IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 60 of 2016

IN THE MATTER OF AN APPLICATION UNDER SECTION 169 OF PART XXIV OF THE LAND TRANSFER ACT [CAP 131]

BETWEEN : **MOHAMMED SHAMSHER AZAAD KHAN** and **SOGRA BIBI** aka **SOGRA BIBI KHAN** both currently of 82 Rossini Drive, Hinchinbrook, New South Wales, Australia.

PLAINTIFFS

A N D : **WALI MOHAMMED** Sukanaivalu Road, Lautoka.

DEFENDANT

Mr. Varunendra Prasad for the Plaintiffs
(Ms) Jyoti Sangeeta Singh Naidu for the Defendant

Date of Hearing : - 09th August 2016
Date of Ruling : - 28th October 2016

RULING

(A) INTRODUCTION

(1) The matter before me stems from the Plaintiffs Originating Summons dated 18th April 2016, made pursuant to **Section 169** of the **Land Transfer Act**, for an Order for Vacant Possession against the Defendant.

(2) The Defendant is summoned to appear before the Court to show cause why he should not give up vacant possession of the Plaintiffs property comprised in Native/ iTaukei Lease No:- 15007, being Lot 11 of Waiyavi Subdivision Stage 2 Plan 2, in the Province of Ba and in the Tikina of Vuda comprising of a total area of 21.3 p.

(3) The Originating Summons for eviction is supported by an affidavit sworn by the Plaintiffs on 31st March 2016.

(4) The Originating Summons for eviction is strongly contested by the Defendant.

(5) The Defendant filed an 'Affidavit in Opposition' opposing the application for eviction followed by an 'Affidavit in Reply' thereto.

(6) The Plaintiffs and the Defendant were heard on the 'Originating Summons'. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiffs and the Defendant filed a careful and comprehensive written submission for which I am most grateful.

(B) THE LAW

(1) In order to understand the issues that arise in the instant case, I bear in mind the applicable law and the judicial thinking reflected in the following judicial decisions.

(2) Sections from 169 to 172 of the **Land Transfer Act (LTA)** are applicable to summary application for eviction.

Section 169 states;

> *"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) .....;
> (c) ...

Section 170 states;

> *"The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of the summons."*

Section 171 states;

> *"On the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in Ejectment.*

Section 172 states;

> *"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 with costs against the proprietor,** mortgage or lessor or he may make any order and impose any terms he may think fit;*
> *Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:*
> *Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons.*
>
> [Emphasis provided]

(3) The procedure under Section 169 was explained by Pathik J in **Deo v Mati** [2005] FJHC 136; HBC0248j.2004s (16 June 2005) as follows:-

> *The procedure under s.169 is governed by sections 171 and 172 of the Act which provide respectively as follows:-*
>
> *"s.171. On the day appointed for the hearing of the Summons, if the person summoned does not appear, then upon proof to the satisfaction of the Judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which*

order shall have the effect of and may be enforced as a judgment in ejectment."

"s.172. If a 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 with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit."

It is for the defendant to 'show cause.'

(4) The Supreme Court in considering the requirements of Section 172 stated in **Morris Hedstrom Limited v. Liaquat Ali** (Action No. 153/87 at p2) as follows and it is pertinent:

"Under Section 172 the person summoned may show cause why he refused to give possession of the land and if he proves to the satisfaction of the judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced."

(5) The requirements of Section 172 have been further elaborated by the Fiji Court of Appeal in **Azmat Ali s/o Akbar Ali** v **Mohammed Jalil s/o Mohammed Hanif** *(Action No. 44 of 1981 – judgment 2.4.82)* where it is stated:

"It is not enough to show a possible future right to possession. That is an acceptable statement as far as it goes, but the section continues that if the person summoned does show cause the judge shall dismiss the summons; but then are added the very wide words "or he may make any order and impose any terms he may think fit" These words must apply, though the person appearing has failed to satisfy the judge, and indeed are often applied when the judge decides that an open court hearing is required. We read the section as empowering the judge to make any order that justice and the circumstances require."

(C) THE FACTUAL BACKGROUND

(1) What are the facts here? It is necessary to approach the case through its pleadings/affidavits, bearing all those legal principles uppermost in my mind.

