

IN THE HIGH COURT OF FIJI
CIVIL JURISDICTION

Civil Action No. HBC 205 of 2016

BETWEEN: **JOHNSON SUI SEEN CHEER as ADMINISTRATOR OF THE**
ESTATE OF LEM KUE DECEASED of Samabula, Suva.

1st PLAINTIFF

AND: **MICHAEL CHEER AND JOSEPH CHEER** operators of Samabula
Cake Shop, Samabula, Suva, Bakers.

2nd PLAINTIFF

AND: **THE DIRECTOR OF LANDS** of Nasese, Suva.

1st DEFENDANT

AND: **THE ATTORNEY-GENERAL OF FIJI** of Suvavou House, Suva.

2nd DEFENDANT

AND: **REGISTRAR OF TITLES** of Civic Tower, Suva.

3rd DEFENDANT

Counsel : **Plaintiff: Mr. N. Nawaikula**

 : **Defendant: Ms. S.C. Chand**

Date of Hearing : **01.7.2020**

Date of Judgment : **19.8.2020**

Catch Words

Declaratory judgment-discretion of court to grant declaration-Sections 57, 140(a) and 140(b) of Land Transfer Act 1971- deprivation of interest in property registered – Statutory guarantee of title (Part XXII of Land Transfer Act 1971)- statutory right to claim damages for deprivation- locus standi- Section 57 all persons interest, Section 140(b) Any person deprived of land or estate or interest therein.- cancellation of indefeasible title unlawfully – powers Registrar of Title- ultra vires cancellation- parties who had lost registered interest- no need to prove sustained loss in deprivation of registered title.

Cases Cited

1. *Forum Hotels Ltd v Native Lands Trust Board, Registrar of Titles & Attorney-General of Fiji* [20131 FJCA 17] Court of Appeal decision (decided on 13 March 2013)
2. *Central Rentals Ltd v Patton & Storck Ltd* [1996] 42 FLR 137
3. *N (by his litigation friend, the Official Solicitor) and another v Poole Borough Council*, [2019] 4 All ER 581
4. *X and others (minors) v Bedfordshire County Council; M (a minor) and another v Newham London Borough Council and others; E (a minor) v Dorset County Council; and other appeals*, [1995] 3 All ER 353
5. *Cama v Attorney-General of Fiji* [2015] FJHC 810; HBC5I2.2005 (16 October 2015)
6. *Russian Commercial and Industrial Bank v British Bank for Foreign Trade* [1921] 2 A.C 438

JUDGMENT

INTRODUCTION

1. First Plaintiff was the executor and trustee of the estate which comprised two long terms State Leases, Namely CL3300 and CL 3301. Transmission by death was duly registered by first Plaintiff. Second Plaintiffs were beneficiaries and also occupiers of the said leases. Second Plaintiffs were conducting their business on the said premises. All the beneficiaries of the estate had negotiations with ex-fourth Defendant (who was struck out from action) for sale of leases, but the deal was not finalised and third Defendant had purportedly, cancelled the two leases. Fresh leases were issued to the same land under CL 3300 and CL3301 and they were granted to ex-fourth Defendant. Before that, CL 3300 and CL 3301 were re-entered in terms of Section 105 of the Property Act 1970, by first Defendant, lessor. After re-entry before cancellation of CL 3300 and CL 3301, third Defendant must comply with Section 57 of Land Transfer Act 1971. Third Defendant did not comply with mandatory provisions contained in proviso (b) of Section 57 of Land Transfer Act 1971. Third Defendant rejected mandatory statutory obligation conferred to the third Defendant in proviso (b) to Section 57 of Land Transfer Act 1971 in her evidence as well as in pleadings. Court of Appeal in *Forum Hotels Ltd v Native Lands Trust Board, Registrar of Titles & Attorney-General of Fiji* [20131 FJCA 17; ABU0046.2010 (13 March 2013) held, Registrar of Title must give notice, in terms of proviso (b) of Section 57, of Land Transfer Act 1971 before cancellation of title and failure to do so ‘*exceeded jurisdiction*’ of third Defendant, hence a **ground for challenging the actions** of the Registrar of Title. (Per Calanchini P). Plaintiffs in this action sought a declaration that second Defendant had breached Section 57 of the Land Transfer Act 1971, and the improvements constructed on the subject property belong to the Plaintiffs. Plaintiffs were seeking damages for deprivation of their interest on land by third Defendant as an alternative to cancellation of new

leases to ex- fourth Defendant. As the re-entry by the lessor to CL3300 and CL3301, were not pursuant to *formal process* or orders of the court through actions, third Defendant must comply with the proviso (b) of Section 57 of Land Transfer Act 1971. So third Defendant *exceeded jurisdiction* in the purported cancellation of CL3300 and CL3301. In terms of Section 140 of the Land Transfer Act 1971 guarantees registered interest or estate extinguished. First Plaintiff as the executor and trustee of late Lem Kue, who had registered interest through transmission of death to CL3300 and CL3301, which **were cancelled unlawfully**, statutorily entitled to bring an action for damages in terms of Section 140(b) of the Land Transfer Act 1971. Plaintiffs neither pleaded fraud and or collusion on the part of the Defendants nor sought judicial review of the actions of the Registrar of the Title for '*exceeding jurisdiction*'¹ in said **illegal cancellation of registered leases** in violation of mandatory statutory provision contained in proviso (b) of Section 57 of the Land Transfer Act 1971.

