

ATTORNEY GENERAL'S CONFERENCE

COMMENTARY BY SEMI TABAKANALAGI

ARE NATIVE LEASE TITLES REGISTERED UNDER TORRENS SYSTEM OR THE LAND TRANSFER ACT INDEFEASIBLE?

My response to this question in strict terms is, ALL native leases registered under the Land Transfer Act (**LTA**) or Torrens System are indefeasible. However, due to specific legislative restrictions, leases under Agricultural Landlord and Tenant Act (**ALTA**) Cap 270 are not indefeasible since they are subject to provisions that have overriding effect on their status of indefeasibility.

The relevant provision of indefeasibility under the Native Land Trust Act Cap 134 (**NLTA**) is outlined under Section 10 that provides:

10(1) All leases of native land shall be on such form and subject to such conditions and covenants as may be prescribed, and such leases shall be recorded in a register to be kept by the Registrar of Titles entitled “Registrar of Native Leases” and it shall be lawful for the Board to change and collect in respect of the preparation of any lease or for any matter in connection therewith such fees as may be prescribed.

(2) When a lease made under the provisions of the Act has been registered it shall be subject to the provisions of the Land Transfer Act, so far as the same are not consistent with the 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.

(3) It shall be lawful for the Registrar of Titles to charge and collect in respect of any lease registered under the provisions of the Act, or in respect of any dealing with such lease, the fees prescribed under the Land Transfer Act in the same manner as if such lease was a lease under that Act.

Hence, for all surveyed native leases with exception of those given under ALTA, are presumed to have had the certainty and protection as provided for under the indefeasibility provisions of Section 37 to Section 42 of the LTA. It is further presumed, once registered under those provisions, the native lease is deemed to be indefeasible and has absolute certainty unless if it falls within the fraud exception under Section 40 of LTA

Administration of NLTB ALTA Leases

NLTB administers about 30,000 leases of which around two thirds are under NLTA whilst one third are under ALTA. All the NLTA leases registered under LTA are indefeasible and have absolute certainty. However, for ALTA leases the provisions of the Act do take precedence over indefeasibility provisions of LTA.

Section 59(2) of ALTA provides:

“59(2) – The provisions of sections 7, 8, 9, 10, 11 and 12 of the Native Land Trust Act and all regulations made thereunder shall be subject to the provisions of the Act .”

Hence, the Section 10 indefeasibility NLTA provides to NLTA tenants is subject to ALTA that makes all registered ALTA native titles prone to challenges. The case of **SOMA RAJU v BHAJAR LAL** that referred to Frazer & Walker as mentioned by Mr Mishra in his paper supports this view. ie Land Transfer Act indefeasibility provisions is subjected to ALTA provisions.

ALTA cannot guarantee the registered title holder under LTA to have certainty or indefeasible interest. A prime provision is **Section 4(1) of ALTA** which provides that where a person has been occupying an area of more than 2 _ acres or one hectare continuously for more than 3 years and can prove that the landlord has not taken any steps to remove him, the illegal occupant can apply to the Tribunal and seek a declaration of tenancy. If such landlord has a title registered under the Land Transfer Act, his title will than be subject to the Agricultural Tribunal that has to make a declaration on whether a tenancy exists or otherwise. If such declaration of tenancy is made by the Tribunal thence under Regulation 48 of the Subsidiary Regulations, an instrument of tenancy which are not registered under the Land Transfer Act is to be registered by the Register of Titles.

Do We Really Need to Have Indefeasibility of Title?

The answer to this is yes, for the sake of business efficacy, certainty of title and to encourage investor confidence in estate related contracts, it is prudent that indefeasibility of title is to be encouraged by all means and should be the way forward. We must work towards having a uniform

system and must review legislation such as ALTA not to have an overriding effect on how our system of registration works.

NLTB as its now common knowledge had continuously called for the changes to ALTA legislation for all native agricultural leases to come within the ambit of NLTA so Section 10 of NLTA will guarantee the indefeasibility similar to any other NLTA registered lease.

Suggestions to Improvements for Registrar of Titles Office and the Land Transfer Act

Its time the LTA needs to be reviewed to consider the new system of surveys such as the Global Positioning System or GPS as survey plans for registered titles. The Office of Registrar of Titles to decentralise its services to the West and North similar to Commissioner of Stamp Duties to enable customers easy access and will also reduce conveyancing fees and costs. The system in terms of data and information needs to be upgraded to allow better services to customers.

Last year, a case in Nadi ended up in the Lautoka High Court wherein two leases were registered on a same piece of land by the Registrar. To make it worse this land was an expired ALTA lease which was also previously registered and it shows there is no capacity within the Registrar of Titles Office to have noticed the discrepancy. I must admit we also have to be blamed for the problem since we prepared two lease documents in the first place but the question is the Registrar should not let this to happen. This case was settled recently by the parties wherein the Plaintiff being the first title to be registered had a better title under the principle of priorities of being first in time with the Registrar.

Effect of Claims by Native Landowners on Existing Leases Titles or Even Freeholds and State Leases

For native leases, as earlier alluded to above, I am certain that all those leases issued under Section 10 of NLTA is indefeasible. A case on point is a 1992 Suva High Court case involving the issue of a tourism lease in Malolo wherein the Lako Mai Resort is situated. The issue was the wrongful consent obtained by NLTB officials for the issue of the lease and the rightful mataqali sued for breach of statutory duty and negligence. The High Court then held that although the consent had been wrongfully obtained, the lessee (Lako Mai Resort Ltd) have been a bona fide purchaser for value and has a good title. The Plaintiffs (rightful landowners) recourse is through breach of statutory duty claim of which they were awarded damages. It is submitted that registered native lease titles under NLTA issued under Section 10 of the Act is indefeasible, has certainty and is a title “in rem.”

For state leases, the recent amendments to the Native Lands and Crown Lands Act that facilitated the transfer of former Crown Schedule A & B lands guarantees that all existing tenancies will still be valid until expiry.

For freeholds, inclusive of state native grants, crown grants and certificate of titles, the proposed setting up of the Land Claims Tribunal may be the vehicle that will address both the legal and administrative implications of claims by Fijian landowners should they succeed. There are already exiting court cases such as the Suvavou Claim wherein status of existing titles are being challenged. The proposed Land Claims Tribunal must consider the status of existing titles and I am of the view

that there is enough case law both locally and abroad to protect the indefeasibility of current title holders apart from Limitation Act, etc.

Finally, I am of the view that Torrens System is useful and must be maintained.

We need a uniform registration of title and Torrens should be the way forward to encourage and boost confidence on investment on land and estate related interests. To have overriding provisions such as ALTA will always be an obstacle to certainty and having an indefeasible good title.

Vinaka vakalevu.

Semi Tabakanalagi
Deputy General Manager, Operations
NLTB, Suva