(2) The Plaintiffs in their 'Affidavit in Support' deposed *inter alia;*

Para 1. *WE are the Plaintiffs in this action. We are registered lessees of Native/iTaukei Lease No. 15007 being Lot 11 Waiyavi Subdivision Stage 2 Plan 2 in the Province of Ba and in the Tikina of Vuda comprising of a total area of 21.3 perches (hereinafter referred to as 'our property'), a true copy of which we annex hereto marked as Annexure "K 1".*

2. *THE facts in this affidavit are either within our knowledge, or based upon the documents and records in our custody and/or our solicitors, of which we have personal knowledge of.*

3. *WE dispose this affidavit in support of our application by which we seek an order that we do recover immediate possession of all that piece of land contained and described in and as Native/iTaukei Lease No. 15007 being Lot 11 Waiyavi Subdivision Stage 2 Plan 2, in the Province of Ba and in the Tikina of Vuda comprising of a total area of 21.3 perches and that the defendant does pay the costs of the Plaintiffs on an indemnity basis.*

4. *THE Defendant who is in occupation of our property, does not have our consent or permission to occupy the same. We annex hereto marked as Annexure "K 2" a true copy of Legal Notice to Quit and Vacate Native/iTaukei Lease No. 15007 dated 15 December 2015 issued to the Defendant which was personally served on the Defendants on 30 December 2015 ('said Notice').*

5. *THE Defendant has not challenged the said Notice nor has he taken any steps to deliver vacant possession of property to us.*

6. *ACCORDINGLY in the circumstances we most humbly pray for an Order that we do recover immediate possession of all that piece of land contained and described in and as Native/iTaukei Lease No. 15007 being Lot 11 Waiyavi Subdivision Stage 2 Plan 2, in the Province of Ba and in the Tikina of Vuda comprising of a total area of 21.3 perches and that the defendant does pay the costs of the Plaintiffs on an indemnity basis.*

(D) ANALYSIS

(1) This is an application brought under Section 169 of the Land Transfer Act, [Cap 131]. Under Section 169, certain persons may summon a person in possession of land before a judge in chambers to show cause why that person should not be ordered to surrender possession of the land to the Claimant.

For the sake of completeness, Section 169 of the Land Transfer Act, is reproduced below;

> **169.** *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 with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or not any previous demand has been made for the rent;*
>
> *(c) a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired.*

I ask myself, under which limb of Section 169 is the application being made?

Reference is made to paragraph (1) of the affidavit in support of the Originating Summons.

> *Para 1.* *WE are the Plaintiffs in this action.* ***We are registered lessees of Native/iTaukei Lease No. 15007 being Lot 11 Waiyavi Subdivision Stage 2 Plan 2 in the Province of Ba and in the Tikina of Vuda comprising of a total area of 21.3 perches*** *(hereinafter referred to as 'our property'), a true copy of which we annex hereto marked as Annexure "K 1".*
>
> (Emphasis added)

Section 169 (a) of the Land Transfer Act, Cap 131, requires the Plaintiff to be the last **registered proprietor** of the land.

The term "**proprietor**" is defined in the Land Transfer Act as "*the registered proprietor of land, or of any estate or interest therein*".

The term "**registered**" is defined in the **Interpretation Act**, Cap 7, as "*registered used with reference to a document or the title to any immovable property means registered under the provisions of any written law for the time being applicable to the registration of such document or title*"

(2) According to the iTaukei Lease No:- 15007 (Annexure K-1), the Plaintiffs are the **lessees** of the subject land. There is no dispute between the parties as to the "*locus standi*" of the Plaintiffs. It is conceded by the Defendant that the land in question is **Native Land** within the meaning of **Native Land Trust Act**. The Plaintiffs title in iTaukei Lease No-15007 is registered with the Registrar of Title on 03rd April 2013. Thus, it seems to me perfectly plain that the Plaintiffs hold a **registered lease** and could be characterised as the **last registered proprietors.**

On the question of whether a **lessee** can bring an application under Section **169 (a) of the Land Transfer Act**, if any authority is required, I need only refer to the sentiments expressed by Master Robinson in "**Michael Nair v Sangeeta Devi**", Civil Action No: 2/12, FJHC, decided on 06.02.2013. The learned Master held;