FACTS

2. Plaintiffs filed this action on 11.8.2016 against four Defendants (the fourth Defendant was struck off later) seeking the following declarations and orders:
 - a) A Declaration that the first Defendant acted in breach of section 105 of the Property Law Act and its actions are therefore null and void;
 - b) A Declaration that the second Defendant acted in breach of section 57 of the Land Transfer Act and that therefore its actions are null and void and of no effect;(There is a typographical error in this order as it should be third Defendant, all the submissions were made on that basis by all the parties without considering this typographical error and it had not prejudiced any party)
 - c) A Declaration that the improvements constructed by the Plaintiffs on the subject property continued to belong to the Plaintiffs;
 - d) And Order that the Defendants re-instate the Plaintiffs leases in their names;
 - e) Alternatively an order that the Defendants pay damages to the Plaintiffs at the current value of the said properties;
 - f) Damages to be assessed; and
 - g) Costs.
3. On 8.6.2017, the first, second, and third Defendants filed its Statement of Defence. After filing a statement of defence, on 28.3.2017, Fourth Defendant filed a Notice of Motion to strike out the Plaintiffs' Claim and accordingly fourth Defendant was struck off by the decision delivered on 21.2.2019.

¹ *Forum Hotels Ltd v Native Lands Trust Board, Registrar of Titles & Attorney-General of Fiji* [20131 FJCA 17; ABU0046.2010 (13 March 2013)](Per Calanchini P)

4. The trial was conducted on 1.7.2020 and three witnesses gave evidence. Mr Michael Cheer (first named second Plaintiff), gave evidence on behalf of the Plaintiffs. Both parties relied on the agreed bundle of documents and the facts relating to said documents were not in dispute.
5. At the outset counsel for the Plaintiffs said that they are not seeking a declaration as to failure to comply Section 105 of the Property Act 1970.
6. Apart from that Plaintiff abandoned forth relief prayed as they have not sought cancellation of titles due to fraud.
7. Mr Vikash Rao, the Principal Lands Officer, and Ms Treta Sharma, the Registrar of Titles on behalf of the Defendants, gave evidence.
8. Late Lem Kue was granted two state Leases CL3300 and CL30301 for ninety nine years from 1961. They are situated in commercial area adjoining a main road.
9. Late Lem Kue and his family had migrated on or around the time of independence and only second Plaintiffs and his late father remained in the said leases and they also conducted business in the said premises. There were two permanent structures constructed by them and they used that for business, conducted on CL3300 and CL3301.
10. First Plaintiff was registered as the executor and trustee of late Lem Kue's estate in purported cancelled State Leases nos. CL 3300 and CL 3301 being exhibits 28 and 29 (pages 55 and 60 of Agreed Bundle of Documents). Both the leases were issued for ninety nine years from 1961.
11. Second Plaintiffs are the sons of late Tse Chey Ming who was a beneficiary of late Lem Kue's estate. They were occupying the subject property and were operating Samabula Cake shop in one building and residing in the other on the subject property.
12. Other beneficiaries of the estate of late Lem Kue were abroad in Canada, except second named Defendants and they desired to sell the two leases subjected to consent from the first Defendant.
13. Initially on or around 23.2.2005 first Plaintiff's solicitors had offered State Leases No CL 3300 and 3301 to the first named second Defendant for a sum of \$725,000 which was later reduced to \$700,000.
14. First named second Defendant had accepted the reduced offer and also agreed to pay outstanding land and city rates for approximately \$40,000 by letter of 11.5.2005.

15. According to the evidence of Michel Cheer two leases were worth more than one million and one person had offered that price but he said that he wanted it for himself.
16. The sale to first named second Defendant did not eventuate and then parties were negotiating with struck out fourth Defendant to sell leases subject to legal requirements.
17. Again this sale did not eventuate, but struck out fourth Defendant, had obtained the premises which were under purported cancelled leases CL 3300 and CL3301, after re-entry by the first Defendant and also cancellation of leases by third Defendant.
18. First Defendant issued notices in terms of Section 105 of the Property Law Act 1970.
19. Third Defendant without complying with the requirements contained in Section 57 proviso (b) of Land Transfer Act 1971 cancelled the said leases.
20. According to third Defendant there was no requirement to comply abovementioned proviso (b) to Section 57 of Land Transfer Act 1971.
21. After the state leases were purportedly cancelled, the first Defendant issued State Lease nos. 19232 and 19233 tendered as exhibits 30 and 31 over the same land parcels to struck off fourth Defendant. Fourth Defendant had obtained the properties with improvements done by the Plaintiffs.

ANALYSIS

22. Plaintiffs' counsel informed at the commencement of this hearing that he will be abandoning first and forth reliefs sought in the prayer to the statement of claim.
23. Before the trial, the Defendants raised a preliminary issue that second Plaintiffs do not have *locus standi* due to the fact that they were neither the registered lessees of cancelled state leases nor the executors or administrators of the same.

locus standi

24. Plaintiffs' action in nutshell are for declarations and for damages resulting from statutory non-compliance and deprivation of their interests in State Leases CL 3300 and CL3301.

