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## Housing Authority v Qio [2000] FJLawRp 18; [2000] 1 FLR 24 (20 January 2000)

[\[2000\] 1 FLR 24](#)

IN THE HIGH COURT OF FIJI

HOUSING AUTHORITY

v

JOSEFA QIO

High Court Civil Jurisdiction  
Shameem, J  
20 January 2000  
HBC 367/99

*Section 169 application - Show cause why the defendant should not hand over possession of native lease to the plaintiff - whether foreclosure a dealing in land requiring Native Land Trust Board consent - can NLTB consent be implied by subsequent consent to assign the lease to new proprietors - [Land Transfer Act](#) (Cap 131) ss73, 169, 172; [Native Land Trust Act](#) ss10(2), 12(1); [Property Law Act](#) s75*

Upon the defendant's default, the plaintiff applied to foreclose and Registrar of Titles ordered foreclosure. The defendant was served with a Notice to Quit but he refused to vacate the property. The defendant has not shown any right to remain on the land over and above the rights of legal mortgagees.

**Held** - If the power of a mortgagee to take possession was subject to NLTB consent, it would render the mortgagee's right to foreclosure uncertain and its inability to take security would frustrate the mortgage itself. The parties intended to give effect to the mortgage and the right to foreclose is valid as it is not a dealing in land for purposes of Native Lands Trust Act s12 thus no consent is required.

Defendant failed to show cause to remain on the land and is ejected.

### Cases referred to in judgment

cons *Chalmers v Pardoe* (1963) 3 All ER 552  
cons *Jai Kissun Singh v Sumintra* [\[1970\] 16 FLR 165](#)  
cons *Fong Lee v Mitlal & Ram Kissun* [\[1966\] 12 FLR 4](#)  
cons *Shaukat Ali v Abdul Razak & Ors* ABU 0033/98S  
appl *Chandra Kand Pala v ANZ Savings Bank* Civ App 517/83  
foll *National Bank of Fiji v Abdul Kadeer Hussein* 0331/94

*Vijay Maharaj for the plaintiff*  
*Tevita Fa for the defendant*

20 January 2000.

## JUDGMENT

**Shameem, J.**

On 5<sup>th</sup> August 1999, the Plaintiff issued summons to the Defendant, to show cause why he should not hand over possession of Native Lease No. 21084 at Naveiwakau to the Plaintiff, under section 169 of the [Land Transfer Act](#). The summons were supported by the affidavit of Jagdish Prasad, Manager Legal Services of the Housing Authority.

In that affidavit, Jagdish Prasad sets out the basis for the summons. The Housing Authority is the registered proprietor of the Lease. The Defendant is a former proprietor who had executed a mortgage with the Authority and who had made default in payment of instalments under the mortgage. Under the terms of the mortgage and the [Land Transfer Act](#), the Authority proceeded to apply to foreclose, and the Registrar of Titles ordered foreclosure under the [Land Transfer Act](#).

On 26<sup>th</sup> February 1999, the Defendant was served Notice to Quit but he refused to vacate the property.

The Defendant, Josefa Qio has filed an affidavit "showing cause". In his affidavit sworn on 10<sup>th</sup> September 1999, he says that the consent of the Native Land Trust Board was necessary for the registration of the Authority's title, and for foreclosure of the mortgage. He says that the Notice to Quit is therefore invalid and that the Plaintiff cannot now demand vacant possession.

The Plaintiff filed an affidavit in reply. The affidavit of Jagdish Prasad sworn on 16<sup>th</sup> November 1999, states that the Authority had informed the Native Land Trust Board on 18<sup>th</sup> June 1999 that the land was vested in the Authority when the application for foreclosure was made under section 73 of the [Land Transfer Act](#), and that foreclosure under the mortgage (to which the NLTB had consented) did not require the consent of the NLTB. The letter, which was signed by Jagdish Prasad (Annexure A) said that foreclosure was not a "dealing in land" under the [Land Transfer Act](#), and therefore did not require the consent of the NLTB.

The summons was heard on 26<sup>th</sup> November 1999. Mr T. Fa for the Defendant submitted that the only issue was whether NLTB consent was required before foreclosure. He said that foreclosure was a dealing in land under section 12 of the [Native Land Trust Act](#). He agreed that the NLTB had consented to the mortgage but said that foreclosure required further consent.