> *"The first question then is under which ambit of section 169 is the application being made? The application could not be made under the second or third limb of the section since the applicant is the lessee and not the lessor as is required under these provisions. But is the applicant a registered proprietor? A proprietor under the Land Transfer Act means the registered proprietor of any land or of an estate or interest therein". The registration of the lease under a statutory authority, the iTLTB Act Cap 134, creates a legal interest on the land making the applicant the registered proprietor of the land for the purposes of the Land Transfer Act. He can therefore make an application under section 169 of the Land Transfer Act".*

The same rule was again applied by the learned Master in "**Nasarawaqa Co-operative Limited v Hari Chand**", Civil Action No: HBC 18 of 2013, decided on 25.04.2014. The learned Master held;

> *"It is clear that the iTLTB as the Plaintiff's lessor can take an action under section 169 to eject the Plaintiff. This is provided for under paragraphs [b] &[c]. For the lessor to be able to eject the tenant or the lessee it must have a registered lease. It is not in dispute that the Plaintiff holds a registered lease, the lease is an "Instrument of*

Tenancy" issued by the iTLTB under the Agricultural Landlord and Tenancy Act. It is for all intents and purposes a native lease and was registered on the 29 November 2012 and registered in book 2012 folio 11824. It is registered under the register of deeds. There is nothing in section 169 that prevents a lessor ejecting a lessee from the land as long as the lease is registered. How will the lessee then eject a trespasser if the lessor in the same lease can use section 169? The lessee under section 169 can eject a trespasser simply because the lessee is the last registered proprietor. The Plaintiff does not have to hold a title in fee simple to become a proprietor as long as he/she is the last registered proprietor. A proprietor is defined in the Land Transfer Act as "proprietor" means the registered proprietor of land, or of any estate or interest therein". The Plaintiff has an interest by virtue of the instrument of tenancy and therefore fits the above definition and can bring the action under section 169."

A somewhat similar situation as this was considered by His Lordship Justice K.A. Stuart in **Housing Authority v Muniappa** (1977, FJSC.) His Lordship held that the Plaintiff Housing Authority holds a registered lease therefore it could be characterised as the last registered proprietor.

In **Habib v Prasad** [2012] FJHC 22, Hon. Madam Justice AngalaWati said;

"The word registered is making reference to registration of land and not the nature of land. If the land is registered either in the Registrar of Titles Office or in the Deeds Office, it is still registered land. This land has been registered on 4th March, 2004 and is registered at the Registrar of Deeds Office, it is still registered land. The registration is sufficient to meet the definition of registered in the Interpretation

Act Cap 7:-

"Registered" used with reference to a document or the title to any immoveable property means registered under the provision of any written law for the time being applicable to the registration of such document or title".

Applying the aforesaid principles to the instant case, I am driven to the conclusion that the Plaintiffs are the last registered proprietors of the land comprised in iTaukei Lease No:- 15007.

(3) Pursuant to Section 170 of the Land Transfer Act;

(1) **the Summons shall contain a "description of the Land"**

AND

(2) **shall require the person summoned to appear in the court on a day not earlier than "sixteen days" after the service of Summons.**

The interval of not less than 16 days is allowed to give reasonable time for deliberations and to prevent undue haste or surprise.

I ask myself, are these requirements sufficiently complied with by the Plaintiffs?

The Originating Summons filed by the Plaintiffs does contain a description of the subject land. The subject land is sufficiently described. For the sake of completeness, the Originating Summons is reproduced below.

ORIGINATING SUMMONS

***LET ALL PARTIES CONCERNED** attend before a Judge/Master of the High Court of Fiji at Lautoka on Monday, the 16th day of May 2016 at 8.30 am o'clock in the forenoon, on the hearing of an application by Mohammed Shamsher Azaad Khan and Sogra Bibi aka Sogra Bibi Khan for an Order that they do recover immediate possession of all that piece of land contained and described in and as **Native/iTaukei Lease No. 15007 being Lot 11 Waiyavi Subdivision Stage 2 Plan 2 in the province of Ba and in the Tikina of Vuda comprising of a total area of 21.3 perches** and that the defendant does pay the costs of the Plaintiffs on an indemnity basis.*

(Emphasis Added)

In light of the above, I have no doubt personally and I am clearly of opinion that the first mandatory requirement of Section 170 of the Land Transfer Act has been complied with.