25. The action for damages for deprivation of interest or estate in land at the hands of third Defendant and or officers under the Act, can be instituted in terms of Section 140 of Land Transfer Act 1971. If a person '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***' such party can bring an action for such misfeasance in terms of section 140 of the Land Transfer Act 1971.
26. An action can be filed by any person deprived of any *estate or interest* in the said land. Second defendants were beneficiaries of the estate late Lem Kue who was the lessee of said leases. First Plaintiff was the executor and trustee of the estate of late Lem Kue. Second Plaintiffs were conducting a business on the said property for a long time and had also constructed and or maintained fixed properties on the land. They were also occupants in the said lands.
27. It is axiomatic that one cannot be in driving seat and decide preliminary objection without considering facts. I cannot decide such fact as whether second Plaintiffs had an interest and or estate to the two leases that were cancelled, without hearing of the case and preliminary objection was premature and can only be dealt in the final judgment.
28. Apart from that, second Plaintiffs were seeking declaration relating to proviso (b) of Section 57 of the Land Transfer Act 1971 which again required notices to '*all persons interested*' in the cancelled lease. It was clear that second Plaintiffs were '*interested*' party as beneficiaries to the said cancelled leases.
29. The court cannot decide whether second Plaintiffs were not '*all persons interested*' in the cancelled leases in abstract manner, before hearing was commenced on the day of hearing. So I deferred said preliminary issue, till conclusion of evidence.
30. Second Plaintiffs who had lived and also carried on business on the property and also beneficiary to part of the proceeds of the estate are clearly persons interested in CL 3300 and CL3301 and can bring an action for declaration relating to the noncompliance of the mandatory provisions contained in Section 57 of Land Transfer Act 1971.
31. The evidence adduced established that second Plaintiffs were neither the registered lessee nor the executors/trustees or the administrators of the cancelled state leases. Second Plaintiffs occupied the subject property as the beneficiaries in the estate of Tse Chey Ming (who was a beneficiary in Lem Kue's estate) so they have an interest in the cancellation of the said leases.

32. Section 140 of Land Transfer Act 1971 states

“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**.(emphasis added).

33. Respondents contend that first Plaintiff was registered as the executor and trustee of the cancelled state leases he was the only person had sufficient interest to bring a claim against the Defendants. Accordingly, any claim by the second Plaintiffs should be dismissed. For the reasons given earlier second Plaintiffs can bring this action for a declaration for violation of section 57 as a party having an interest in the land as the occupiers and also beneficiaries of the registered interest of the first Plaintiff.

34. Even if I am wrong, Section 140 of Land Transfer Act 1971 granted second Plaintiffs a statutory right, to file an action as they were parties who were deprived of their interest as the beneficiaries in the estate to which the two cancelled ninety nine year leases CL 3300 and CL3301. They had lived and made permanent improvements to the said property in a commercial area. So the objection as to status of the second Plaintiff is overruled.

Indefeasibility of title and Violation of Mandatory provisions of Land Transfer Act 1971

35. Under Torrens system, registration is indefeasible and this indefeasibility is not absolute, as there are safeguards to secure property rights of the registered proprietors. CL 3300 and CL3301 were registered titles in the name of late Lem Kue and upon his death rights were conferred to first Plaintiff as executor and trustee to the said leases, through transmission by death , registered on the titles.

36. So, Plaintiff's interest in the said leases gained infeasibility hence can only be taken away from them in accordance with provisions contained in Land Transfer Act 1971.
37. There is no unfettered discretion given to third Defendant to cancel registered interest in terms of Section 57 of the Land Transfer Act 1971.
38. It should be noted sections 37 and 38 of the Land Transfer Act 1971 together grants indefeasibility to titles registered in terms of the Land Transfer Act 1971.
39. Section 37 of the Land Transfer Act 1971 states that no instrument until it is registered '*in accordance with the provisions of the Act*' will create or vary or extinguish rights. So the registered interests of the first Plaintiff over two leases obtained indefeasibility under Land Transfer Act 1971 which can only be cancelled in terms of the said Act.
40. Section 37 of Land Transfer Act 1971, reads,

“37. **No instrument until registered in accordance with the provisions** of this Act shall be effectual to create, vary, extinguish or pass any estate or interest or encumbrance in, on or over any land subject to the provisions of this Act, but upon registration the estate or interest or encumbrance shall be created, varied, extinguished or passed in the manner and subject to the covenants and conditions expressed or implied in the instrument.”(emphasis added)
41. There is no issue that first Plaintiff as the trustee and executor had registered interest that was infeasible and it was lost not due to re-entry in terms of Section 105 of the Property Act 1970, but due to cancellation of title by the Registrar of Titles purportedly in terms of Section 57 of Land Transfer Act 1971.
42. Section 38 of the Land Transfer Act 1971 grants protection to registered title, but this does not preclude party aggrieved by '*excess of jurisdiction*' by Registrar of Title to seek redress by way of Judicial Review, Declaration, and or to seek damages for misfeasance or deprivation of such interest, in terms of Section 140 of Land Transfer Act 1971.
43. So sections 37, 38, 39 and 140 needs to be considered in order to understand indefeasibility and title guaranteed in terms of Land Transfer Act 1971. It also allows adequate compensation for parties who had lost titles due to errors of law and or omissions on the part of third Defendant.
44. Section 38 of the Land Transfer Act 1971 states

‘38. No instrument of **title registered under the provisions of this Act** shall be impeached or defeasible by reason or on account of any informality or in any application or document or in any proceedings previous to the registration of the instrument of title.’

