



**Counsel** : **Mr. D. Sharma for the 3<sup>rd</sup> Respondent**  
**Mr. H. Nagin for the Applicant**  
**Mr. S. Valenitabua for the Applicant (since 8<sup>th</sup> January, 2016)**  
**Mr. Sokimi A for Blue Ocean Marine Limited**  
**Mr. V. Singh for Linda and Company**

**Dates of Hearing** : **29<sup>th</sup> February, 2016 and 12<sup>th</sup> August, 2015**  
**Date of Decision** : **29<sup>th</sup> April, 2016**

## **DECISION**

### **INTRODUCTION**

1. The application for judicial review was in the first instance refused by the High Court and the leave to appeal to the Court of Appeal, against the said refusal was also refused. The Applicant subsequently obtained leave pursuant to Section 20(1)(a) of the Court of Appeal Act (Cap.12) to appeal to the full Court of the Court of Appeal. A single judge of the Court of Appeal (Calanchini P) granted the leave and the matter went before full court and, three judges of the Court of Appeal, granted the leave for judicial review. The substantive hearing of the judicial review commenced in High Court. The Applicant was successful and orders were made accordingly. The judicial review related to the cancellation of registered titles issued to the Applicant by unlawful repossession by 1<sup>st</sup> Respondent, in violation of Section 16 of the Crown Lands Act (Cap 132) read with 57 of the Land Transfer Act (Cap 132). It was held that the said decision was contrary to law and illegal and the forfeiture of the registered titles to the applicant was null and void, hence the titles should be restored to the Applicant. The cancellation of the ROT was also in violation of Section 57 of Land Transfer Act (Cap 131). After delivery of the said judgment the 3<sup>rd</sup> Respondent, sought stay of orders made relating to restoration of the title to the Applicant. At the same time there were two different applications seeking intervention to this case and also setting aside or staying the orders relating to the restoration of the title to the Applicant. These two parties were subsequent purchasers of the interest in the lands which were previously registered to the Applicant and, were illegally cancelled.

2. The Director of Lands (DOL) has issued Protected Crown Leases No. 17769, 17770 and 17771 in favour of the Applicant and the same were registered with Registrar of Title (ROT). The ROT canceled the registration of said three crown leases granted by DOL to the Applicant and also registered under the Land Transfer Act (Cap 131). The purported cancellation of the titles issued to the Applicant, were in pursuant to re possession and re entry Notice for alleged breaches under Sections 4 and 16 of the Crown Lands Act (Cap 132) by the Applicant.
3. It should be noted that said cancellation of the registered titles by the ROT had violated mandatory requirement contained in the proviso (b) of Section 57 of the Land Transfer Act (Cap 131). It was also violation of natural justice.
4. The Applicant sought certiorari against the decision of the DOL to re possess and re enter the land on 8<sup>th</sup> February, 2010 and this was granted in the judicial review. The judgment for the judicial review was delivered on 13<sup>th</sup> May, 2015 after hearing conducted on 24<sup>th</sup> February, 2015.
5. A notice of motion for stay and execution of judgment was filed on 16<sup>th</sup> June, 2015 by the 3<sup>rd</sup> Respondent (1<sup>st</sup> Application). A further summons was filed by a third party to this proceeding (2<sup>nd</sup> Application) on 24<sup>th</sup> June, 2015 seeking joinder of them as an interested party to this action and also seeking setting aside of an order (Order4) and seeking amendment of the judgment delivered on 13<sup>th</sup> May, 2015. They also sought to stay the orders made in the judgment. As an alternative remedy leave to appeal to Court of Appeal was sought.
6. Apart from the said two applications another interested party (Linda and Company) also made an application seeking leave to join these proceedings and also sought setting aside of an order (order4) of the judgment. (3<sup>rd</sup> Application.)

7. The first two applications were heard simultaneously, and before the delivery of decision the third application was filed on 1<sup>st</sup> September, 2015. So the decision regarding the first two applications was adjourned to a date after hearing of the 3<sup>rd</sup> Application on 29<sup>th</sup> February, 2016.

