INOKE DEVO v ITAUKEI LAND TRUST BOARD AND FIJI ELECTRICITY AUTHORITY (HBC0064 of 2012S)

HIGH COURT — CIVIL JURISDICTION

AMARATUNGA M

27 June, 7 September 2012

Practice and procedure — pleadings — proceedings — strike out — abuse of process — proceedings commenced by summons seeking declaration and nullification in respect of a decision of the iTaukei Land Trust Board to grant a lease — whether statement of claim discloses reasonable cause of action — whether proceedings abuse of process — distinction between private and public law proceedings — statement of claim alleged breach — iTaukei Land Trust Act s 4(1), ss 8(1), 26 — Native Land Trust Act s 4(1) — Land Transfer Act ss 2(1), 39, 40, 41 — High Court Rules O 18 rr 6, 18, O 15, r 18, O 53.

The plaintiff commenced proceedings in the High Court of Fiji in his personal capacity and as representative of the Mataqali Solia of the Yavua Solia of Vuna, Naitasiri. Those proceedings were commenced by summons and sought a declaration that a decision of the first defendant (iTaukei Land Trust Board) to grant a lease of an access road and a plot of land to the second defendant (Fiji Electricity Authority) for, inter alia, the transmission of electricity. The proceedings were commenced around 22 years after the decision was made.

The plaintiff's statement of claim relevantly sought relief in the following terms:

'(a). A declaration that the 1st Defendant breached its statutory duty provided under s 4(1) of the *iTaukei Land Trust Act Chapter 134* when it granted a Lease Agreement to the 2nd Defendant for the land known as COLO-I-SUVA, Nakobalavu Access Road, which was not for the benefit of the landowning units;

(b) A declaration that the lease granted by the 1st Defendant to the 2nd Defendant over native land known as COLO-I-SUVA, Nakobalavu Access Road is null and void;

(c) An order that the lease agreement entered into between the 1st Defendant and the 2nd Defendant in July 1990 be set aside.'

Section 4(1) of the *iTaukei Land Trust Act* provided:

'The control of all native land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the Fijian owners.'

The second defendant applied to strike out the proceedings pursuant to O 18 r 18 of the *High Court Rules 1988*.

Held –

(1) The statement of claim does not disclose a reasonable cause of action against one or more of the defendants. The decision to grant the lease can only be challenged on grounds of fraud, which were not alleged in the statement of claim and a breach of s 4(1) of the *iTaukei Land Trust Act* does not confer a cause of action in a private capacity.

(2) A challenge to the legality of the exercise of a public power should be instituted by way of judicial review pursuant to O 53 of the *High Court Rules* not by a summons for a declaration and nullification.

(3) The proceeding for a declaration and nullification instituted by the summons is an abuse of process and should be struck off or dismissed.

Proceedings struck out

Cases referred to

Agar v Hyde [2000] HCA 41; *Moroccan Workers Association v Attorney-General* (1995), cited.

Assets Co. Ltd v Mere Rohi; Assets Co Ltd v Wiremu Pere [1905] AC 176; *Chand v Fiji Times Ltd* [2011] FJSC 2 CBV0005.2009; *Doyle and Others v Northumbria Probation Committee* (1991) 1 WLR 1340; *Farrell v Secretary of State for Defence* [1980] 1 All ER 166; *Frazer v Walker* [1967] 1 All ER 649; *Goundar v Colonial Fiji* [2003] FJHC 284; *MoseseRadreu v Emperor Gold Mining Co Ltd* (1978) 24 FLR 104; *Naiduki v Native Land Trust Board* [2000] FJHC 239; *Serupeneli Dakai No 1 v OrsNative Land Development Corporation* [1983] 29 FLR 92, considered.

O'Reilly v Mackman [1983] 2 AC 237; *Ram Prasad f/n Ram Rattan v The Attorney-General of Fiji* Civil Appeal No.ABU0058 of 1997S; *Ram Prasad s/o Ram Rattan and the Attorney-General of Fiji* (Civil Action No 311/92, followed.

Fa S. for the Plaintiff

Roslin Sharma for the second Defendant

Amaratunga M.

A. INTRODUCTION

[1] The 2nd Defendant, has filed this summons seeking to strike out the Plaintiff's action in terms of the O 18 r 18 (1) (a) and (d). The issues are whether the Plaintiff's statement of claim discloses a reasonable cause of action and whether the process is abused by this application which seeks to **rescind the lease** granted to the 2nd Defendant by the 1st Defendant and also seeking to **nullify the said decision of the 1st Defendant to grant the lease** and a declarations to that effect. The Plaintiff's claim is based on the alleged breach of s 4(1) of the iTaukei Land Trust Act, by iTaukei Land Trust Board when it granted a lease of an access road and a plot of land at a peak of a mountain for transmission of electricity etc, to the 2nd Defendant (FEA) in 1990. The statement of claim only state that 1st Defendant has breached the s 4 (1) when it decided to lease the iTaukei Land to the 2nd Defendant and no particulars of the alleged breach is stated in the statement of claim and, it is grossly insufficient. The alleged breach incurred in 1990 and if a statutory body (1st Defendant) has wrongfully and or unreasonably acted judicial review of the said decision would have been the proper redress and it is evident that any such application would be dismissed for belatedness without considering the merits as the alleged incident happened nearly 22 years ago. The Plaintiff is attempting to circumvent the delay by filing this action for a declaration and also seeking nullification of the lease by first Defendant to Second Defendant. If this is allowed any administrative and or qusi-judicial decision will be subject to scrutiny by courts indefinitely hence no finality to decisions of the Board taken relating to iTaukei Land. Apart from this, in a country where Property Law is governed by Torrens system of law this type of belated collateral challenge to title/interest in land is a misnomer and the indefeasibility of the title/interest in land is seriously at stake and no finality to instruments relating to interest in land. The only exception to indefeasibility is fraud and there is no allegation of fraud in the statement of claim and there is no claim for damages but seeks to nullify the lease and also seeks a declarations to that effect. There is no reasonable cause of action disclosed in the statement of claim and even an amendment is allowed, it does not serve any purpose, as the process is abused by filing this action as stated by Lord Denning MR, in *O'Reilly v Mackman* [1983] 2 AC 237 at 259 stated in conclusion stated '*My conclusion is that the only appropriate remedy in this case was by judicial review under Rules of Supreme Court O 53. If leave had been sought, it would certainly have been refused.* **No judge would have granted it. It is far too late**. *I would,*