45. Sections 38 of the Land Transfer Act 1971 reiterate that indefeasibility, but not absolute terms. It is the title that is registered in terms of the Land Transfer Act 1971 that obtains indefeasibility. In other words Registrar of Title does not possess unfettered powers to eliminate people’s property rights knowing or unknowingly and for that safeguards are in place.
46. If the Registrar of Title exercised powers *exceeding the jurisdiction* or acted *ultra vires*, such a cancellation is illegal and can be challenged in judicial review for quashing the act of cancellation and can be subjected to damages and or for declarations in appropriate civil action.
47. Property Rights are protected in the Bill of Rights in the Constitution of the Republic of Fiji. So interpretation of any provision contained in the Land Transfer Act 1971 needs to done ‘*contextually*’². So, the text of the statute can be interpreted without granting third Defendant an absolute power in cancellation in violation of proviso (b) of Section 57 of Land Transfer Act 1971 read with sections 37 and 38 of the same Act.
48. As stated earlier such *ultra vires* acts can be subjected to judicial review as well as for damages for misfeasance and or for deprivation of interest or estate in land, by third Defendant.
49. Plaintiffs allege that third Defendant failed to comply with the procedure for cancellation of leases under section 57 of the Land Transfer Act 1971, and as such, the action to cancel state leases were *null and void* and of no legal effect.
50. Third Defendant cancelled the state leases upon re-entry by the first Defendant in terms of Section 105 of the Property Law Act 1970.
51. Third Defendant in evidence said that they do not need to comply with proviso (b) of Section 57 in order to cancel the two leases and stated so in the paragraph 15 of statement of defence filed on behalf of Defendants. This was a misconception of law.
52. Section 57 of the Land Transfer Act states:

² Section 7(5) of the Constitution of the Republic of Fiji

Cancellation by Registrar

“The Registrar, upon proof to his or her 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 or her 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 or her 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 or her 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.”(emphasis added)
53. Cancellation of registered interest in land under Land Transfer Act 1971 is deprivation of property rights enshrined in the Bill of Rights of the Constitution of the Republic of Fiji hence should only be in accordance with the Land Transfer Act 1971. Indefeasibility of title does not mean that Registrar of Title can disregard the provisions contained in the Land Transfer Act 1971 and enter a cancellation of a registered interest which also has all the protection given in the same Act.
54. If this is allowed it will create a serious erosion of property rights enshrined in the Bill of Rights of Constitution of Republic of Fiji. Such an action is clear breach of statutory law.
55. Section 57 of the Land Transfer Act 1971 must be complied before cancellation of registered interest in terms of the said provision. Registrar of Title must comply with proviso (a) **and** (b) to Section 57 of Land Transfer Act 1971, before cancellation.
56. It is not the re-entry of the lessor that extinguish the indefeasible registered interest, to the property but the cancellation of such right by Registrar of Titles. This is

- evident from proviso (a) to the Section 57 of Land Transfer Act 1971, where even a third party who had registered an interest in the land, was given an opportunity to settle the arrears or rentals, before cancellation. If that is done no cancellation can be executed by Registrar of Titles.
57. The rationale contained in the prerequisites of proviso (a) and (b) of Section 57 of Land Transfer Act 1971, is clear. This is to curtail the power of the Registrar of Title being abused and also separation of power between lessor as to re-entry of premises, and power of Registrar of Titles to cancel the titles after lawful re-entry by the lessor.
 58. Both lessor and Registrar of Title cannot collude, in order to cancel an infeasible title registered to a person. This is equally applicable, irrespective of lessor is a private party or state entity such as Director of Lands. Powers of lessor and Registrar of Title, are separated for the purpose of prevention of abuse and for transparency, elimination of fraud and or corruption, and also for protection of property rights of all persons having registered interest in terms of Land Transfer Act 1971.
 59. This type of checks and balances are paramount in a legislation such as Land Transfer Act 1971 where Registrar of Title amasses a considerable authority as to the property rights of the individuals. So strict compliance in terms of proviso (b) to Section 57 of Land Transfer Act 1971 is *sine qua non*.
 60. Court of Appeal in *Central Rentals Ltd v Patton & Storck Ltd* [1996] 42 FLR 137 held,

‘We are unable to treat *Laffer v. Gillen* as a decision that the entry by the Registrar of Titles on the register of a memorial cancelling a lease cannot be challenged in the High Court. On that question we consider we should follow *Frazer v. Walker* [1967] 1 AC 569, a considered decision of the Privy Council, which dealt with the question of indefeasibility of title under the Land Transfer Act 1952 (NZ).

At 585 their Lordships said that registration under that Act-

"... in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a Court acting in personam may grant."

Similarly the Fiji Act does not deny the right of a plaintiff to bring an action against the Registrar of Titles for such relief based on the Registrar's own wrongful acts or omissions. See also *Brooker's Colours Ltd. v. Sproules* (1910) 10 SR (NSW) 839 at 841-2 where registration of the

cancellation of a lease was held to be no bar to the enforcement of the tenant's equity to relief against forfeiture.'(Emphasis is mine)

61. Court of Appeal in *Forum Hotels Ltd v Native Land Trust Board* [2013] FJCA 24; ABU0046.2010 (13 March 2013) reiterated importance of the proviso (b) to Section 57 and in the concurrent decision of Calanchini P held

'[5]. The Registrar was acting under section 57 of the Land Transfer Act Cap 131 when he registered the cancellation of the Appellant's lease. Before doing so the Registrar was, in this case, required to do two things. The first was to be satisfied upon proof that the re-entry and recovery of possession by the First Respondent was lawful. The second was to require notice of the application to register the cancellation to be served on all persons interested under the lease or arrange publication of the application in the Gazette before making any entry in the register. This second requirement is contained in proviso (b) to section 57 of the Land Transfer Act.

