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

CIVIL APPEAL NO.ABU 0072 of 2018
[High Court Civil Action No. 315 of 2014)

BETWEEN : **THE DIRECTOR OF LANDS** *1st Appellant*

REGISTRAR OF TITLES *2nd Appellant*

ATTORNEY-GENERAL OF FIJI *3rd Appellant*

AND : **PATRICK PAUL**

Respondent

Counsel : **Ms M. Motofaga with Mr A. Prakash for the Appellants**
Ms N. Choo for the Respondent

CIVIL APPEAL NO.ABU 0085 of 2018
[High Court Civil Action No. 315 of 2014)

BETWEEN : **PATRICK PAUL**

Appellant

AND : **THE DIRECTOR OF LANDS** *1st Respondent*

REGISTRAR OF TITLES *2nd Respondent*

ATTORNEY-GENERAL OF FIJI *3rd Respondent*

Coram	:	**Basnayake, JA** **Lecamwasam, JA** **Dayaratne, JA**
Counsel	:	**Ms N. Choo for the Appellant** **Ms M. Motofaga with Mr A. Prakash for the Respondents**
Date of Hearing	:	**15 May, 2019**
Date of Judgment	:	**7 June, 2019**

JUDGMENT

Basnayake, JA

[1] I agree with the reasoning and conclusion of Dayaratne, JA

Lecamwasam, JA

[2] I agree with the reasoning and conclusion of Dayaratne, JA.

Dayaratne, JA

Judgment of the High Court and the two appeals

[3] The judgment that is being challenged in this court is that of the High Court of Suva dated 27.06.2018. There are two appeals before this Court. Civil Appeal No. ABU 0072 of 2018 has been filed by the Defendants in the High Court (the Director of Lands, the Registrar of Titles and the Attorney General of Fiji respectively). The Cross Appeal bearing Civil Appeal No. ABU 0085 of 2018 has been filed by the Plaintiff in the High Court (Patrick Paul). The two separate appeals are in respect of the two separate issues that came up for determination in the High Court. At the hearing before us, they were consolidated and taken up together. Therefore, there will be one judgment and in this judgment, I will first deal with the appeal filed by the Defendants in the High Court and secondly deal with the cross appeal of the Plaintiff in that case.

The Case before the High Court

[4] The land in question was foreshore land and had been leased to a Company by the name of Kilowen Fiji Limited (hereinafter referred to as the 'Çompany') under Crown Lease bearing No.13569 and thereafter the Company mortgaged it to Patrick Paul (Plaintiff) as security for monies obtained from him. The mortgage had been executed with the consent of the Director of Lands (1st Defendant), as required by Section 13 of the State Lands Act.

[5] The Company fell in to arrears of lease rent and the 1st Defendant had given notice of re-entry in terms of Section 105 (1) of the Property Law Act. Subsequently the Company had been served with Notice under Section 57 of the Land Transfer Act and thereafter the Crown Lease was cancelled. The Plaintiff states that no notice was given to him.

[6] The Plaintiff commenced proceedings in the High Court against the Defendants and he complained of two issues. **Firstly,** that the cancellation of the Crown Lease over which he enjoyed rights as a mortgagee, by the 1st and 2nd Defendants was a violation of Section 4(2) of the State Lands Act. This was on the basis that the 1st Respondent had not obtained his written consent prior to such cancellation as required therein. **Secondly,** he complained that the 2nd Defendant had failed to give him notice as required under Section 57 of the Land Transfer Act prior to cancellation of the Crown Lease.

[7] Accordingly he sought declarations that the cancellation of the Crown Lease and Mortgage was illegal and void, declaration that the Crown Lease remains current, general damages and costs.

[8] The Defendants took up the position that there was no requirement to obtain the written consent of the Plaintiff since Section 4(2) of the State Lands Act did not apply and also took up the position that notice as envisaged under Section 57 of the Land Transfer Act had been given to him.

[9] After trial, the learned High Court Judge held;

- With regard to the first issue - that the cancellation of the Lease and its registration was contrary to Section 4(2) of the State Lands Act and therefore illegal and void.