therefore, allow this appeal and strike out this action as being an abuse of the process of the court.' I cannot do better, than quoting the said judgment, on the facts and materials before me and in addition I would also state the statement of claim does not disclose a reasonable cause of action and even if that is amended, from the facts submitted by the affidavit in opposition the matter should be struck off as an abuse of process. I quote Lord Diplock's decision affirming Lord Denning's decision at page 280 – 281 below

> **'The Public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making power for any longer period than is absolutely necessary in fairness to the person affected by the decision.'**
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> At p 282
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> **'…the plaintiff evaded the safeguards imposed in the public interest against groundless, unmeritorious or tardy attacks upon the validity of decisions made by public authorities in the field of public law.'**

B. FACTS

[2] The Plaintiff has instituted a claim by way of Writ of Summons claiming declaratory orders against the 1st Defendant. The Plaintiff seeks that the Lease granted by the 1st Defendant to the 2nd Defendant be declared null and void and further that it be set aside.

[3] The 2nd Defendant states that the Lease Agreement was entered with the 1st Defendant on 19th of November 1990 for a period 30 years and not in July 1990, and this is not disputed and not material to the application before me.

[4] The Defendant filed an affidavit in opposition since the summons contained abuse of process as a ground for striking out.

C. ANALYSIS

[5] Order 18 r 18 of the High Court Rules 1988 sets the provision for Striking Out pleadings and indorsements. The provision states:

> *Strike out pleadings and indorsements*
>
> *18.-(1) The Court may at any stage of the proceedings order to be struck out or amend any pleading or the indorsement of any writ in the action, or anything in nay pleading or in the indorsement, on the ground that –*
>
> *(a) It discloses no reasonable cause of action or defence, as the case may be; or*
>
> *(b) ……*
>
> *(c) …*
>
> *(d) It otherwise and abuse of the process of the court: and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*

[6] The issues before me are

a. whether the Plaintiff's statement of claim discloses a reasonable cause of action, and or

b. Whether the filing of this action is an abuse of process.

Answer in affirmative to either (a) and, or (b) would result in the striking out of this action.

Whether the Plaintiff's statement of claim discloses a reasonable cause of action

[7] The Plaintiff in its statement of claim which comprised 7 paragraphs, does not disclose a cause of action but only state in the paragraph 6 as follows:

'6. The Plaintiff alleges that the lease granted by the 1st Defendant to the 2nd Defendant over native land known as COLA-I-SUVA, Nakobalavu Access Road for a term of 30 years with an annual rental of $326.00 (Three Hundred and Twenty Six Dollars) is for the benefit of the 2nd Defendant at the expense of the Plaintiff.'

[8] In the preceding paragraph the Plaintiff state that the said lease was not for the benefit of the Plaintiff and other Mataqali's in contravention of s 4(1). This is grossly insufficient for Defendants to file a proper defence and this is more so as regards to the 2nd Defendant who would be the most affected party by such a finding as alleged by the Plaintiff. The 1st Defendant in its statement of defence at paragraph 10 and 11 state that the statement of claim does not disclose a reasonable cause of action and also frivolous and vexatious and abuse of process, but the 2nd Defendant without filing their statement of defence filed the summons seeking strike out of the action for abuse of process and also for non disclosure of reasonable cause of action.

[9] iTaukei Land Trust Act, Part IV, Miscellaneous in s 26 headed as '*Penalty*' reads as follows:

"Every omission or neglect to comply with and every act done, or attempted to be done, contrary to the provisions of this Act or of any regulation or order made thereunder, or in breach of the conditions and restrictions subject to or upon which any license or permit has been issued, shall be deemed to be an offence against this Act, and for every such offence for which no penalty is specially provided the offender shall be liable to a fine of $100 or to imprisonment for six months or to both such fine and imprisonment".

So, any violation of provision of the said Act is an offence and if so why it was not resorted and dealt accordingly is not known and not addressed in the statement of claim and or in the affidavit in opposition. This is a general provision in the said Act and any violation of any provision is generally covered under the said penalty.

[10] Section 4(1) of the Native Lands Trust Act, Cap 134 lately amended by the Native Land Trust (Amendment) Decree No 8 of 2011 to be cited as the iTaukei Land Trust Act states as follows:-

"The control of all native land shall be **vested** in the Board and all such land shall be **administered** by the Board for **the benefit of the Fijian owners**". (emphasis added)

[11] In *Mosese Radreu v Emperor Gold Mining Co Ltd* [1978] 24 FLR 107, William J confirmed the interpretation of s 4(1) of the Native Land Trust Act, now known as the iTaukei Land Trust Act, at p 108, where it was held:

"In other words it makes the Board legal owners of all native land as trustees for the Fijian owners".

[12] The above was applied in the case of *Naiduki v Native Land Trust Board* [2000] FJHC 239, Bryne J further concluded and said:

"I therefore conclude from these authorities that the First ***Defendant has no duty in law to consult with land owners before it makes any decisions a****ffecting native land held in trust for them".* (emphasis is mine)

Further held:

"I am satisfied even at this stage that all sub-leases granted by the First Defendant have been authorised by law...."