[6]. In **Central Rentals Limited –v- Patton and Storck Limited** (1996) 42 FLR 137 this Court at page 138 commented on the scope of proviso (b):

"Para (b) was included in section 57 on the enactment of the Land Transfer Act following the repeal of the Land (Transfer and Registration) Ordinance (Cap 136) (1955). Its evident purpose was to reverse the effect of **Ram Kali – v- John Bayly** (1954) 4 FLR 139 to ensure that a lessee is given a reasonable opportunity to make submissions to the Registrar against the cancellation of the lease and if necessary to take court proceedings."

[7]. It was not disputed that the Registrar had not served a notice under section 57 proviso (b) on the Appellant. In passing I indicate that I do not accept the submission by the Second and Third Respondents that notice under section 57 proviso (b) is not necessary when the lessee has been properly served notice under section 105 of the Property Law Act Cap 130. The notices are necessary conditions precedent to (a) re-entry by the landlord under section 105 of the Property Law Act and (b) registration of the cancellation by the Registrar under section 57 of the Transfer of Land Act.'

62. Both parties in the written submissions relied on the said Court of Appeal decision. It is clear that Defendants' contention was rejected by Calanchini P in the said decision.
63. Calanchini P in *Forum Hotel*(supra) emphasised the consequences of the non-compliance of proviso (b) to Section 57 of Land Transfer Act 1971, as fatal error to the purported cancellation of title

and held,

“At the very least the notice under proviso (b) was an administrative requirement to be complied with before the Registrar could be satisfied upon proof that re-entry and recovery of possession was lawful. The performance of the discretion to register the cancellation was dependent upon the lessee being given the opportunity to be heard in the form of making submissions. **By proceeding to register the cancellation before sending the notice the Registrar of Titles had exceeded his jurisdiction.** By not giving the Appellant an opportunity to make a submission the Registrar of Titles had failed to observe the principles of natural justice. **Both are grounds for challenging the actions of the Registrar of Titles.**” (emphasis is mine).

64. Said two leases namely CL 3300 and CL 3301 were indefeasible, and re-entry to the property by the first Defendant was not the point they lost the registered interest to said two properties.
65. It was clear from Section 57 of Land Transfer Act 1971, that third Defendant was the authority under Land Transfer Act 1971, to cancel the leases upon re-entry by the lessor in terms of Section 105 of Property Law Act 1970. This authority is not an unfettered one and subjected to checks and balances in the same Act. By disregarding the provisions contained in proviso (b) in Section 57 of Land Transfer Act 1971 third Defendant had acted *ultra vires* or *exceeding jurisdiction*.
66. This action of third Defendant could have been challenged in a judicial review and nullified cancellation, on the basis of *ultra vires* action or done in exceeding jurisdiction.
67. In exercise of the authority to cancel the original lease, third Defendant must be satisfied upon proof that the re-entry and recovery of possession by a lessor either by formal process of law or in accordance with the provisions for re-entry contained or implied in the lease, was lawful. This was the first requirement out of three requirements stated in Section 57 of Land Transfer Act 1971.
68. There was no dispute that re-entry by the lessor to the two leases in issue was not pursuant to any sort of formal court process.
69. Registrar of Titles in her evidence said that the state leases were cancelled on 1.2. 2012 after she was satisfied of lawful re-entry based on the first Defendant's statutory declaration exhibited as document 38 and 54 contained in agreed bundle of documents. These documents and contents were admitted without any proof as both parties commonly relied on them.

70. What is deduced from the said document was that first Defendants are estopped from denying that re-entry to the purported cancelled leases were only on arrears of rents under respective leases.
71. Both first and third Defendants are estopped from said position in this hearing and the legal consequence from that position was that re-entry by the lessor had not extinguished the leases and can be rectified upon payment of arrears as stated in proviso (a) to Section 57 of Land Transfer Act 1971.
72. Second requirement under Section 57 of Land Transfer Act 1971 was to give notices in terms of proviso (a) of Section 57 of Land Transfer Act 1971 for parties who have a registered interest in said leases.
73. According to the application to cancel made by first Defendant, he had re-entered the subject property on 13 .11. 2010 as the first Plaintiff was in arrears of rent and had failed to remedy the breach despite being given time to remedy the default. So the reason for re-entry by first Defendant was arrears of rent only, to his own admission to the third Defendant.
74. First Plaintiff as the executor or trustee had registered interest in the two leases but third Defendant had not given the notice in terms of proviso (a) to Section 57 of Land Transfer Act 1971. Third Defendant in her evidence said that no notice was issued under section 57(a) of the Land Transfer Act 1971, to first Plaintiff as the executor or trustee of the property was the 'lessee' in terms of the proviso (a) to Section 57 of Land Transfer Act 1971.
75. Defendant's contention was that first Plaintiff who had registered transmission by death on state leases, was the 'lessee' in terms of the said provision and proviso (a) to section 57 of the Land Transfer Act 1971, excluded in the issuance of notice to the lessee in case of re-entry based on non-payment of rent. This argument has merits, as third Defendant in any event required to give notice to all the parties interested in the land before cancellation in terms of proviso (b) to Section 57 of Land Transfer Act 1971 including and not limiting to lessee.
76. Third requirement was the compliance of proviso (b) to Section 57 of Land Transfer Act 1971 which was admittedly not complied by third Defendant. This was an exceeding jurisdiction on the part of third Defendant.
77. Once Registrar of Titles exceeded jurisdiction in the cancellation of a title that was indefeasible, what is the position of the proprietor whose was denied of the indefeasible title, interest or estate through unlawful action of the Registrar of Tiles? The title is guaranteed in the Land Transfer Act 1971 when it is registered in terms of the provisions of the act as stated in Sections 37 and 38 of Land Transfer Act

1971. An indefeasible title cannot be denied in illegal and unlawful manner through actions of Registrar of Title *exceeding jurisdiction*.