### 1<sup>st</sup> Application - Stay of the Execution

8. In the *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* [2005] FJCA 13; ABU0011.2004S (decided 18 March 2005) (unreported) Fiji Court of Appeal dealt with the principles in granting stay of order of the court and held,

*'Principles on a stay application*

*[7] The principles to be applied on an application for stay pending appeal are conveniently summarised in the New Zealand text, McGechan on Procedure (2005):*

*"On a stay application the Court's task is "carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful": Duncan v Osborne Building Ltd (1992) 6 PRNZ 85 (CA), at p 87.*

9. The following non-comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from *DymoocksFranchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48, at p 50 and *Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission* (1993) 7 PRNZ 200:

- (a) *Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 41 (CA).*
- (b) *Whether the successful party will be injuriously affected by the stay.*
- (c) *The bona fides of the applicants as to the prosecution of the appeal.*

- (d) *The effect on third parties.*
- (e) *The novelty and importance of questions involved.*
- (f) *The public interest in the proceeding.*
- (g) *The overall balance of convenience and the status quo."*

10. In the judgment delivered on 13<sup>th</sup> May, 2015 following final orders were made,

***'FINAL ORDERS***

1. *An Order of Certiorari is issued in respect of the decision made on or about 8th February, 2010 by the First Respondent purporting to re possess and re enter the Crown Leases issued by the Applicant and the said decision is quashed.*
2. *A declaration that the First Respondent had acted unfairly and against the rules of natural justice and exceeded jurisdiction in purporting to re-enter the Applicant's Crown Lease Nos. 11769, 17770 and 17771 and purporting to issue new Crown Lease Nos. 18013, 18014 and 18015 in the name of the Proline Marketing Limited.*
3. *A Declaration that the First Respondent's Notice dated 8th February, 2010 is unlawful, invalid, void and of no effect, hence the Mortgage Nos. 729939A, 729939B and 729939C in favour of 3rd Respondent are unlawful and null and void.*
4. *The registration by the 2nd Respondent of any document pursuant to said Notices Dated 8th February, 2010 and more specifically the Crown Lease Nos 18013, 18014 and 18015 and the mortgages No 729939A, 729939B and 729939C are wrongful and null and void.*
5. *Considering the circumstances of the case I will not award any cost for this application.'*

11. The **Order 2 and Order 3 above are declaratory** orders and there cannot be stayed till they are overturned. The said orders were already been made by this court and will remain so till it being varied by competent court. What can be stayed is the Order 1 and Order 4. The consequence of declarations of order 2 and 3 can be stayed if the grounds for

stay are established. (See: the judgment of Gates J(as his lordship then was) in *Prasad v Republic of Fiji (No 5) [2000] FJHC 273; [2000] 2 FLR 115 (20 December 2000)*)

12. There are 20 grounds of appeal and looking at said grounds of appeal I think those should be looked briefly to consider the *bona fides* of the appeal and whether there are any novel issues to be determined in appeal.

**Ground 1**

The phrase ‘purported loan’ was used for the reasons stated in the judgment and it cannot be taken out of the context. As the reasons for using said phrase was given in paragraph 8 of the judgment. I do not think there is any elaboration needed regarding the consequences of ‘illegal’ act.

**Ground 2**

Section 13(1) of Crown Lands Act (Cap 132) states that ‘it shall not be lawful’ to deal with protected lease without prior written consent of the DOL and the Appellant is unable to direct any written consent obtain prior to the date of the dealing.

**Ground 3**

The Section 13(1) of the Crown Lands Act (Cap 132) states as follows ‘.....it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained,....’ The words are clear and unambiguous and this was reiterated in the judgment in paragraphs 10 and 11 and no strained meaning can be given.

**Ground 4**

The paragraph 16 of the judgment analyzed the contradictory acts and the explanation for the same, which in my mind cannot be accepted. 28<sup>th</sup> April, 2009 document was not registered. It need not state that before registration a variation could be done and this was done by the request of the lessee by the lessor prior to execution.

**Ground 5**

The said letters in quoted in paragraph 19 and 20 show the position taken by DOL when request to note their interest in the said properties. The letters were self explanatory and nothing could be added.

**Ground 6**

If the leases were surrendered by the Applicant there would not be any need to act in this manner by all the parties, and even this application for judicial review.

**Ground 7**

This refers to paragraph 31 and 32 of the Court of Appeal decision regarding the grant of leave of the judicial review.

**Ground 8**

The DOL had changed its decision upon the request of the 4<sup>th</sup> Respondent. If there was a mistake in the second decision why it was not revealed?

**Ground 9**

The relationship of the two legal persons can be considered if the corporate veil is lifted, as stated in the Fiji Court of Appeal decision.

**Ground 10**

The decision to repossess was the decision under review, though the final result was cancellation of the lease by the ROT in pursuant to said decision.

**Ground 11**

There was no opportunity given under the law before re-entry, but a notice was given after re-entry.