The s 8 (1) iTaukei Land Trust Act states the duty of the Board as follows:

"8(1)Subject to the provisions of s 9, it shall be **lawful for the Board to grant leases or licences of portions of native land not included in a native reserve** for such purposes and subject to such terms and conditions as to renewals or otherwise as may be prescribed.

(2) Any lease of or licence in respect of land under the provisions of this Act shall be made out from and in the name of the Board and such lease or licence shall be executed under the seal of the Board".

[13] There is no allegation of the land that was leased belong to the native reserve as such the law does not prohibit lease of the land in issue by 1st Defendant to the 2nd Defendant. The Fiji Court of Appeal in *Serupeneli Dakai No 1 vNative Land Development Corporation[1983] 29 FLR 92* stated

"No argument was advanced in support of this ground but we take it to mean that individuals are entitled to be consulted by the Board before it exercises its statutory powers of control, **particularly in granting leases of native land. This is clearly not so** – the Board alone has the power and any consultation prior to authorizing leases may have been merely a public relations exercise and have lead, as Kermode J. believes, to a **mistaken belief** by individual members that they are entitled to be consulted." (emphasis added).

So, the action of granting lease of native land is empowered under the said Act, and if it is not done reasonably the matter is in the realms of judicial review as opposed to an action founded on a writ of summons. Since there is no duty cast upon the board to consult individuals which grants the lease relating to iTaukei Land, there cannot be a cause of action for the Plaintiff in the private capacity to sue the Defendants and only remedy is in the area of Public Law, which I discuss latter in the decision. Even if I am wrong on that, the statement of claim does not disclose a reasonable cause of action against the one or more Defendants.

[14] The statement of claim does not disclose fraud and the title at the hand of the 2nd Defendant is indefeasible. The Land Transfer Act, Cap 131 defines 'instruments of title' under s 2(1) to include "*certificate of title, Crown grant, lease, sub lease, mortgage or other encumbrances as the case may be*." A lease granted under the above provision in the iTaukei Land Trust Act falls within the ambit of the Land Transfer Act and all the attributes are conferred on such title/ interest as well.

[15] Since a lease amounts to an instrument of title, Sections 39, 40 and 41 of the Land Transfer Act protects the 2nd Defendant wherein s 40 clearly states;

"Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest in land subject to the provisions of this Act shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such proprietor or in any previous proprietor of such estate or interest is or was registered, onto see to the application of the purchase money or any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

[16] The Privy Council in *Frazer v Walker* [1967] 1 All ER 649 said the following:

"The expression 'indefeasibility of title', not used in the Act, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be over looked when a total description of his rights is required; but as registered proprietor, and while he remains such, no adverse (except as specifically admitted) may be brought against him.'

Section 39 and 40 of the Land Transfer Act safeguards the registered proprietor by guaranteeing a good title upon registration. The exception to this rule is in the case of fraud. The leading Privy Council decision of *Frazer v Walker* (supra) stated at 583:

"The leading case as to the rights of a person whose name has been entered without fraud in respect of an estate or interest is the decision of this board in *Assets Co Ltd v Mere Roihi*; *Assets Co Ltd v Wiremu Pere* [1905] AC 176***... In each appeal their Lordships decided that registration was conclusive to confer upon the appellants a title unimpeachable by the respondents."***

Hence the concept of ***"indefeasibility of title"*** applied in the case of *Assets Co Ltd v Mere Roihi*; *Assets Co Ltd v Wiremu Pere* [1905] AC 176 and *Frazer v Walker* [1967] 1 All ER 649 is pertinent to the rights of a registered proprietor under the Land Transfer Act. Section 39 and 40 grants protection to the registered proprietor from adverse claims, so long as he is a bona fide proprietor without notice. It is further clear that Sections 39, 40 and 41 of the Land Transfer Act is founded on the Torrens System which is well established law in Fiji, and cannot be challenged unless in a case of fraud.

[17] In *Farrell v Secretary of State for Defence* [1980] 1 All ER 166 and to the comments of Lord Edmund Davis as follows:

"Pleadings plays an essential part in civil actions, and their primary purpose is to define the issue and thereby to inform the parties in advance of the case which they have to meet, enabling them to take steps to deal with it; and such primary purpose remains and can still prove of vital importance, and therefore it is bad law and bad practice to shrug off a criticism as a 'mere pleading point'.

[18] The Supreme Court of Fiji in the case of *Chand v Fiji Times Ltd* [2011] FJSC 2 CBV0005.2009 (8th April 2011) at Paragraph 18 stated:

"[18.] The objective of pleadings is to narrow the issues between the parties and limit the scope of the trial".

[19] Order 18 r 6 deals with Facts, not evidence, to be pleaded

'6(1) Subject to the provisions of this rule, and rules 9, 10, and 11, every pleading must contain, and contain only, **a statement in a summary form of the material facts on which the party pleading relies for his claim** or defences, as the case may be, but not the evidence by which those facts are to be proved, *and* the statement must be as brief as the nature of the case admits.' (emphasis is added)

[20] In Supreme Court Practice (1988) at page 269 it was stated under the **"Material facts, not evidence"** 18/7/3 state as follows

'Material facts, not evidence'- Every pleading **must contain only a statement of the material facts on which the party pleading relies**, and not the evidence by which they are to be proved (per Farwell LJ in *North Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1913] 3 KB 422,425). "The distinction is taken in the very rule itself between the facts on which the party relies, and the evidence to prove those facts (per Brett LJ in *Philipps v Philipps* (1878) 4 QBD 127). All facts which tend to prove the fact in issue will be relevant at the trial, but they are not "material facts" for pleading purposes. "It is an elementary rule in pleading that, when a statement of facts is relied on, it is enough to allege it simply without setting the allegation" (per Lord Denman CJ in *Williams v Wilcox* (1838) 8 A&E 314, 331; and see *Stuart v Gladstone* (1879) 10 Ch D626)…..' (emphasis is added)

[21] The facts that can be averred in a statement of claim cannot be strictly defined, but when one examines the pleadings one can see very clearly if it does not conform to the requirements contained in O 18. The Pleadings are very important as it is what the other party has to answer and if that is not properly understood it cannot be answered adequately or formulate the defence properly

and the process is abused causing unnecessary delay and inconvenience to all parties to action as well as to the court in proper administration of justice.