78. Plaintiffs had negotiated to sell their interests in two leases, subjected to necessary consents, to ex-fourth Defendant, but this did not eventuate. Same party, (ie ex-fourth Defendant) had obtained these two leases and this was possible due to unlawful cancellation of indefeasible registered interest of first Plaintiff.(see document 29 in page 52 in the agreed bundle of documents)
79. Plaintiffs in the written submissions abandoned the relief for cancellation and restitution of the titles. Instead seeking alternative relief for damages.
80. In the purported cancelled two leases, the transmission by death transmitted the estate of the deceased to the first Plaintiff making, this does not make him to be excluded in proviso (b) of Section 57 of Land Transfer Act 1971.
81. As the re-entry was not through *formal* process of law third Respondent must give notice to all parties interested and failure to do so allows first and or second Plaintiffs to bring an action for declarations and damages in terms of Section 140 of Land Transfer Act 1971. Formal Process is through an action filed and through orders of court.
82. Counsel for the Defendants contend that third Defendant was only required to give notice of application to cancel the leases to all registered persons. This is not correct as notice under proviso (b) of Section 57 of Land Transfer Act 1971 can be distinguished from proviso (a) of the same Act where it limited to persons '*appearing in the registry*'. This restriction is not to be found in proviso (b) of Section 57 of Land Transfer Act 1971.
83. Even if third Defendant's contention is correct she had not given notice to registered interest holder, the notice of application of cancellation in terms of proviso (b) to Section 57 of Land Transfer Act 1971. This is an error of law on the part of third Defendant as there was no requirement for registration to give 'all persons interested' in land under proviso (b) to Section 57 of Land Transfer Act 1971.
84. Again third Defendant contended, that she was not aware of the parties who had not registered their interests in the memorials of the respective leases, in order to give notice of application for cancellation. This was the reason that allowed third Defendant to publish paper advertisements and gazette notifications about the notice of application to cancel the titles.
85. In this case second Plaintiffs were on the property where permanent structures were erected and they were also doing business at a commercial bub, hence third

Defendant could have given notice of application for cancellation by first Defendant to them, without any difficulty.

86. Third Defendant relied on notices given by first Defendant as lessor for re-entry contained in exhibits 37 and 53 (pages 87 and 104). These were neither, notices given by third Defendant, nor were notices regarding application of cancellation of title. So on both grounds said notices cannot be considered as notices in terms proviso (b) of Section 57 of Land Transfer Act 1971.
87. Third Defendant had to comply proviso (a) and proviso (b) of Section 57 of Transfer act if they apply and cannot seek refuge under one of them for noncompliance of the other.
88. Third Defendant relied on various notices given by first Defendant relating to defaults and or breaches of lease to Plaintiffs but these cannot substitute the statutory notices required to be issued by third Defendant. There was no notice of application to cancel to any of the Plaintiffs on or around the time such application was made before cancellation of the registered interest of first Plaintiff. The contention that first Defendant had posted notice of cancellation at the time of notice of re-entry cannot hold water. Third Defendant under Section 57 of Land Transfer Act 1971 was required to be satisfied that there was a lawful re-entry hence it is only third Defendant who can give notices in terms of provisos to Section 57 of Land Transfer Act 1971. The separation of power under the provision is clear.
89. In the circumstances, declaration is granted that third Defendant had violated proviso (b) of Section 57 of Land Transfer Act 1971.
90. Plaintiffs are seeking orders as to the ownership of the improvements on purportedly cancelled leases. These are permanent structures attached to the fresh title given hence ownership of them cannot be separated from the leaseholder.
91. Power of the court to make declaratory order is discretionary. (see *Russian Commercial and Industrial Bank v British Bank for Foreign Trade* [1921] 2 A.C 438.
92. So, I refrain from making an order as to the ownership of the permanent structures on the new leases issued to the struck out fourth Defendant in the exercise of my discretion as it is order as the Plaintiffs had withdrawn the claim for cancellation of the leases issued to ex-fourth Defendant, and it had obtained fresh leases for same land.
93. I can consider this as a factor in the assessment of damages for deprivation of the interest registered in order to grant an appropriate sum for violation of property rights in terms of Section 140(b) of Land Transfer Act 1971.

DAMAGES

94. Court of Appeal held that third Defendant must comply with proviso (b) of Section 57 of Land Transfer Act 1971 and failure to do so was considered as excess of jurisdiction.³ So the failure to do so was an error of law and or omission on the part of third Defendant.
95. There is a statutory cause of action created in the Section 140 (b) for any party deprived of an interest in such error or omission on the part of third Defendant, in order to guarantee indefeasible titles that are affected from such acts.
96. Without prejudice to above there is duty of care for Public Authorities such as Registrar of Titles to follow mandatory statutory provisions , which were reiterated in Court of Appeal decisions in *Forum Hotels Ltd v Native Land Trust Board* [2013] FJCA 24; ABU0046.2010 (13 March 2013) and *Central Rentals Limited –v- Patton and Storck Limited* (1996) 42 FLR 137.
97. UK Supreme Court in a recent case formulated duty of care for public authorities in *N (by his litigation friend, the Official Solicitor) and another v Poole Borough Council*, [2019] 4 All ER 581 after analyzing several cases including previous HL , SC , and CA decisions held, (Per Lord Reed)

p 592

“[27] In particular, as Lord Reid explained in *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294 at 300–301, [1970] AC 1004 at 1030, **a person performing a statutory duty was liable for an act which, but for the statute, would be actionable at common law**, if he performed the act carelessly so as to cause needless damage. His liability arose because the defence which the statute provided extended only to the careful performance of the act. The rationale, Lord Reid explained, was that:

'Parliament deems it to be in the public interest that things otherwise unjustifiable should be done, and that those who do such things with due care should be immune from liability to persons who may suffer thereby. **But Parliament cannot reasonably be supposed to have licensed those who do such things to act negligently in disregard of the interests of others so as to cause them needless damage.**'

Lord Reid added that the position was not the same where Parliament conferred discretion. If the discretion was exercised lawfully, then the act in question would be authorised by Parliament:

³ *Forum Hotels Ltd v Native Land Trust Board* [2013] FJCA 24; ABU0046.2010 (13 March 2013)

'But there must come a stage when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament has conferred. **The person purporting to exercise his discretion has acted in abuse or excess of his power.** Parliament cannot be supposed to have granted immunity to persons who do that.' (emphasis added)

At p 603

“[65] It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2) that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation.”

98. In an earlier UK House of Lords decision in *X and others (minors) v Bedfordshire County Council; M (a minor) and another v Newham London Borough Council and others; E (a minor) v Dorset County Council; and other appeals*, [1995] 3 All ER 353 at pp 363- 364 held, (Per Lord Bowne-Wilkinson)

“GENERAL APPROACH

Introductory—public law and private law

The question is whether, if Parliament has imposed a statutory duty on an authority to carry out a particular function, a plaintiff who has suffered damage in consequence of **the authority's performance or non-performance of that function has a right of action in damages against the authority.** It is important to distinguish such actions to recover damages, based on a private law cause of action, from actions in public law to enforce the due performance of statutory duties, now brought by way of judicial review. The breach of a public law right by itself gives rise to no claim for damages. A claim for damages must be based on a private law cause of action. The distinction is important because a number of earlier cases (particularly in the field of education) were concerned with the enforcement by declaration and injunction of what would now be called public law duties. They were relied on in argument as authorities supporting the plaintiffs' claim for damages in this case: I will consider them in a little more detail later. Private law claims for damages can be classified into four different categories, viz:

(A) actions for breach of statutory duty simpliciter (ie irrespective of carelessness); (B) actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action; (C) actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it; and (D) misfeasance in public office, ie the failure to exercise, or the exercise of, statutory powers either with the intention to injure the plaintiff or in the knowledge that the conduct is unlawful.

Category (D) is not in issue in this case. I will consider each of the other categories but I must make it clear that I am not attempting any general statement of the applicable law: rather, I am seeking to set out a logical approach to the wide ranging arguments advanced in these appeals.”

99. *P.F. (International) Ltd v Financial Conduct Authority* [2020] All ER (D) 33 the abovementioned House of Lords decision was applied. So the common law can be applied where there is no statutory cause of action for damages.
100. Part XXII of Land Transfer Act 1971 guarantee titles. CL 3300 and CL3301 were registered titles and deprivation of them, through an error or omission on the part of third Defendant creates a statutory obligation to pay compensation for said breach in terms of Section 140(b) of Land Transfer Act 1971.
101. So the violation of statutory duty contained in proviso (b) of Section 57 of Land Transfer Act 1971 by third Defendant is liable for damages, in terms of Section 140 of the Land Transfer Act 1971 and I do not have to venture to common law for grant of damages for deprivation of indefeasible interest or estate in land by third Defendant.
102. A right to sue for breach of public law may arise in judicial review and or for tort of misfeasance or directly for derivation of a right as stated in Section 140(b) of Land Transfer Act 1971.
103. The right to sue for deprivation of interest or estate, in land, including errors of law or omissions from third Defendant are statutorily guaranteed. The rationale behind this is that a party who held indefeasible title can lose it unlawfully due to actions of officials including third Defendant, and should not be left high and dry. So first Plaintiff's registered interest as executor and trustee was statutory guarantee provided in Section 140 (b) of Land Transfer Act 1971.
104. Land Transfer Act 1971 creates indefeasibility when interests are registered, but this is not technical registration per se, but registration in terms of Land Transfer Act 1971. First Plaintiff had registered transmission by death as the executor and trustee of the estate of late Lem Kue. This was lost due to purported cancellation of CL

3300 and CL3301 by the third Defendant. These two leases were valuable assets of the estate of late Lem Kue and all the beneficiaries, including second Plaintiffs were deprived of this valuable asset