**Ground 12**

Section 16(3) of the Crown Lands Act (Cap ....) has not conferred any power to the DOL for forfeiture of the properties .If such power is granted it should be specific. The property rights are guaranteed by the Constitution, hence any deprivation of that right should be in accordance with the law. This may be an issue that is worth determination in this Appeal.

**Ground 13**

This ground has no bearing on the grant of judicial review as it was relating to leases that were registered.

**Ground 14**

This ground like the earlier ground, does not affect the manner in which the leases were cancelled by the ROT due to re-entry by the DOL in unlawful manner.

**Ground 15**

Once the decision of the DOL is found unlawful, void and no force of law the consequences are that the properties earlier registered to the Applicant should be restored to it.

**Ground 16**

Bona fide purchasers were not parties to the judicial review and the Court of Appeal in granting leave for judicial review, has not considered as directly affected parties to be added.

**Ground 17**

The fact that two out of the lands were sold would not affect the unlawful acts of the DOL and actions done in pursuant to said unlawful acts by the ROT

**Ground 18**

When an unlawful act was committed it should be quashed.

So, on totality the grounds of appeal at least indicate one issue that has some merits and also a novel issue which is yet to be decided by a superior court.

13. The grounds of appeal raise a novel issue in this action. The DOL had forfeited three specific registered lands and this was done illegally and also not following the rules of natural justice.
14. The ROT had not followed the mandatory requirement contained in the proviso (b) of the Section 57 of the Land Transfer Act (Cap 131) in the purported cancellation of titles issued to the Applicant.
15. The argument for the Appellant - 3<sup>rd</sup> Respondent (the Appellant) is that once the title registration was cancelled and a new owner was registered it cannot be subject to cancellation by judicial review. When the Applicant's registered title was illegally cancelled by 2<sup>nd</sup> Respondent, the mandatory requirements were not followed by ROT and DOL assumed powers that were not conferred to it.



16. The argument of the Appellant is that title registration by the 2<sup>nd</sup> Respondent in pursuant to a purported decision of the DOL cannot be quashed by the court.
17. If the indefeasibility of the title extends to such an extent is a novel issue, and that needs to be determined in appeal.
18. At the same time if the stay is not granted and the title is restored with the Applicant, it can be further transferred, to a bona fide purchasers and appeal would be rendered nugatory regarding the main issue. There could be further third parties being affected during the pendency of the appeal.
19. There are already two parties who had come before this court and alleging that their rights would be violated if the judgment is executed specially the order 4 of the judgment delivered on 13<sup>th</sup> May, 2015. This will be a matter in favour of the grant of stay order.
20. There are effects on the third parties if the orders are executed and considering the novelty of the issue the execution of the order 1 and 4 is stayed pending determination of the Appeal by the Court of Appeal.

**Application 2- for joinder- setting aside of the judgment – leave to appeal to court of appeal**

21. The Application filed by the Blue Ocean Marine Limited (BOML) through the summons in this actions seeking following orders

*'That the BOML, a limited liability .....,be joined as an interested party to this action.*

*Order 4 of the judgment .... And other parts thereof directly affecting the rights and interests of BOML be set aside for non-compliance with Order 53 rule 5 of the High Court Rules 1988.*

*That the judgment as a whole be amended to take into consideration BOML's rights and interests as the bonafide purchaser and registered proprietor of CL 18015*

*OR alternatively*

*BOML be granted leave to appeal the judgment to the Court of Appeal.*'

22. This is a judicial review and only parties who are directly affected are made parties. The parties who were before the court accepted by the Court of Appeal as the parties directly affected, while granting the leave to appeal. In my judgment BOML was not a party directly affected by the judicial review.
23. Judicial Review applications often have wider effects on third parties. This does not allow all the parties affected to come to court and seek intervention. Sometime all the third parties might get affected due to implementation of the orders subject to review while the case is pending.
24. At the hearings of the three applications before this court, no party made submission as to who are 'parties directly affected'. In 'De Smith's Judicial Review(6<sup>th</sup> Edi) at page 98-99<sup>1</sup> states as follows  

*'...Being inevitably or necessarily affected by the outcome of the claim for judicial review is insufficient to make a person directly affected; he must (also) be "affected without the intervention of any intermediate agency'<sup>2</sup>.*
25. The Applicant had made DOL and ROT as Respondents, it was through them only that the BOML will get affected by the orders of the court. The parties who were directly affected by the orders sought, were made parties to this action. It would be impossible for an applicant to make all the parties that get affected in a judicial review. When a case is pending the directly affected parties can do certain acts that can make other parties affected by the decision. This does not make such parties 'directly affected' or listening