- With regard to the second issue - that the Plaintiff had notice of cancellation and an opportunity to pay arrears of rental.

[10] The claim for damages had been declined on the basis that no evidence was led in that regard.

Civil Appeal No. ABU.0072 of 2018
The Appeal of the Director of Lands, the Registrar of Titles and the Attorney General of Fiji

[11] This Appeal is with regard to the determination of the learned High Court judge on the first issue, namely that the cancellation of the Crown Lease and its registration was contrary to Section 4(2) of the State Lands Act and therefore illegal and void. The Defendants in the High Court will hereinafter be referred to as the 'Appellants' and the Plaintiff will be referred to as the 'Respondent'.

The Appellants have raised six grounds of appeal. They are as follows;

1. *That the Learned Trial Judge erred in law in finding in paragraph 9 of the Judgment that section 4 (2) of the State Lands Act 1945 applies to state leases when it only applies to cases of compulsory acquisition of estates in fee simple/land with certificates of title.*

2. *That the Learned Trial Judge erred in law and in fact in finding in paragraph 9 of the Judgment that the First Defendant (now First Appellant) was subject to section 4(2) of the State Lands Act 1945 when the First Defendant directed the Second Defendant (now Second Appellant) to cancel Crown Lease No. 13569.*

3. *That the Learned Trial Judge erred in law and in fact in finding in paragraph 18 of the Judgment that the primary obligation of the First Defendant (now First Appellant) was to obtain the Plaintiff's (now Respondent's) written consent for the cancellation of Crown Lease No. 13569 when the First Defendant (now First Appellant) is not legally required to obtain such consent from the encumbrancee of a crown lease.*

4. *That the Learned Trial Judge erred in law and in fact in finding in paragraph 9 of the Judgment and further declaring that the cancellation of Crown Lease No. 13569 by the First Defendant (now First Appellant) and the registration by the Second Defendant (now Second Appellant) of the cancellation of Crown Lease No. 13569 is illegal and void when there is no legal requirement for the First Defendant (now First Appellant) to obtain such consent from the encumbrancee of a crown lease.*

5. *That the Learned Trial Judge erred in law and in fact in finding in paragraph 18 of the Judgment that the cancellation of Crown Lease No. 13569 by the First Defendant (now First Appellant) was in contravention of section 4(2) of the State Lands Act 1945 when section 4(2) does not apply to cancellation of crown leases but to cases of compulsory acquisition of estates in fee simple.*

6. *That the Learned Trial Judge erred in law and in fact in declaring that the Defendants (now Appellants) are to pay the Plaintiff (now Respondent) costs summarily assessed in the sum of $1250."*

The Nature of the Land

[12] Although six grounds of appeal have been raised, the issue that is central to them all is as to whether the provisions contained in Section 4(2) of the State Lands Act are applicable in respect of the said Crown Lease. It was contended by learned counsel for the Appellants that Section 4(2) has no application since the land that was leased out was foreshore land (thus coming within the definition of 'State Land' in terms of Section 2 thereof) and that the land was not land that had been acquired by the State and registered in the name of the Director of Lands. It was further submitted that upon the registration of the Crown Lease, in terms of Section 21 of the Land Transfer Act 1971, the Company becomes the registered 'proprietor' and hence the land does not have the character of *'land registered in the name of the Director of Lands'* as found in that Section.

[13] I will now consider as to whether there is merit in this argument. There is no contest between the parties that the land is foreshore land. The first appellant acting for and on behalf of the State leased the land to the Company. He was able to give the land on lease because the land was subject to the control of the State. Therefore, there can be no doubt that it is State land by virtue of the definition contained in Section 2 of the State Lands Act. It is clear that consequent to the execution and registration of the said Crown Lease, the 1st Appellant became the registered Lessor and the Company became the registered Lessee. Needless to say, the title to the land does not pass to the Company (Lessee) and the 1st Appellant (Lessor) will at all times retain title of the land on behalf of the State subject to the leasehold rights of the Lessee. This position is consonant with the provisions contained in Section 21 of the Land Transfer Act which deals with 'Registration of instruments of title'.