(4) Now comes a most relevant and, as I think, crucial second mandatory requirement of Section 170 of the Land Transfer Act.

The Originating Summons was returnable on 16th May 2016. According to the Affidavit of Service filed by the Plaintiffs, the Originating Summons was served on the Defendant on 21st April 2016.

Therefore, the Defendant is summoned to appear at the Court on a date not earlier than "sixteen days" after the Service of Summons. Therefore, the second mandatory requirement of Section 170 of the Land Transfer Act too has been complied with.

To sum up; having carefully considered the pleadings, evidence and oral submissions placed before this Court, it is quite possible to say that the Plaintiffs have satisfied the threshold criteria spelt out in Section 169 and 170 of the Land Transfer Act. **The Plaintiffs have established a prima facie right to possession.**

Now the onus is on the Defendant to establish a lawful right or title under which he is entitled to remain in possession.

In the context of the present case, I am comforted by the rule of law expounded in the following judicial decisions.

In the case of **Vana Aerhart Raihman v Mathew Chand**, Civil Action No: 184 of 2012, decided on 30.10.2012, the High Court held;

> *"There is no dispute between parties as to the locus standi of the Plaintiff, and once this is established the burden of proof shifted to the Defendant to prove his right to possession in terms of the Section 172 of the Land Transfer Act."*

In the case of **Morris HedstromLimited –v- Liaquat Ali** CA No: 153/87, the Supreme Court said that:-

> *"Under Section 172 the person summoned may show cause why he refused to give possession of the land and if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure.* ***That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right must be adduced."***
>
> (Emphasis is mine)

Also it is necessary to refer to Section 172 of the Land Transfer Act, which states;

> *"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 with costs against the proprietor,** mortgage or lessor or he may make any order and impose any terms he may think fit; Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:*
> *Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons".*
>
> [Emphasis provided]

(5) At the commencement of the hearing before the court, counsel for the Plaintiffs raised an objection to the Defendant's Affidavit in Opposition. It was contended by Counsel for the Plaintiffs that the Defendant's 'Affidavit in Opposition' is defective as it has not been indorsed with the note as is mandatorily required under Order 41, rule 9 (2) of the High Court Rules, 1988.

It is true that the Affidavit in Opposition filed by the Defendant lacked the mandatory indorsement of Order 41, rule 9 (2).

However, I grant necessary leave pursuant to Order 41, rule 4 for the Affidavit in Opposition filed by the Defendant to be used in evidence in these proceedings.

See; **Chandrika Prasad v State (2001) (2) FLR 39.**

What are the Defendant's reasons refusing to deliver vacant possession? The application for vacant possession is opposed by the Defendant on various reasons expressly set out in the Affidavit in Opposition. There is a considerable amount of overlap between one reason and another and that it is more likely to be helpful for them to be looked at cumulatively rather than separately. The Defendant's reasons raise the questions of **'indefeasibility of title'**, **'equitable interest'** and **'Constructive Trust'**. Thus, I approach the matter as follows;

Ground (01) ⟶ Reference is made to paragraph (4) and (23) of the Defendant's Affidavit in Opposition.

Para 4. ***On or about 22nd March 1988, Mohammed Yas the Lawful Attorney of Mohammed Shamsher Azaad Khan and I entered into an agreement to buy the said property at the price of $45,000.0.*** *It was agreed that I would pay a deposit of $15,000 and the balance of $30,000 to be paid by monthly instalment to Home Finance Company Ltd to pay off Mohammed Yas Shamsher Azaad Khan loan standing for the property. After which, the property would be transferred to me.*

23. *In response to paragraph 3 and 4 of the said Affidavit I state those Mr Azaad Khan at all material times knew of my occupation of the said property since 22nd March, 1988. I had transferred my two vehicles valued $15,000 to the Plaintiff in consideration of purchasing the property. Later I had also paid off the home loan with HFC (Financial Institute) on or about 18th October, 2010. I had also paid lease rental from 22nd March , 1988 to 16th July 2012. The Plaintiffs are not bona fide purchaser.*

Ground (02) ⟶ Reference is made to paragraphs (5), (6), (7) and (10) of the Defendant's Affidavit in Opposition.

