the performance of a statutory duty. The purported agreements were meant to defeat the manifest purpose of Land Sales Act. They are illegal and unenforceable to the extent they contravene the provisions of Land Sales Act, and therefore, they cannot confer any right to the first defendant to possess the subject property.
28. I now turn to discuss the second question, whether the first defendant can benefit from the Sub-Lease of Pine Limited as he claims that, Pine Limited is holding the Sub-Lease No. 288423 as his nominee. This question to be looked in two angles. First is whether the consent given by the Minister to Pine Limited was for that company itself or for it to act as an agent for any non- resident. The second is whether Pine Limited deposited the subject property to the first defendant – the non-resident. The phrase “*No non-resident or any person acting as his agent...*” in section 6 (1) of the Land Sales Act denotes that, any person *who acts for a non-resident* may enter into the contract with the consent of the Minister, and can hold the property/land on behalf of that non-resident, if the consent granted by the Minister to that effect. If any such person intends to act for any non-resident, that person must apply for the consent of the Minister, in that capacity. However, this provision should not be taken to mean that, it allows a non-resident to act for another non-resident.
29. The annexure marked as “JSM 3” is the application made for the consent of the Minister for sub-leasing the subject property to Pine Limited – a non-resident company. The purpose of the sub-lease, as mentioned in paragraph 8 of that application was to build 20, 1 & 2 bedroom units to be added the plaintiff company for its management and rented as guest accommodations. Nowhere in that application, is it stated that, Pine Limited was

acting as agent for the first defendant – the non-resident, and being a non-resident company, Pine Limited cannot act for another non-resident. The consent granted by the Minister on 12.12.1989 was to sub-lease the subject property to Pine Limited itself. The consent was not granted for Pine Limited to act for the first defendant – the non-resident. Therefore, the argument of the first defendant, that Pine Limited was acting as his nominee, cannot be accepted based on the purported Trust Agreement (FY 1), because enforcement of which contravenes section 6 (1) of the Land Sales Act.

30. Secondly, the section 7 (1) of the Land Sales Act provides that, a non-resident may deposit such land with the prior consent of the Minister responsible for land. The said section is as follows:

Disposition of land by non-resident

7.-(1) No non-resident or any person acting as his agent shall without the prior consent in writing of the Minister responsible for land matters make any contract for the disposition of any land in favour of another non-resident.

31. Pine Limited which held the Sub-Lease No. 288423 never deposited the subject property to the first defendant. If Pine Limited intended to act for the first defendant, it would breach both section 6(1) and 7 (1) of the Land Sales Act. Looking at both angles I hold that, the first defendant cannot benefit from the said Sub-Lease 288423 issued to Pine Limited itself and which was not deposited to the first defendant at all. In any event, the plaintiff company, as it is evident from the annexure marked as “JSM 8” (Notice of re-entry and determination of Sub-Lease No 288423) has re-entered the subject property. It was argued on behalf of the first defendant that, procedure under section 57 of the Land Transfer Act Cap 131 was not followed in respect the said Notice of Re-entry and Determination of Sub-Lease. The Sub-Lessee is Pine Limited, a limited liability company which is distinct from its directors too. However, that company had not, till the date of hearing of this summons, challenged the decision of the plaintiff company to determine its sub-lease and re-enter the subject property. Therefore, the first defendant has no locus at all to challenge that decision in this proceeding, when the Sub-Lessee itself is not challenging the same.
32. The counsel for the first defendants further submitted that, the summary procedure for eviction in this case is inappropriate as the defendants filed a separate action against the plaintiff company alleging fraud in relation to this matter. I do acknowledge that, another case (Civil Action No. HBC 236 of 2018) is pending in this court. However, I must re-emphasize the very reason of speedy process for vacant possession under section 169 of the Land Transfer Act (Cap 131) to answer this submission of the counsel for the defendants in this case. It is the Torrens system of registration that resulted in the guarantee and protection for the last registered proprietor. The protection of indefeasible

title from illegal occupation is the high priority of this registration system. This protection is not only against any illegal occupant of a particular land or property, but also is extended against any person who otherwise entered any property by a legal authority, but continued to occupy that property even after cessation of such authority or permission. That is why the section 169 (b) and (c) allow the lessor to bring the summons for eviction even the rental for a month is due or notice to quite has been given or term of tenancy has expired. This shows that even a tenant, who legally entered any property, becomes an illegal occupant if the rental falls in arrears or notice to quit is served or term expired. At this point, the law does not allow considering any dispute between the lessor and lessee in relation to the tenancy agreement, but the court should grant order for vacant possession unless the full rental and cost paid before the hearing as provided in proviso of section 172 of the Land Transfer Act (Cap 131). The rationale is that, the moment any lessee fails to pay the rental or has been served with notice to quit or his tern has expired, he or she should be evicted and the indefeasible title of the lessor, which is the high priority of the registration system, should be upheld. Any dispute relating to tenancy/lease should be dealt with in an appropriate forum and not in this proceeding for eviction.

33. It is because this rationale, the superior courts upheld that, the pendency of any proceeding in the court is not a sufficient cause to resist an application under section 169 of the Land Transfer Act. The Fiji Court of Appeal in its decisions in the cases of **Dinesh Jamnadas & Others v. Honson Ltd.** FCA Civ. App. 22/85, [1985] 31 FLR 62 and **Muthusami v. Nausori Town Council** FCA 23/86 (unreported case and decided on 04.07.1986) affirmed the same view by High Court. In both cases, other proceedings were pending in relation to the tenancy. In the first case (**Dinesh Jamnadas**) the High Court held that, existence of such proceedings was, by itself, not a cause sufficient to resist an application under section 169. In the other case (**Muthusami**), the High Court held that, mere institution of by writ did not by itself shut out a claim under section 169. The Fiji Court of Appeal upheld the decision of the High Courts in both cases.
34. Even if Pine Limited, which was the sub-lessee of the subject property, filed any action against the decision of the plaintiff company to cancel the sub-lease and to re-enter the subject property, it would not prevent the plaintiff company from bringing the summons under section 169 of the Land Transfer Act, to evict sub-lessee or its agent. How then the action filed by the defendants, who claim their right on some illegal contracts or agreements, can resist the plaintiff's instant summons for evicting them? As a result I see no merits in the argument of the counsel for the defendants.
35. The summary of the discussion is that, the plaintiff company is the last registered proprietor of the property described in the summons, and it fulfilled all necessary requirements under section 170 of the Land Transfer Act. On the other hand, the first defendant failed to adduce tangible evidence establishing a right to possess or supporting an arguable case for such a right. The second defendant totally relied on the defence of the first defendant, without adducing any tangible evidence independent from that of the

first defendant. As a result, she too failed to satisfy this court of her right to remain in possession of the subject property. Therefore, the both defendants should immediately deliver the vacant possession of the subject property described in the summons and should pay a reasonable cost to the plaintiff company for bringing this summons.

36. Accordingly, I make following final orders:

- a. Both defendants are hereby ordered to immediately deliver the vacant possession of the property mentioned in the summons to the plaintiff company, and
- b. Both defendants are further ordered to jointly pay a summarily assessed cost of \$ 3,000.00 to the plaintiff company, within a month from today.

At Lautoka  
24/07/2020



  
U.L. Mohamed Azhar  
Master of the High Court