[14] This logical sequence finds statutory support in Section 11 and 12 (2) of the State Lands Act.

Section 11 states that:

> *"Any lease or license in respect of land under the provisions of the Act shall be made out from and in the name of the Director of Lands on behalf of the Crown, and such lease or license shall be executed by the person then holding office of Director of Lands as lessor or licensor, and the person for the time being holding the office of Director of Lands shall, while he holds such office, be deemed the lessor or licensor of such lease or license".*

Section 12(2) states that:

> *"When a lease made under the provisions of this Act has been registered, it shall be subject to the provisions of the Land Transfer Act 1971, so far as the same are not inconsistent with this Act in the same manner as if such lease had been made under that Act and shall be dealt with in a like manner as a lease so made"*

[15] In the case of **Proline Boating Company Ltd v Director of Lands** [2003] FJCA 39; Misc. Action 39A.2011 (17 May 2013) cited by the Respondent, Calanchini P has recognized the role of the Director of Lands as Lessor of Crown Leases in terms of the provisions contained in Section 11.

[16] Therefore, the position taken up by the learned counsel for Appellants that the land concerned was not registered in the name of the 1st Appellant has to necessarily fail. In order to support her position that the land was not registered in the name of the 1st Appellant, the learned counsel for the Appellants submitted that after the registration of the Crown Lease, the Company is registered as the *'proprietor'* of the land. This argument too has to fail in the light of the analysis made by me above. Nevertheless, for sake of completeness, I would like to refer to the interpretation Section contained in the Land Transfer Act in order to demonstrate the fallacy of the said proposition. According to Section 2, 'proprietor' means *"the registered proprietor of land, or of any estate or interest therein"*, whilst 'lessee' means *"the proprietor of a lease or sublease"*. 'Lessor' is defined as *"proprietor of the land leased and includes a sub-lessor"*. Thus, the Company as lessee, becomes the ***proprietor of the lease*** and not proprietor of the land. The *proprietor of the land leased* is the 1st Appellant (Director of Lands) because he is the lessor.

Does the land come within the description contained in Section 4(2)?

[17] Having arrived at the above conclusion, it will now be necessary to consider as to whether the provisions contained in Section 4(2) of the State Lands Act will apply in respect of the land that was leased out. This is the main issue as far as this appeal is concerned.

[18] Having analyzed the provisions contained in Section 4(2), the learned counsel for the Respondent submitted that the land comes within the description contained in the second limb of Section 4 (2) and thus subject to the condition laid down in the proviso.

[19] Section 4(2) reads as follows;

> *"Notwithstanding anything contained in the Land Transfer Act, upon the registration of any transfer of land to the Director of Lands for and on behalf of the Crown,* ***or*** *in respect of* ***any land which is registered in the name of the Director of Lands for and on behalf of the Crown,*** *the Registrar of Titles shall, if directed in writing by the*

Director of Lands, cancel, either in whole or in part, the title in respect of such land, ***provided that, in respect of any title against which are registered any encumbrances, no such direction shall be given, without the written consent of the encumbrancee."*** *(emphasis added)*

[20] A close study of this Section makes it clear that it makes reference to two types of lands. The first category would be 'the lands that are transferred and registered in the name of the Director of Lands on behalf of the State' and the second category is ***"any land which is registered in the name of the Director of Lands for and on behalf of the Crown"***. The analysis made by me herein before, would make it clear that the land in question falls within the second category. Therefore, the provisions contained in Section 4(2) would invariably become applicable to the said Crown Lease.

Requirement to obtain consent of Respondent

[21] A mortgage had been registered in the name of the Respondent and this was admittedly with the consent of the 1st Appellant. Thus the Respondent is an *'encumbrancee'* as envisaged under the proviso to Section 4(2) and hence it was imperative for the 1st Appellant to have obtained his written consent before he directed the 2nd Appellant to cancel the lease.