Para 5. ***In relying on the representation made by Mohammed Yas, I transferred my two vehicles registration number BC 363 and BF 777 valued at $15,000 (but consideration amount was of $10,000) to Mohammed Yas as part of the deposit and later paid $5000.*** *(Annexed herewith and marked 'WM2' is a true copy of the acknowledgement receipt by Mohammed Yas as the Lawful Attorney of the Mohammed Shamsher Azaad Khan).*

6. *I also paid the lease rental from 22nd March 1988 to 16th July 2012 for the said property to TLTB. TLTB and Mohammed Shamsher Azaad Khan (registered owner) knew that I was residing on the said property and that I was paying such rental. However, after 16th July 2012, Mohammed Shamsher Azaad Khan paid rental to TLTB. This was done*

without my knowledge and contrary to what we had agreed upon. (Annexed herewith and marked 'WM3' is a true copy of receipts issued to me by TLTB after I made lease payments under the said lease). Nonetheless, currently I am the one paying both lease rental and the city rate for the said property.

7. *I was also paying the HFC loan and when only $8,000 was remaining, Mohammed Shamsher Azaad Khan paid the enter amount to sell the property to someone else.*

10. *After all I have done for the Plaintiffs in relation to payments and improvement on the property, the Plaintiffs has not transferred the property as agreed. I have partly or even fully performed the said agreement.*

Ground (03) ⟶ Reference is made to paragraph (12) of the Defendant's Affidavit in Opposition.

Para 12. *My family and I tend to lose a lot and are seeking damages against the Plaintiff(s) in* ***my initial claim considering that we have been residing on the property for more than 26 years*** *and now Mohammed Shamsher Azaad Khan is trying to evict from the said house.*

Ground (04) ⟶ Reference is made to paragraph (23) of the Defendant's Affidavit in Opposition.

Para 23. *In response to paragraph 3 and 4 of the said Affidavit I state those Mr Azaad Khan at all material times knew of my occupation of the said property since 22nd March, 1988. I had transferred my two vehicles valued $15,000 to the Plaintiff in consideration of purchasing the property. Later I had also paid off the home loan with HFC (Financial Institute) on or about 18th October, 2010. I had also paid lease rental from 22nd March , 1988 to 16th July 2012.* ***The Plaintiffs are not bona fide purchaser.***

Ground (05) ⟶ Reference is made to paragraph (13) of the Defendant's Affidavit in Opposition.

Para 13. ***I instructed my solicitor to file Statement of Claim filed herein.*** *In my Statement of Claim I am basing my claim on fraudulent misrepresentation and unjust enrichment. I am also seeking a declaration of both constructive and resulting trusts and as well as seeking to have the said property be transferred to me. I am also seeking damages for unjust enrichment against the Defendant. The Defendant did not file his Statement of Defence. (Annexed herewith and marked 'WM4' is a true copy of the said Writ of Summons dated 1st May 2014).*

Ground (06) ⟶ Reference is made to paragraph (06) of the Defendant's Affidavit in Opposition.

Para 6. *I also paid the lease rental from 22nd March 1988 to 16th July 2012 for the said property to TLTB.* ***TLTB and Mohammed Shamsher Azaad Khan (registered owner) knew that I was residing on the said property and that I was paying such rental.*** *However, after 16th July 2012, Mohammed Shamsher Azaad Khan paid rental to TLTB. This was done without my knowledge and contrary to what we had agreed upon. (Annexed herewith and marked 'WM3' is a true copy of receipts issued to me by TLTB after I made lease payments under the said lease). Nonetheless, currently I am the one paying both lease rental and the city rate for the said property.*

(6) Based on the above grounds in Opposition there are eight problems that concern me. As I see it, eight questions lie for determination by this Court. They are;

(1) Is the Defendant's entry and occupation of the land by virtue of the purported Sale and Purchase Agreement entered on 22nd March 1988, with Mohammed Yas, the Attorney of the Plaintiff, 'dealing in land' within the meaning of Section 12 of the Native Land Trust Act?