[22] In Supreme Court Practice (1999) at page 314 under the heading **'Need for compliance'** of O 18 where it was stated as follows

> **'Need for compliance-** These requirements should be strictly observed (per May L J in *Lipkin Gorman (a firm) v Karpnale Ltd* [1989] 1 WLR 1340 at 1352). Pleadings play an essential part in civil actions, and their primary purpose is to define the issues and thereby to inform the parties in advance of the case which they have to meet, enabling them to take steps to deal within it, and such primary purpose remains and can still prove of vital importance, and therefore it is bad law and bad practice to shrug off a criticism as a "mere pleading point" (see per Lord Edmund Davis in *Farrell (formerly McLaughlin) v Secretary of State for Defence* [1980] 1 WLR 172 at 180, *Farrell v Secretary of State for Defence* [1980] 1 All ER 166 at 173)'. (emphasis is added)
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> In the Supreme Court Practice (1999) at page 315 under the heading **'Facts must be material'** it was stated as follows
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> 'Facts must be material- The words "contain only" emphasize that only facts which are material should be stated in a pleading. Accordingly, statement of immaterial and unnecessary facts may be struck out (*Davy v Garrett* (1878) 7 ChD 473; *Rassam v Budge* [1893] 1 QB 571; *Murray v Epsom local Board* [1897] 1 Ch 35; and see also r 19). Unless, however, statements are ambiguous or otherwise embarrassing, the Court as a rule will not inquire very closely into their materiality (Knowles v Roberts (1888) 38 ChD 263 at 271; *Tomkinson v South Eastern Railway Co* (No 2) (1887) 57 LT 358)'
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> In *Farrell v Secretary of State for Defence* [1980] 1 All ER 166 at 173 Lord Edmund –Davies held
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> **'It has become fashionable in these days to attach decreasing importance to pleadings,** and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But **pleadings continue to play an essential part in civil actions**, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstances may arise when the grant of permission would work in justice or, at least, necessitate an adjournment which may prove particularly unfortunate in trials with a jury. **To shrug off a criticism as 'a mere pleading point' is therefore bad law and bad practice. The purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take step to deal with it.'** (emphasis is added).

[23] The brief allegations contained in the paragraphs 6 and 7 of the statement of claim is grossly inadequate to establish a cause of action for the Plaintiff, but considering the particulars in affidavit in opposition even if an amendment is allowed there is no reasonable cause of action against the Defendants and this if further reinforced by the fact that the final relief sought by the Plaintiff is to nullify the lease granted by the 1st Defendant to the 2nd Defendant in 1990 without any allegation of fraud. Even an allegation of fraud is not sufficient as particulars of the fraud is needed. In the affidavit in opposition there is no evidence of fraud. The statement of claim and the writ should be struck off on that ground alone, but even if I am wrong on that issue I considered whether any amendment to writ and or statement of claim would prevent my striking out of the action. The case of *Agar v Hyde* [2000] HCA 41 High Court of Australia submitted by counsel for Plaintiff has no relevance to matter before me as it was a voluntary sporting association and not a statutory body as in the matter before me.

ABUSE OF PROCESS

[24] The Plaintiff's statement of claim contains following reliefs

'(a). **A declaration** that the **1st Defendant breached its statutory duty** provided under s 4(1) of the iTaukei Land Trust Act Chapter 134 when it granted a Lease Agreement to the 2nd Defendant for the land known as COLO-I-SUVA, Nakobalavu Access Road, which was not for the benefit of the landowning units;

(b) **A declaration** that the **lease granted** by the 1st Defendant to the 2nd Defendant over native land known as COLO-I-SUVA, Nakobalavu Access Road **is null and void;**

(c) An order that the **lease agreement** entered into between the 1st Defendant and the 2nd Defendant in July 1990 be **set aside**

(d) An order for costs against the Defendants

(e) Any other orders …' (emphasis added)

[25] The statement of claim seeks to nullify a lease agreement entered in 1990, between the 1st and 2nd Defendant on the basis that it violate s 4(1) of the iTaukei Land Trust Act, without particularly addressing how it was violated.

[26] Order 15 r 18 of the High Court Rules of 1988 (which is analogous to RSC O 15 r 16 in UK in 1983) was discussed with its evolution in the light of the judicial review and the expansion of the O 53 (identical provision in Fiji) regarding judicial review and its overlapping jurisdiction in *O'Reilly v Mackman* [1983] 2 AC 237 by Lord Diplock at 276 in the following manner

'My Lords, the power of the High Court to make declaratory judgments is conferred by what is now RSC O 15 r 16. The language of this rule which first made in 1883 has never been altered, though the numbering of the rule has from time to time been changed. It provides

'No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not and consequential relief is or could be claimed.'