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<sup>1</sup> De Smith's Judicial Review p 98- Interested Parties and Interveners- 2-064

<sup>2</sup> R v Rent Officer Service Ex p. Muldon [1976] 1 W.L.R. 1103, interpreting a similar provision (RSC, Ord. 53 r. 5(3) in the precursor to the current rules; the Secretary of State for Social Security reimbursed local authorities for up to 95% of their expenditure on housing benefit but was not "directly affected" by a judicial review of the refusal or failure of a local authority to determine claims for benefits where rent officers had been denied entry to the dwelling in circumstances where there had been no deliberate denial of entry by the applicant.

to them a mandatory requirement. If so there would not be an end to judicial review application, as each time an act was done and something done in this regard a new party may be needed to be added. The new parties similar to BOML are affected by the orders of the judicial review, but it was due to the actions of the Respondents, to this action .So they were not directly affected as stated in the decision of *R v Rent Officer Service Ex p. Muldon* [1996] 3 All ER 498, [1996] 1 WLR 1103, HL<sup>3</sup>

26. Even if I am wrong, the addition of BOML or any other third party would not make illegal and unlawful acts committed by the Respondents, contrary to the law, any different. It would be futile to add them, as directly affected parties, as consequences arising from illegality is clear. The actions of the DOL taking repossession without due process and also forfeiture of the property by usurping a power that was not conferred on to the DOL are clear violations, to grant a quashing order. Apart from that there was no **prior written consent** in terms of the section 13(1) of the Crown Lands Act (Cap 132) for the dealings of the said three leases in the mortgages. The consent has to be prior to the dealing with the land, and it needs to be in written form. This again makes it unlawful and all these findings would not change by addition of BOML or any other party affected subsequent to these unlawful acts.
27. Without prejudice to what was already stated, BOML was not even a party involved in this action at the time of the institution of the action. The directly affected parties were all notified and all the parties were represented by lawyers. Due to the actions of the said directly affected parties that the BOML obtained interest of a land subject to this judicial review action. So BOML was not directly affected party at the time of the institution of this action, but due to the actions of the directly affected party they had bought one of the subject matters.

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<sup>3</sup> I could not find this case from the reference given in the foot note of De Smith's Judicial Review p 98

28. If BOML was not informed of the pending judicial review by the solicitors who were aware of this action that cannot be a reason to make them a directly affected party to this judicial review action.
29. The Applicant's rights to the three leases were interfered unlawfully after registration. This happened due to the unlawful acts of DOL in repossession and forfeiture and also illegal cancellation of the titles by the ROT. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents have also acted in contrary to Section 13 of the Crown Lands Act (Cap 132) on the failure to provide prior written consent as to the dealings. The judicial review was regarding said decisions and BOML was not a party directly affected to the said decision.
30. Since BOML was a party affected by the judicial review, through the actions done by Respondents jointly and or severally. So the alternate remedy of granting leave to appeal to the Court of Appeal can be granted. Except that, all other remedies in the said summons are struck off.

### **3<sup>rd</sup> Application - by Linda & Company**

31. There are two applications made on behalf of Linda & Co and for the convenience I have consolidated as 3<sup>rd</sup> Application, and they are as follows;
  - a. Summons filed on 1.09.2015 seeking
    - i. That Linda be granted leave to join these proceedings.
    - ii. That order 4 of the judgment dated 13.5.2015 be set-aside.
  - b. Summons dated 9.09.2015, seeking
    - i. Order 4 of the Orders of the judgment as applicable to Linda be stayed pending the determination of this application and application filed by Linda on 1.09.2015 and any appeal thereof.  
(the other order in the said summons was abandoned at the time of the hearing )