105. In terms of section 140 (a) of Land Transfer Act 1971 a person **sustained loss** due to *misfeasance* of third Defendant **or** a person *deprived* of a land under Section 140(b) can bring an action for damages making third Defendant a nominal defendant.
106. *Misfeasance* is not a requirement in terms of Section 140(b) of Land Transfer Act 1971. By the same token, Plaintiffs need not prove that they *sustained loss* in order to seek relief in terms of Section 140(b) of Land Transfer Act 1971.
107. So in terms of Section 140(b) any person who *'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,* may bring an action for damages. Such party need not prove they *sustained loss* or *misfeasance*, on the part of third Defendant, to bring an action in terms of Section 140(b) of Land Transfer Act 1971. Said Act, guarantees "indefeasibility" of CL3300 and CL3301, through adequate compensation by way of civil action for damages.
108. The deprivation of indefeasible title through illegal or unlawful manner entitles such aggrieved parties who are deprived to seek damages in terms of 140(b) of Land Transfer Act 1971 without proof of *sustained loss*.
109. Even if I am wrong on the above. Plaintiff in his evidence stated that the leasehold rights held by first Plaintiff as the trustee was worth more than one million and this was not challenged through evidence, though no valuation was presented.
110. There is evidence that in 2005 Michel Cheer had accepted an offer of \$700,000 for two leases that were purportedly cancelled.
111. Second Plaintiff in his evidence said that the two leases were worth more than million and one person had requested for that amount but he did not sell as he was interested to purchase it.
112. This part of evidence was not challenged in cross examination. There was evidence that second Plaintiff had accepted an offer from first Plaintiff for \$700,000 in or around 2005.
113. There was undisputed evidence that two leases were purportedly cancelled by third Defendant while there were permanent fixtures and first Defendant had failed to pay for such permanent improvements in terms of Clause 16 of CL 3300 and CL3301.

114. Plaintiffs did not provide valuation of said ninety nine year lease hold rights that were purportedly cancelled by third Respondent.
115. Pursuant to Clause 16 of purportedly cancelled state leases, the lessee is entitled to remove the building of the demised land when the lease has expired and the lessor does not wish to renew the lease, which is not applicable in this instance.
116. If the lessor desired to purchase the permanent improvements, must pay fair value for the building.
117. In the evidence Defendants tried to set off this for arrears of rents, but they were estopped from charging that from Plaintiffs as first Defendant had informed the lawyers of the second Plaintiff that all the arrears of rentals were paid by the successor to said leases in the letter dated 28.5.2012 (exhibit 60 in page 115 of agreed bundle of documents)
118. The purported cancellation deprived the estate of late Lem Kue very valuable assets. CL 3300 and CL301 were situated at heart of highly commercial area and they were purchased by a commercial entity. Considering the circumstances of case I am not inclined to take of path of least resistance to deny what Plaintiffs are entitled in terms of Section 140(b), stating that no valuation was produced. Though such a valuation would have helped them, failure to do so should not deprive them adequate compensation on the available evidence.
119. The rationale behind Section 140 (b) of Land Transfer Act 1971, is to guarantee a party who is deprived of land and this can be done only from granting suitable damages from available evidence.
120. The fact that struck out fourth Defendant was the last person to offer two leases CL3300 and CL 3301 and had obtained the identical lands from first Defendant for new leases CL 19232 and CL 233. This is evident from document 26 (page 52) and Michel Cheer had expressed amazement. These new leases issued to struck out entity was possible due to purported cancellation of two leases, by third Defendant. This type of abuse of power through infeasibility can be compensated in terms Section 140(b) of Land Transfer Act 1971 through adequate compensation for the loss to the estate of late Lem Kue.
121. Plaintiff in evidence valued it over a million and had accepted an offer for \$700,000 with the improvements. So the loss to the estate was more than \$800,000 on the available evidence. So in my judgment first Plaintiff as the executor and trustee is entitled for damages in the sum of \$800,000.
122. In *Cama v Attorney-General of Fiji* [2015] FJHC 810; HBC512.2005 (16 October 2015) relied on by the Defendants was not a case where damages sought in terms of

Section 140 of Land Transfer Act 1971 for misfeasance. There is a clear distinction between a person being deprived of indefensible title through misfeasance and or actions of *ultra vires* and or *exceeding jurisdiction* and failure to grant such property right.

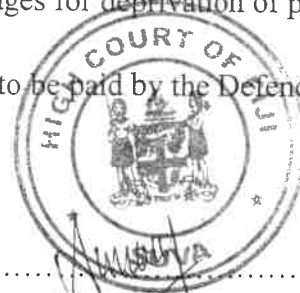
CONCLUSION

123. Plaintiffs had brought this action for declarations and also for damages for purported cancellation by third Defendant who disregarded mandatory statutory provision contained in proviso (b) of the Section 57 of Land Transfer Act 1971. Section 140 of the same Act guarantees the registered title holder under Chapter XXII of Land Transfer Act 1971. Misdirection and or omission on the part of third Defendant had exceeded jurisdiction and had cancelled infeasible registered interest of first Plaintiff as the executor and trustee of the estate of late Lem Kue. This had derived the estate of Lem Kue two leases. First Plaintiff as executor and trustee is entitled for damages in the sum of \$800,000 for said misfeasance. Plaintiffs are entitled for costs assessed summarily at \$4,500 payable by Defendants.

FINAL ORDERS

- a. A Declaration is made third Defendant acted in breach of proviso (b) of section 57 of the Land Transfer Act 1971 and had acted *ultra vires* or outside the authority or '*exceeded jurisdiction*' in said cancellation of two leases (CL 3300 and CL 3301) by third Defendant.
- b. No declaration is made as to the improvements on the purported cancelled leases, which are permanently fixed their ownership cannot be separated from land
- c. First Plaintiff is granted a sum of \$800,000 as damages for deprivation of property against Defendants.
- d. Cost of this action is summarily assessed at \$4,500 to be paid by the Defendants.

Dated at Suva this 19th day of August, 2020.



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Justice Deepthi Amaratunga
High Court, Suva