This rule, which is in two parts separated by "*and*", has been very liberally interpreted in the course of its long history, wherever it appeared to the court that the justice of the case required the grant of declaratory relief in the particular action before it. Since "*action*" is defined so as to have included since 1938 and originating motion applying for prerogative orders, O 15 r 16 says nothing as to the appropriate procedure by which declarations of different kinds ought to sought, …"

[27] The Plaintiff is claiming that the iTaukei Land Trust Board (1st Defendant) when it entered in to a lease agreement with the 2nd Defendant in 1990, it was not for the benefit of the Fijian owners of the land in issue. The s 4(1) confers a duty on the iTaukei board to act for the benefit of the Fijian owners. It is a broad public policy of the iTaukei Board and there is no express provision for the breach of such provision except for the general penal provision for any violation of any provisions of the said Act. It is an offence to act in contravention of the said Act and for that intention is a vital comportant. If it is a statutory duty and if it breached there cannot be a common law remedy, but any statutory body if it violated its statutory duty can be subjected to a certiorari, mandamus, prohibition or quo warranto and judicial review is the appropriate and more desired cause, and procedure for that are different from the writ of summons as in this case.

[28] Lord Diplock *O'Reilly v Mackman* [1983] 2 AC 237 stated at 279 as follows regarding the availability of the judicial review relating to the decision of a statutory body

'It will be noted that I have broadened the much-cited description by Atkin LJ in *R v Electricity Commissioners, Ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171, 205 of bodies of persons subject to the supervisory jurisdiction of the High Court by prerogative writs might issue, to those "having the duty to act

judicially". For the next 40 years this phrase gave rise to many attempts, with varying success, to draw subtle distinctions between decisions that were quasi-judicial and those that were administrative only. **But the relevance of argument of this kind was destroyed by the decision of this House in** *Ridge v Baldwin* [1964] AC 40, where again the leading speech was given by Lord Reid. Wherever any person or body of persons has authority conferred by legislation to make decisions of the kind I have described, it is amenable to the remedy of an order to quash its decision either for error of law in reaching it or for failure to act fairly towards the person who will be adversely affected by the decision by failing to observe either one or other of the two fundamental rights afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to whom the decision falls to be made.' (emphasis is added)

[29] From the above passage of Lord Diplock's judgment in upholding the decision of Lord Denning's leading speech in striking out of the action for declaration, where the judicial review is applicable, for abuse of process held that though the declaratory action and judicial review were optional causes till 1977 it was no longer so in the light of the expansion of the jurisdiction and the procedure in the RSC 53 and discussed the legislative history and its development extensively in the said judgment at page 275-279.

[30] 1st Defendant is a board incorporated under iTaukei Land Trust Act, and the Plaintiff in this action is seeking to nullify its decision in this action. Any statutory body has to act within its statutory powers granted and if not any such action is ultra vires and in the disguise of a declaration the same cannot be scrutinized by way of writ of summons seeking to nullify the decision it had taken as far back in 1990. There need to be finality and certainty of the decisions made by the Board relating to land and should not be questioned nearly 22 years after the alleged breach unless in a case of fraud.

[31] In *O'Reilly v Mackman* [1983] 2 AC 237 it was held:

"*That since all the remedies for the infringement of rights protected by public law could be obtained on an application for judicial review, as a general rule it would be contrary to public policy and an abuse of the process of the court for a plaintiff complaining of a pubic authority's infringement of his public law rights to seek redress by ordinary action and that, accordingly, since in each case the only claim made by the plaintiff was for a declaration that the board of visitors' adjudication against the plaintiff was void, it would be an abuse of the process of the court to allow the actions to proceed and thereby avoid the protection afforded to statutory tribunals".*

[32] The above passage was quoted in *Goundar v Colonial Fiji* [2003] FJHC 284; HBC0298.2002s (30 May 2003) by Justice Pathik who decided the issue of actions based on Judicial Review and writ of summons and held as follows

'I agree with Mr Nagin's submission that the decision of the Permanent Arbitrator can only be challenged by way of Judicial Review and not by way of writ of summons as the plaintiff has done in this case.

The Arbitrator in this case was performing a **public duty**. To challenge the decision of the Arbitrator the plaintiff should have proceeded by way of judicial review. The plaintiff's Union took up her case for the sole purpose of ascertaining whether her dismissal by her employer was fair and reasonable or not.

The very issue before the Court was dealt with by me in **Joeli Naitei and 1. The Public Service Commission 2. The Attorney-General of Fiji** (Civil Action No 256 of 2000 – judgment 7.8.01). In determining the issue I shall adopt the same reasoning as in that case and for ease of reference and for completeness I set out the same authorities at the risk of being lengthy.

Here the plaintiff is seeking to enforce a public right on the performance by the Arbitrator of a public duty. Hence the decision is susceptible to judicial review. It is different if there is a contract between the aggrieved person and the public body, and in this regard it is worth noting the following passage from the book **The Applicant's Guide to Judicial Review by Lee Bridges and Others** at p 5:

"However, if there is a contract between the aggrieved person and the public body then it is likely that any actions or decisions the body makes in relation to that person be governed by private law rather than public law. The individual will not therefore be able to challenge them by judicial review: his or her remedy will be to sue for damages (and/or a declaration or injunction) in an ordinary civil court or tribunal". (emphasis added)

In this case there is no contract between the plaintiff and the defendant and hence no question of private law arises. The **"question will depend to an extent on the kind of body to be challenged and more so on the functions they are exercising in the particular case" (Bridges**, ibid at p 6).

The following extract from the judgment in *O'Reilly v Mackman* [1983] 2 AC 237 is pertinent:

"***That since all the remedies for the infringement of rights protected by public law could be obtained on an application for judicial review, as a general rule it would be contrary to public policy and an abuse of the process of the court for a plaintiff complaining of a pubic authority's infringement of his public law rights to seek redress by ordinary action and that, accordingly, since in each case the only claim made by the plaintiff was for a declaration that the board of visitors' adjudication against the plaintiff was void, it would be an abuse of the process of the court to allow the actions to proceed and thereby avoid the protection afforded to statutory tribunals".***

Under **Order 53** where the plaintiff wrongfully brings his claim by way of judicial review, the court has power to order that that claim be continued as though it had been commenced by writ. But where the claim is wrongly commenced by writ or originating summons as in this case, the Court has no power to convert it into a claim for judicial review. As stated by **Henry J** in *Doyle v Northumbria Probation Committee* [1991] 1 WLR 1340 at 1344:

"And if the plaintiffs were now to bring a free-standing application for judicial review, their delay has been such that I would find it difficult to envisage the court granting leave to them to apply for such judicial review. Therefore it seems to me that if the defendant committee succeeds in the application that it is making, that will be end of the plaintiffs' claim."