[22] It is important here to note that the legislature in its wisdom has included such provision in order to ensure that the legal rights of a person who has an interest in such lands are not violated. The constraint imposed on the 1st Appellant is to enable an 'encumbrancee' to avail of any legal/administrative remedies if considered necessary, prior to a decision adverse to his/her interests is taken.

Determination

[23] In view of the matters as discussed by me above, I agree with the determination of the learned High Court judge that the cancellation of the Crown Lease by the 1st Appellant and its registration by the 2nd Respondent was illegal and void, since they had acted in violation of Section 4(2) of the State Lands Act.

[24] I therefore, affirm the judgment of the learned High Court Judge and dismiss this Appeal.

Civil Appeal No. ABU 0085 of 2018
The Cross Appeal filed by Patrick Paul

[25] This cross appeal is with regard to the determination of the learned High Court judge on the second issue, namely that the Plaintiff had notice and an opportunity to pay the arrears of rental. The Plaintiff in the High Court will hereinafter be referred to as the 'Appellant' and the Defendants will be referred to as the 'Respondents'.

[26] The grounds of appeal raised by the Appellant in the Cross Appeal are;

Ground 1

That the Learned Judge erred in law and in fact in his findings on the second issue and particularly at paragraph 17 of the judgment that service of Notice under Section 57(a) and (b) of the Land Transfer Act on Plaintiff's lawyers R Patel & Co was deemed to be Notice served on Plaintiff.

Grounds two and three

That the learned Trial Judge erred in law and fact and in failing to give weight to the evidence of Deputy Registrar of Titles, specifically to her admissions that Plaintiff's address was specified in the Mortgage document and Notice served on R Patel & Co, purportedly under Section 57 (a) and (b) was completely defective.

[27] The second issue the Appellant had taken up in the High Court was that prior to re-entry it was incumbent on the 2nd Respondent to serve a notice on him to pay the arrears of rent in terms of Section 57 of the Land Transfer Act. The position of the Appellant was that the 2nd Respondent had not given him such notice.

[28] Although the Appellant has spelt out three grounds of appeal, a perusal of the three grounds clearly indicate that they are intrinsically interwoven. Therefore, I will deal with all grounds together.

Requirement to give notice

[29] In order to determine this issue, it is necessary to carefully examine Section 57 of the Land Transfer Act. It reads as follows;

> *"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 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."*

[30] A perusal of this Section makes it clear that the notice requirement arises under two situations. Sub section (a) relates to situations where the default is limited to non-payment of rent and in such situations '*any person other than the lessee who has a registered interest*' has to be served with notice so that such person can come forward and pay the arrears. Sub section (b) is where notice has to be given to '*all persons who have an interest in the land*' in situations where re-entry was other than through a formal process of law. In lieu of such notice, a gazette notification or a paper advertisement has to be published.

[31] It is admitted that the Company had failed to pay lease rentals and it is also admitted that a mortgage has been registered in favour of the Appellant. Thus he falls in to the category of *'any person other than the lessee who has a registered interest in the lease'* as well as *'all persons interested under the lease'* as found in Section 57 (a) and (b) respectively and there is no doubt that he was a person who was statutorily entitled to receive a notice from the 2nd Respondent.

[32] There cannot be any ambiguity on this issue and the case of **Forum Hotels Ltd v Native Land Trust Board** [2013] FJCA 24 cited by the Appellant supports this position. It was held in that case that a cancellation which had been effected by the Registrar of Titles without notice being given in terms of Section 57 (b) was not valid and hence bad in law.

Was the Appellant given notice?

[33] The Respondents had taken up the position in their pleadings that notice has been sent. It however transpired in evidence that the notice had infact been sent to R Patel & Co., the lawyers who had acted for the Appellant at the time of the mortgage. The position of the learned counsel for the Respondents was that adequate notice was given to the Appellant and that the learned High Court judge has come to a correct conclusion.