32. According to Linda and Co , they are making this application in terms of Order 53 rule 8 and Order 15 rule 6(2)(b). In my judgment Order 53 rule 8 of the High Court Rules of 1988 has no application to the present position. It only deals with interlocutory applications. Though 'interlocutory application' as regards to the said provision includes orders made under Order 24, or 26, or Order 38 rule 2(3) or for an order dismissing the proceedings by consent of the parties. So this has no application to the present application by Linda & Co. The judgment of the court regarding the judicial review was delivered. All the parties that were directly affected were before the Fiji Court of Appeal when it granted leave for the judicial review and it was a mandatory requirement.
33. The Order 53 rule 3(3)(i) states as follows  
*'(3)(i) Copies of the application for leave and the affidavit in support must be served on all persons directly affected by the application.'*
34. The leave for Judicial Review in this matter was granted by the Fiji Court of Appeal and the parties directly affected were already decided at the time of granting the leave for judicial review by the Court of Appeal.
35. The certiorari was sought against DOL and also ROT in cancellation of the titles of the Applicant.
36. Considering the orders the directly affected parties were before the Court of Appeal at the time of the grant of leave and also subsequently at the hearing of the judicial review application and judgment was pronounced on 13.5.2015 by this court.
37. If due to actions of the parties already before the court, a party can get affected and such affected party cannot be considered as 'party directly affected'. In this case Linda & Co obtained the title of the land in issue due to the actions of the Respondents in this action. So Linda & Co was not a party 'directly affected' in terms of the service of the judicial review application at the stage of obtaining leave or thereafter.

38. The 'directly affected party' was considered in *R v Rent Officer Service, ex p Muldoon, R v Rent Officer Service, ex p Kelly* [1996] 3 All ER 498, [1996] 1 WLR 1103, HL. Lord Keith held,
- 'That a person is directly affected by something connotes that he is affected without the intervention of any intermediate agency.'*
39. The *R v Rent Officer Service* (supra) was applied in a recent case of *Trustees of the Lehman Brothers Pension Scheme v Pensions Regulator and others* [2013] 4 All ER 744 in order to interpret the words 'directly affected persons' of judicial review application. These authorities were not submitted by the parties at the hearing or thereafter.
40. Linda & Co in their submission submitted the decision of High Court of Hong Kong but this was a setting aside of leave for judicial review for want of reviewability, the existence of an alternative remedy, want of arguability and non disclosure of existence of ouster clause.
41. It is well settle law that leave granted for judicial review can be set aside by the same court, but now the judgment is delivered by this court. So the said judgment cannot be used to set aside the judgment or leave to join the proceedings now. So *Woo Tze Man v Water Supplies Dept et al* (decided on 18.05.2012) (unreported) has no application to the issue before me.
42. Though the court could set aside the leave for judicial review application under limited circumstances this cannot be applied in toto to set aside a judgment of judicial review. See *R v Cornwall County Council, ex p Huntington* [1992] 3 All ER 566.
43. *The Sun Insurance Company Ltd v Bank of Baroda* [2008] FJCA 57; ABU0071.2006 (22 October 2008) (unreported) was not a judicial review application hence there is no interpretation of 'persons directly affected' in relation to a judicial review. That was a case where order *ni si* was made absolute without proper service of the *ni si* order. So, the

application has to be made to the same court that made order absolute to set aside. This again has no application to matter before me.

44. *Prembroke School Inc v Human Rights and Equal Opportunity Commission* 2002 FCA 1020 was a case where Order 37 rule 7(2) of the Federal Court Rules of Australia was utilized to set aside a judicial review, but I have not been referred to such provision in High Court Rules of Fiji.
45. *Prembroke* (supra) held that judgment could be set aside on the actual of fraud and discovery of fresh evidence, but there is no such allegation in this case. The fraud should be real and this should go to the crux of the decision. The judicial review was granted due to several illegalities and Linda & Co was not a part of that illegality that resulted in the judicial review application.
46. Linda & Co had sought to join in this proceedings and this could be granted in the limited purpose, to allow leave to appeal to Court of Appeal against the judgment deliver on 13<sup>th</sup> May, 2015, if they so desire. Though they have not specifically asked for such leave, considering the circumstances of the case that can be granted on the material before me.

## CONCLUSION

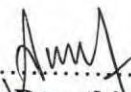
47. Both BOML and Linda & Co are aggrieved parties and their rights to the property are affected due to the judgment, hence they should be allowed leave to appeal to the Court of Appeal. As I have stated in this decision they were not parties 'directly affected' at the time of the institution of this judicial review and their participation would not have changed the quashing order in the judgment. Considering the circumstances of the case I would stay the execution of the judgment (namely stay of Order 1 and Order 4 of the judgment delivered on 13.5.2015). Considering the circumstances of the case I do not think there should be any award as to costs. The parties to bear their own costs.

## FINAL ORDERS

- a. The execution of the judgment (i.e only Order 1 and Order 4) stayed till the determination of the Appeal by the Court of Appeal.
- b. The leave is granted to BOML and Linda & Co to appeal to the Court of Appeal if they so desire.
- c. No costs.

**Dated at Suva this 29<sup>th</sup> day of April, 2016**



  
.....  
**Justice Deepthi Amaratunga**  
**High Court, Suva**