I have considered the legal arguments put forward by the learned counsel for the plaintiff. She has raised certain points. The main hurdle that the plaintiff has to get over is whether the writ of summons is the correct mode of proceeding with her grievance. As I have said, for the above reasons, the plaintiff has adopted the wrong mode, in other words she should have proceeded by way of judicial review. There is abundance of authority on the subject and I have dealt with it at length in **Ram Prasad s/o Ram Rattan and the Attorney-General of Fiji** (Civil Action No 311/92) which was upheld by the Court of Appeal which also dealt with the issues at some length. [*Ram Prasad f/n Ram Rattan v The Attorney-General of Fiji* Civil Appeal No ABU0058 of 1997S – Judgment 27.8.99].

Having decided that this was not the correct mode, I conclude with the following passage from the judgment in *Moroccan Workers Association v Attorney-General* (1995) 1 Law Reports of the Commonwealth 451 (SC) vide Commonwealth Law Bulletin July 1995 p747 –749.

"Matters of public law and administration ordinarily fell within the purview of s.31 of the Supreme Court Act 1981 and RSC Ord 53. The remedies therein provided that judicial review ought to be the normal recourse in all cases where allegations were made that rights under public law were being infringed, e.g. where a private person was challenging the conduct of a public authority or a

public body, or of anyone acting in the exercise of a public duty. The institution of proceedings by originating notice of motion for purely declaratory relief without any explanation of the delay that occurred before their institution in February 1993 and which were brought for the purpose of challenging matters of public law and administration was an inappropriate procedure and an abuse of the process of court."

In this case judicial review was the procedure under O 53 of The High Court Rules. The ratio of **O'Reilly** as found in **Lord Diplock's** speech at p.285 was extended to *Cocks v Thanet District Council* [1983] 2 AC 286. There the action was commenced by writ and "it was stopped in that course, in that it was struck out as an abuse of the process of the Court in the House of Lords".

In the outcome in the light of the many authorities on the issue before me and in view of the decision that I have reached as to the form the proceedings should take in matters of the nature before the Court I will allow the procedural objection raised by the defendant.

Before departing from this subject of distinction between private law and public law, it is accepted that **Ram Prasad**, *a decision of the Court of Appeal, is authority for the decision in this case. A number of other cases in the High Court have been struck out for the reasons stated in Ram Prasad. Some of the cases are:*

Jimione Buwawa v The Permanent Secretary for Education and Others (Suva High Court Judicial Review No HBJ0019 of 1997, 22 July 1997, Pathik J) – dismissing an originating summons; *Fiji Public Service Association v Civil Aviation Authority of Fiji & Others* (Lautoka High Court Judicial Review No HBJ0015 of 1998 – 30 November 1998 – Madraiwiwi J); *Eroni Waqaitanoa v The Commissioner of Prisons & Others* (Suva High Court Civil Action No HBC0271 of 2000 – 7.9.2000 – Scott J); *Shakuntala Nair v v The Secretary, Public Service Commission & Another* .(Suva High Court Civil Action No HBC0359 of 2000 – 28.5.2001 – Scott J). For completeness I would mention that Bryne J was inclined towards a different view from his brother Judges in the *Fiji Teachers Union v The Permanent Secretary for Education & Another* (Suva High Court Civil Action No HBC0021 of 1997, 21.7.98) after referring to an extract from Administrative Law by Wade and Forsyth and relying on Doyle (supra) and *British Steel v Customs & Excise Commissioners* [1997] 2 All ER 366. However, His Lordship's decision predates Ram Prasad.

For these reasons I declare that the plaintiff is not entitled to continue with his Writ of Summons or seek the relief sought by her otherwise than by application for judicial review if she is still able to do so under O 53 of The High Court Rules. It is for her counsel to decide what course the plaintiff should take to pursue her grievance.'

[33] The case of *Goundar v Colonial Fiji* [2003] FJHC 284; HBC0298.2002s (30 May 2003) decided on the issue of availability of writ of summons for declaration where the matter is a subject matter of a judicial review. If a statutory body exceeded its authority or had acted unreasonably it is clearly an issue relating to public law and the said scope of law is covered in administrative law as opposed to common law remedy by way of a writ of summons. The alleged incident happened in 1990 and it cannot be a subject of writ of summons in order to subvert the delay of nearly 22 years, in institution of an action for judicial review as opposed to a declaration and nullification of a decision of a statutory body.

[34] In the case of *O'Reilly v Mackman* [1983] 2 AC 237 Lord Denning in his judgment at page 254 discussed the action for declaratory relief as opposed to action for judicial review and discussed why the declaratory relief was considered as complimentary cause prior to 1977 before the complete overhaul of O 53 and stated as follows

'Does declaration still lie against the board?