Mr V. Maharaj disagreed. He submitted that when the NLTB consented to the mortgage, it also consented implicitly, to each of the clauses of the mortgage including Clause 15 which provided the right to foreclosure. Moreover, the NLTB consented to the assignment of the lease to the new proprietors (Annexure C of Jagdish Prasad's affidavit of 16<sup>th</sup> November), and that their consent could in any event be implied. He finally submitted that foreclosure was not a dealing in land requiring NLTB consent, that the Defendant did not deny the debt, the default or that all procedures had been followed under section 169 of the [Land Transfer Act](#).

Section 169 of the [Land Transfer Act](#) Cap 131 provides as follows:

"The following persons may summon any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant:-

(a) the last registered proprietor of the land.....

(b) a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired."

Section 172 of the Act provides:

"If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons...."

The question therefore is whether the Defendant has "a right to the possession of the land." The basis of the Defendant's claim that he has such a right, is the failure of the Plaintiff to obtain NLTB consent before foreclosing. If he is right, then the Notice to Quit is invalid.

The [Native Land Trust Act](#) Cap 134 provides that native land shall not be alienable except to the State.

Section 10 of the Act provides that all native leases shall be recorded by the Registrar of Titles in a "Register of Native Leases." Section 10(2) of the Act provides:

"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](#), so far as the same are not inconsistent with this Act, in the same manner as if such lease has been made under that Act, and shall be dealt with in a like manner as a lease so made."(my underlining)

Section 12(1) of the [Native Land Trust Act](#) provides:

"Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void."

It is clear, from the letter annexed to the affidavit of Josefa Qio (Annexure AA) that the NLTB considered the eviction of the Defendant to be null and void. The Board Secretary, Mr N. Nawaikula, in his letter to the Plaintiff stated:

"I am concerned however, that on 15/7/1998, under dealing no. 443289 there is an endorsement on the title to say that the whole of this land is now vested under Housing Authority. I understand this to be clearly unlawful as I cannot see from our files any consent granted by the Board entitling Housing Authority to be vested with the whole of this land."

The NLTB position is plain. The Defendant is the Board's tenant not the Housing Authority's. The only relationship between the Plaintiff and the Defendant is the Mortgage dated 25<sup>th</sup> January 1994. That mortgage does not, according to the Board, entitle the Authority to evict the Defendant without the consent of the Board.

The questions for the Court are as follows: Firstly is foreclosure a "dealing in land" for which the consent of the NLTB is required? Secondly, if it is, can that consent be implied by the NLTB's consent to assign the lease to the new proprietors of the lease namely Makalesi Radinivilevu and Mereadani Nakalesi? Thirdly, if the consent of the NLTB is not necessary, has the Defendant shown that he has a right to remain on the land?

I turn to the first question. What is a "dealing in land"? Mr Fa referred me to the Privy Council case of *Chalmers v. Pardoe* (1963) 3 All ER 552 which discussed these words in the context of development on native land without consent. On the appeal from the Fiji Court of Appeal, the appellant claimed he had an equitable charge on the land that had been leased to the respondent to the value of buildings he had erected. The appellant had later been evicted by the respondent. The Privy Council held that a dealing with land had clearly taken place for the purposes of section 12 of the old Native Land Trust Ordinance because "the Board found itself with six more buildings on the land without having the opportunity of considering beforehand whether this was desirable. It would seem ... that this is one of the things that s.12 was designed to prevent."

In *Jai Kissun Singh v. Sumitra* [1970] 16 FLR 165, a native leasehold had been held by the respondent and her son the appellant as tenants in common in equal shares. By virtue of a panchayat agreement the respondent agreed to sell her half of the interest in the land and the cane contract to her son, the appellant. The appellant then took over management of the farm. The question was whether a later consent to the NLTB was valid when the terms of the panchayat agreement (which had not been signed by the respondent) named the appellant as the respondent's agent.

The Court of Appeal held (Marsack JA dissenting) that the agreement was a dealing in land within the meaning of section 12 of the Native Land Trust Ordinance, and that the agreement was null and void.

In *Fong Lee v. Mital and Ram Kissun* [1966] 12 FLR 4, an application by the purchaser for the consent of the NLTB for the purchase of leasehold, was made after the sale and purchase agreement had been executed. It was held by the Court of Appeal that the appellant was entitled to specific performance of the contract, despite the fact that consent had not been obtained until after execution of the contract.