[34] The witness called by the Respondents had explained in evidence that the notice had been sent to the law firm since the Lease has been lodged by them and because the Appellant had an overseas address. It has also been admitted by the witness that it was the Appellant who was the mortgagee and not the law firm and also that no attempt was made to serve it on the Appellant or to find out from the law firm if they were still acting on behalf of the Appellant. The witness has further accepted that no steps were taken to publish an advertisement in terms of Section 57 (b) and that the notice sent to the law firm was completely defective. The learned counsel for the Appellant in her submissions referred to the evidence given by this witness and in her written submissions the portions of the transcript have been reproduced. Even the learned High Court judge has reproduced this evidence in his judgment. Since I have summarized that evidence, I do not consider it necessary for me to reproduce that evidence here.

[35] A perusal of the judgment makes it clear that the learned High Court judge had taken in to consideration the evidence of this witness pertaining to the manner in which the notice was sent. It appears that he has taken the view that the receipt of notice by the law firm and their response thereto, amounted to the Appellant receiving notice and hence concluded that the Appellant had notice.

Manner of giving notice

[36] Since I have already concluded that the sending of a notice is mandatory, the question this court now has to decide is as to whether there has been sufficient compliance with Section 57 or whether the judgment of the learned High Court judge has to be set aside on the basis that there has not been sufficient compliance by the 2nd Respondent of the statutory requirements. The learned counsel for the Appellant submitted that if the statute spells out the manner of service, one cannot deviate from such procedure.

[37] Section 57(a) spells out as to whom the notice must be sent and also stipulates the manner in which the notice is to be sent. The notice has to be sent to such person *'at his or her address appearing in the register'*. Further, Section 176 of the Land Transfer Act also spells out the manner in which notices under the Act are to be served. That too states that notices are to be served *'to that person at his or her address'*. Thus it is clear that in sending out a notice, this procedure has to be followed. However, in arriving at a conclusion, this court must invariably consider the circumstances peculiar to this case.

The response of the law firm on behalf of the Appellant

[38] It is admitted that consequent to the notice being sent, the law firm responded within the one month period. The letter said *"Kindly note that we are arranging for the alleged arrears of rental to be paid by our client in order to ensure that there is no cancellation of our client's Lease. We understand that our client has until 14th November 2012 to make this payment"* and concluded by stating *"We will shortly forward to you the receipt*

of payment". This was clear and unequivocal evidence that the Appellant infact had notice and that he had acted in pursuance of such notice.

[39] It must be emphasized here that this is not a case where notice was not sent at all. Notice was sent but it has been sent to the law firm instead of serving it personally on the Appellant. In the case of **Forum Hotels Ltd v Native Land Trust Board** [2013] FJCA 24 cited by the Appellant, no notice had been given at all under Section 57 of the Land Transfer Act and the Registrar of Titles had relied on the notice given to the lessee under Section 105 of the Property Law Act. Whilst this case supports the position that notice must be given under Section 57, the facts of that case can be distinguished from the facts of this case and therefore, would not aid us in arriving at our decision.

Determination

[40] The purpose of notice is to bring to the attention of the party that has an interest in the property that the lease is to be cancelled and to afford him an opportunity to pay the arrears of lease rental and avoid cancellation of the lease. The intention of the legislature no doubt was to avoid any arbitrary conduct on the part of officers of the State and ensure that rules of natural justice prevailed. In this case, notwithstanding the absence of strict compliance on the part of the 2nd Respondent, there was sufficient compliance. The ultimate objective of making the Appellant aware of the impending step and affording him an opportunity to pay the arrears was achieved. The contents of the law firm's letter confirms that the Appellant had acted pursuant to the notice and had given them instructions. The law firm indicated that steps were being taken by the Respondent to pay the arrears. However, for reasons best known to him he has not taken steps to do so.

[41] Taking all circumstances in to consideration, it is clear that no prejudice has been caused to the Appellant by the failure of the 2nd Respondent to serve notice personally on him. This court is therefore not inclined to allow the appeal.

Order

Both Appeals are accordingly dismissed. No costs.

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Hon. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice V. Dayaratne
JUSTICE OF APPEAL