……

> Now that those limitations have been swept away by RSC O 53, the remedy by an action for a declaration had many defects. It could be started, as for right, without the leave of the court. It could be started years and years after the event. It could involve long trials with discovery, cross-examination, and so froth. So many defects were present in that remedy by action that I am quite clear that now that the new procedure has been introduced, there should no longer be recourse to the remedy by action for a declaration. If a complaint is brought by ordinary writ-without leave – it can and should be struck out as abuse of the process of the court.'
>
> Lord Denning further at page 254 under a heading Abuse of process stated as follows
>
> *Abuse of process*
>
> Some point was mad about the scope of '***abuse of process***". Reference was made to the opening paragraph of *Lord Diplock's speech in Hunter v Chief Constable of the West Midlands Police (Birmingham Six case)* [1981] 3 WLR 906,909. But that should not be regarded as statutory definition. Suppose a prisoner applied under RSC Ord 53 for judicial review of the decision of the board of visitors: and the judge refused leave. It would to my mind, be an abuse of process of the court for him to start afresh an action at law for a declaration, thereby avoiding the need for leave. It is an abuse for him to try and avoid the safeguards of O 53 by resorting to an action at law. So also if he deliberately omits to apply under appropriate remedy is given by the procedure of the court-with safeguards against abuse-**it is an abuse for a person to go by another procedure so as to avoid the safeguards.'** (emphasis is mine)

[35] There are number of safeguards against the abuse of the judicial review process, that are contained in the O 53 of the High Court Rules of 1988 and the most effective and important one being the leave of the court and discretion of the court being exercised, at the point of institution of the action as opposed to the right of the party to file an action relating to writ of summons including originating process. This is a paramount consideration, as the matters relating to decisions of the statutory body would invariably relate to the broad policy as opposed to a particular law or private law remedy.

[36] Lord Diplock in appeal upheld the striking out of the action for abuse of process in *O'Reilly v Mackman* [1983] 2 AC 237 and further stated

> At 280
>
> 'On the other hand as compared with an action for the declaration commenced by writ or originating summons, the procedure under O 53 both before and after 1977 provided for the respondent decision making statutory tribunal or public authority against which the remedy of **certiorari was sought protection against claims which it was not in the public interest for courts of justice to entertain.'**

[37] The Plaintiff after 22 years is seeking to nullify a lease granted by the 1st Defendant, a statutory body that is vested with all iTaukei Land, to the 2nd Defendant namely the Fiji Electricity Authority, a statutory body entrusted with the generation and distribution of the electricity, among other things. The lease is regarding an access road to a point at higher elevation where the power distribution towers are located. Electrification of an area or a country is for the benefit of all the communities and in the interest of the everybody and if such decisions are being challenged long after investments are being made as per the decision, courts would be reluctant to intervene as it is not for the interest of the public at large. This is the rationale of the requirement of leave of the court before the court properly entertains such application to nullify a decision of a statutory authority and the safeguards contained in O 53 of the High Court Rules and they are for a purpose. Apart from leave there are number of other safeguards against

abuse of the judicial review process so that while judicial scrutiny is kept, it is not utilized for ulterior motives having in mind the broad policy considerations in such decisions.

[38] Then Lord Diplock at length discussed in his judgment at p 280-282 the safeguards that are found in the judicial review as opposed to writ seeking declaration. In a judicial review first the leave of the court is required and for that affidavit evidence is needed and if false statements are made it can be considered as perjury and uberima fides of the facts stated in the affidavit is also required and failure to disclose the candid facts would result the application for judicial review being dismissed. Lord Diplock at page 280 *O'Reilly v Mackman* [1983] 2 AC 237 stated as follows

> 'The public interest in good administration requires that public **authorities and third parties should not be kept in suspence** as to the legal validity of a decision the authority has reached in purported exercise of decision –**making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.** In contrast, allegation made in a statement of claim or an indorsement of an originating summons are **not on oath**, so the requirement of a prior application for leave to be supported by **full and candid affidavit verifying the facts relied on** is *and important safeguard against groundless or unmeritorious claims that a particular decision is a nullity.* There was also power in the court on granting leave to impose terms as to costs or security.
>
> Furthermore, as O 53 was applied in practice, as soon as the application for leave had been made it provided a **very speedy means, available in urgent cases within a matter of days rather than months,** for determining whether a disputed decision was valid in law or not. A reduction of the period of suspence was also effected by the requirement that leave to apply for certiorari to quash a decision **must be made within a limited period was accounted for to the satisfaction of the judge.** The period was six months under the pre-1977 O 53: under the current O 53 it is further reduced to three months.' (emphasis is added)

[39] After discussing the plethora of safeguards that are found in judicial review in terms of O 53 held in *O'Reilly v Mackman* [1983] 2 AC 237 at 282 as follows

> '… to proceed against the authority by an action for a declaration of nullity of the impugned decision……instead of applying for an order of certiorari and this despite the fact that, by adopting this course, the **plaintiff evaded the safeguards imposed in the public interest against groundless, unmeritorious or tardy attacks upon the validity of decisions made by public authorities in the field of public law.'** (emphasis is added)

[40] The Plaintiff is seeking declaring that a decision taken in 1990 by the 1st Defendant which is a statutory body, to lease a part of land with access road to the 2nd Defendant, FEA breached the statutory duty under s 4(1) of the iTaukei Land Trust Act and also to declare the said lease null and void and to set aside the said lease. This action was filed 22 years after the alleged lease was executed between the 1st and 2nd Defendants. Lord Diplock *O'Reilly v Mackman* [1983] 2 AC 237 at 283 held '*Failing such challenge within the applicable time limit, public policy, expressed in the maxim Omnia praesumutur rite esse acta, requires that after the expiry of the time limit it should be given all the effects in law of a valid decision.*' The delay of 22 years is a factor that would be sufficient for refusal of leave in any judicial review, but I need not venture on that as the abuse of the process is evident in this action.