What then, is the mischief that section 12 is intended to prevent? It seems clear on a reading of the section, and of the Privy Council decision in *Chalmers v. Pardoe* (supra), that it is intended to prevent alienation or dealing with land which the Native Land Trust Board should be able to prevent, and certainly to know about.

It is not disputed that the Board consented to the mortgage. Nor is it in dispute that the Board consented to the assignment of the lease to the new proprietors.

Clause 14 of the mortgage provides:

"THAT the power of and all other powers conferred on a Mortgagee by the Property Law Act 1971 may be exercised by the Mortgagee immediately upon or at any time after default in payment of any of the moneys hereby secured...."

Clause 15 provides that upon the power of sale becoming exercisable the Mortgagee may take possession. There is no dispute that the Authority satisfied the requirements of the [Land Transfer Act](#) before proceeding to bring the application under section 169.

If Clauses 14 and 15 of the mortgage between the plaintiff and the defendant were to be read subject to the consent of the NLTB under section 12 of the Native Land Trust Board Act, it would clearly render the mortgagee's right to foreclose uncertain.

Indeed, I would go further and say that the inability of the mortgagee to realise its security by taking possession without further consent, would frustrate the mortgage itself.

In *Shaukat Ali v. Abdul Razak and Others* Civil Appeal No. ABU 0033 of 1998S, the Court of Appeal said that where the consent of the Director of Lands was required in respect of a mortgage, further consent was not required in respect of a transfer of that mortgage to another person.

The relationship between section 12 of the NLTB Act and mortgages was discussed in *Chandra Kant Pala v. ANZ Savings Bank* Civil Appeal No. 517 of 1983. The Court of Appeal said that it was arguable that section 12 "does not apply to mortgages which do not purport to do anything more than charge land in favour of a mortgagee."

However for the purpose of that decision, the Court accepted that a mortgage was a dealing in land. In that case, the Board had consented to the mortgages. The appellant argued that the terms of the mortgages were ineffective. The Court said at page 10:

"Unless by operation of law the two mortgages could not be effective (were dead as it were), there is no way in which the appellant

could possibly argue that they were now not binding him and effective. He himself signed applications for consent to mortgage in respect of those two mortgages, and after obtaining it, they were registered. There is no suggestion that the parties intended fresh mortgages....of course the parties intended that they should become operative."

In this case the Defendant himself applied for consent to execute the mortgage. The land, the mortgagee, the amount of the principal sum of \$50,000 and the term of the mortgage were specified in the application. The NLTB consented. The mortgage was signed by the parties. It is clear that the parties intended to give effect to the mortgage. The Defendant received his money.

It would be quite wrong, in my view to now claim, as the Defendant claims, that the clauses of the mortgage have no effect without further consent.

As Fatiaki J said in *National Bank of Fiji v. Abdul Kadeer Hussein* Civil Action No. 0331 of 1994, the mortgagee has a right not only under the terms of the mortgage but also by virtue of section 75 of the Property Law Act Cap 130, to claim possession of the security. He referred to Buckley LJ's judgment in *Western Bank Ltd v. Schindler* (1977) 1 Ch 1 when he said:

"A legal mortgagee's right to possession is a common law right which is an incident to his estate in the land. It should not be lightly treated as abrogated or restricted. Although it is perhaps most commonly exercised as a preliminary step to an exercise of the mortgagee's power of sale, so that the sale may be made with vacant possession, this is not its only value to the mortgagee. The mortgagee may wish to protect his security .... He might wish to take possession for the purpose of carrying out repairs or to prevent waste."

The purpose of section 12 of the NLTB Act is to prevent land being dealt with without the knowledge and consent of the NLTB. I find that this purpose was fulfilled when the NLTB consented to the mortgage.

The purpose for the mortgage was to give the Plaintiff security for the money advanced. The Plaintiff and the Defendant were willing parties to this agreement, and I find that the mortgage and the right to foreclose valid. The act of foreclosure per se is not a dealing in land for the purpose of section 12. The consent of the NLTB was not required.

It follows therefore, in answer to the second question, that there is no need to consider whether the NLTB impliedly consented to foreclosure by its subsequent consent to re-assign the lease.

It also follows in response to my third question, that the Defendant has not shown that he has any right to remain on the land over and above the rights of the legal mortgagee.

For these reasons I find that the Defendant has failed to show cause under section 169 of the [Land Transfer Act](#).

The Defendant must pay the Plaintiff costs of this application to be taxed if not agreed.

*Application granted.*

Marie Chan