[41] Lord Diplock *O'Reilly v Mackman* [1983] 2 AC 237 at 284 further stated

'My Lords, at the outset of this speech, I drew attention to the fact that the remedy by was of declaration of nullity of the decision of the board was discretionary- as are all the remedies available upon judicial review. Counsel for the plaintiffs accordingly conceded that the fact that by adopting the procedure of an action begun by writ or by originating summons instead of an application for judicial reviews under O 53 (from which there have now been removed all those disadvantages …..) **the plaintiffs had thereby been able to evade those protections against groundless, unmeritorious or tardy harassment that were afforded to statutory tribunals or decision-making public authorities by O 53**, and which might have resulted in the summary, and would in any event have resulted in the speedy deposition of the application, is among the matters fit to be taken into consideration by the judge in deciding whether to exercise his discretion by refusing to grant a declaration: but, it was contended, this he may only do at the conclusion of the trial.

So to delay the judge's decision as to how to exercise his discretion would defeat the public policy that underlies the grant of those protections; viz, the need, in the interest of good administration and *third parties who may be indirectly affected by the decision*, for speedy certainty as to whether it has the effect of a decision that is valid in public law. An action for declaration or injunction need not be commenced until the very end of the limitation period; if begun by writ, discovery and interlocutory proceedings may be prolonged and the plaintiffs are not required to support their allegations by evidence on oath until the actual trial. The period of uncertainly as to the validity of a decision that has been challenged upon allegations that may eventually turn out to be baseless and unsupported by evidence on oath, may thus be strung our for a very lengthy period, as the actions of the first three appellants in the instant appeal show. **Unless such an action can be struck out summarily at the outset as an abuse of the process of the court the whole purpose of the public policy to which the change in O 53 was directed would be defeated.'** (emphasis is added)

[42] The above quoted passage is pertinent, to action before me as the 2nd Defendant is FEA which is entrusted inter alia, with the generation and distribution of the electricity, in Fiji. There is no allegation of any breach by the 2nd Defendant though the Plaintiff is alleging the violation of s 4 of the iTaukei Land Trust Act by the 1st Defendant. The 2nd Defendant is clearly a third party as far as the said s 4 of the Act is concerned. It had already built electricity transmission towers at a higher elevation of the land and the access road is essential and if the lease is nullified apart from the 2nd Defendant other parties may get affected including the consumers of the electricity. If the access is now denied after 22 years any repair or upgrading will also can be affected and these can have cascading effect resulting unforeseen difficulties to 2nd Defendant as well as to the consumers who will invariably adversely affected from such nullification of lease to the land where high tension power distribution apparatus, including towers are located. These are all considerations if a timely judicial review was applied after the said lease in 1990. After such vital part of national grid is built, now.

[43] High Court Rules of 1988 which is applied in Fiji contained the O 53 which is analogous to the RSC 53 in UK after 1977.

Supreme Court Rules (White Book) 1988 at page 791 53/1-14/1 states as follows

Introduction

History- This Order which was substituted by RSC (Amendment No 3)1977(SI 1977 No 1955), entirely replaced the former O 53. It created a uniform, flexible and comprehensive code of procedure for the exercise of the High Court of its supervisory jurisdiction over the proceedings and decisions of the inferior courts, tribunals or other bodies of persons charged with the performance of public acts and duties. At the same time it eliminated procedural technicalities relating to the machinery of administrative

law, mainly by removing procedural differences between the remedies which an applicant was formerly required to select as the most appropriate to his case……..'

[44] The provision contained in O 53 in the High Court Rules of 1988 is substantively identical to the provisions contained in the R.S.C 53 in U.K after 1977 amendment to the said rule which repealed the previous rule and the ratio in *O'Reilly v Mackman* [1983] 2 AC 237 is applicable in Fiji and this was applied by Pathik J in the said case *Goundar v Colonial Fiji* [2003] FJHC 284; HBC0298.2002s (30 May 2003) was decided on the abuse of process though the rationale in Lord Diplock was not discussed. After the amendment to R.S.C 53 in UK in 1977 the declaratory relief is no longer complementary to the judicial review applications. Since the High Court Rules of 1988 adopted the amended RSC 53 to its O 53 the ratio of *O'Reilly v Mackman* [1983] 2 AC 237 is applicable. This is more applicable in the present situation as the order sought by the court intends to challenge the indefeasibility of the title /interest of the 2nd Defendant without alleging any wrongdoing on its part.

F. CONCLUSION

[45] The action filed by the Plaintiff against the Defendants are based on the lease granted by 1st Defendant to the 2nd Defendant. The 1st Defendant is vested with the iTaukei Land and the 2nd Defendant is the authority entrusted with the generation and distribution of the electricity. The statement of claim does not disclose a reasonable cause of action against the Defendants. 2nd Defendant is added as the lease agreement was between the 1st and 2nd Defendants. The allegation is that the 1st Defendant while granting the lease in 1990 did not executed the lease for the benefit of the Plaintiffs. The statement of claim does not disclose a reasonable cause of action and even with an amendment it cannot be cured as the indefeasibility of the title /interest is paramount in land where the Torrens System of law is applicable. Without prejudice to that, the orders sought by the Plaintiffs are declaratory in nature and obviously sought in a writ of summons without resorting to judicial review for obvious reasons. The safeguard against a judicial review is not available in rules regarding the writ of summons including the originating process. In the light of the ratio in *O'Reilly v Mackman* [1983] 2 AC 237 this action for declaration as well as for nullification is an abuse of process. Lord Denning's decision to strike out an action for declaration was upheld by Lord Diplock and both decisions are comprehensive and I cannot add more on the issue of the abuse of process. This action is struck off for non disclosure of reasonable cause of action against both Defendants and it cannot be cured by any amendment as the action itself is an abuse of process. The 2nd Defendant is granted a cost of $500 as the cost of this application assessed summarily.

G. FINAL ORDERS

a. The action is struck off.
b. The 2nd Defendant is granted a cost of $500 as cost, assessed summarily.

Application granted.

Will Bateman
Solicitor