(This relates to the **first ground** adduced by the Defendant)

(2) Whether the purported Sale and Purchase Agreement is in breach of Section 12 of the Native Land Trust Act?

(This also relates to the **first ground** adduced by the Defendant)

(3) Is there any equitable estoppel or lien arising in the Defendant's favour on the land for the monies expended on the land by the Defendant i.e. the transfer of two vehicles valued at $15,000.00, the payment of $5000.00 being deposit of the purchase price, the payments of rental to TLTB and Home Finance Ltd and the monies expended on improvements and constructions on the land and the maintenance of the property.

To be more precise, whether the purported Sale and Purchase Agreement is enforceable either at law or in equity to grant a legal right or equitable interest?

(This relates to the **second ground** adduced by the Defendant)

(4) Is the occupation of the property by the Defendant for whatever length of time, a circumstance giving rise to any form of proprietary estoppel or equity?

(This relates to the **third ground** adduced by the Defendant)

(5) Whether a Court of equity will impose a 'Constructive Trust' on the Plaintiffs for the benefit of the Defendant?

To be more precise, whether the Plaintiffs would, on ordinary principles, be guilty of the act of interference with existing contractual rights if they are to evict the Defendant?

(This relates to the **fourth ground** adduced by the Defendant. This relates to an argument concerning equitable interests and rights in *personam* notwithstanding the indefeasibility provision of Land Transfer Act).

(6) Whether the Plaintiff holds an indefeasible title?

(This also relates to the **fourth ground** adduced by the Defendant)

(7) Whether the pendency of the Civil Action, (viz, HBC 67 of 2014) is enough to sustain a right to possession for the time being for the Defendant?

(This relates to the **fifth ground** adduced by the Defendant)

(8) Would it be quite unconscionable for the Native Land Trust Board to plead illegality under the Native Land Trust Act?

(This relates to the **sixth ground** adduced by the Defendant)

(7) There are no complicated questions of fact in this case to be investigated. Therefore, procedure under section 169 is most appropriate here.

Having said that let me now move to examine the questions posed at paragraph six. I propose to examine the **first and the second question** posed at paragraph six (06) jointly.

The Land in question in this case is Native Land within the meaning of Native Land Trust Act. Therefore it is necessary to examine Section 12 of the Native Land Trust Act.

I should quote Section 12 of the Native Land Trust Act which provides;

> *"12.-(1)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 affected without such consent shall be null and void:*
>
> *Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before 29 September 1948 to mortgage such lease."*

Reading as best, as I can, between the Sections of Native Land Trust Act, it seems to me that Section 12 prohibits any 'dealing with the land' which is comprised in Native Lease without the consent of the Board as lessor.

Moreover, unlawful occupation of Native Land is an offence under Section 27 of the Native Land Trust Act.

On a strict reading of Section 12 and 27, it is perfectly clear that the two Sections are clearly designed for the control and protection of the Native Land. The language of Section 12 and 27 are precise and clear.

In **Reddy v Kumar [2012] FJCA 38, ABU 0011.11 (8 June 2012)** Fiji Court of Appeal held that any dealing in respect of a **Government land** effected without the consent of the Director of Lands shall be considered *ab-intio* void and has no effect or force in the eyes of the law. **It is further stated in the said Judgment that the**

consent of the Director under the Crown Lands stands as a mandatory requirement before any transaction or similar dealing is affected in respect of a leasehold Government land.

In paragraph (9) and (10) of the Judgment, his Lordship Chirasiri J. Stated as follows:

> *"9. The above section of the Crown Lands Act clearly stipulates that it is unlawful to alienate or deal with a land comprising a lease unless the written consent of the Director of Lands first had obtained. It is further stated that any sale or transfer or other alienation or any dealing affected in respect of such land without the consent of the Director of Lands shall be null and void. Accordingly, a statutory bar is being imposed for the transactions or dealings affecting Government land or part thereof which is subjected to a protected lease unless and until the consent for such a transaction is obtained from the Director of Lands beforehand.* ***Therefore, if any dealing in respect of a Government land is affected without the consent referred to above, such a transaction shall be considered ab-intio void and has no effect or force in the eyes of the law."***
>
> *"10. When looking at the said Section 13, it seems that the consent of the Director referred to therein should be given by him only upon considering the totality of the provisions contained in the Crown Lands Act. That power of the Director cannot be exercised by a person functioning in another capacity than of the Director of Lands.* ***[Section 13 (4) of the Act].*** *However, it must be noted that it does not mean that the right to review decisions of the Director or the Minister, if there had been an appeal under* ***Section 13 (3)*** *to the Minister, is taken away from the jurisdiction of Courts but of course subject to the provisions of the law prevailing in Fiji.* ***Hence, the requirement to have the consent of the Director under the Crown Lands Act stands as a mandatory requirement before any transaction or similar dealing is affected in respect of a leasehold Government land."***
>
> (Emphasis added)

In **Raliwalala v Kaicola (2015) FJHC 66,** a similar situation arose involving **Native Land** whereby the Defendants were trying to justify its position of occupation by virtue of an agreement with the previous owner. The court in that instance stated:

> *"The main issue to be determined in this application is that whether such an arrangement entered between the previous tenant and the Defendant constitutes a consent or licence to occupy the land. Indeed it is an arrangement entered between the tenant and a third party to settle loan arrears with the bank. In order to legitimize such a transfer of property by the tenant, he is required to obtain the consent of the Native Land Trust Board which has not been obtained. In the meantime, the previous tenant deposed in his annexed affidavit that he was forcefully evicted from the land and the Defendant was demanding the money back, which he paid to the bank. Under such circumstances, it appears that the dispute between the previous*

tenant and the Defendant does not relate to the occupation of the land. The Defendant may have a claim "in personam", but not for the possession of the land. Accordingly, it is my opinion that the Defendants have not obtained consent or a licence to occupy or remain in occupation of this land.

Returning to the present case, on the question as to whether the Defendant's entry and occupation of the land by virtue of the purported Sale and Purchase Agreement, can be "dealing in land" within the meaning of Section 12 of the Native Land Trust Act, if any authority is required, I need only refer to the rule of law enunciated by the Privy Council in **Chalmers v Pardoe (1963) 3 A.E.R. 552,** where a somewhat relevant situation was considered.

In that case, Mr. Pardoe was the holder of a lease of Native Land. **The Native land is subject to Section 12 (1) of the Native Land Trust Act which is in the exact same terms as Section 13 of the Crown Lands Act.** Section 12 (1) 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 affected without such consent shall be null and void ...."

The leading case upon the interpretation of Section 12 of the Native Land Trust Act is **Chalmers v Pardoe** *(supra).* Mr. Pardoe was the holder of a lease of Native Land. By a "friendly arrangement" with Mr Pardoe, Mr Chalmers built a house on a part of the land and entered into possession. The consent of the Native Land Trust Board was never obtained. **The rule of law enunciated by the Privy Council was that the transaction amounted to an agreement for a lease or sublease but even regarding it as a licence to occupy coupled with possession and that "dealing" with the land took place.**

As to whether the "friendly arrangement" amounted to "dealing" with native land within the meaning of s.12 of the Ordinance, Sir Terence Donovan, in delivering the speech of the Privy Council in **Chalmers v Pardoe** *(supra),* explained it as follows:

"Repeating this term, but without necessarily adopting it, the Court of Appeal held, as their lordships have already indicated, that the least effect which could be given to the "friendly arrangement" was that of a licence to occupy coupled with possession. Their lordships think the matter might have been put higher. "I gave him the land for nothing" said Mr Pardoe. Again, "He could get anything – a sublease or a surrender, which was perfectly correct..." And so on. In their lordships view an agreement for a

> ***lease or sublease in Mr Chalmers' favour could reasonably be inferred from Pardoe's evidence.***
>
> ***Even treating the matter simply as one where a licence to occupy coupled with possession was given, all for the purpose, as Mr Chalmers and Mr Pardoe well knew, of erecting a dwelling-house and necessary buildings, it seems to their lordships that, when this purpose was carried into effect, a "dealing" with the land took place. On this point their lordships are in accord with the Court of Appeal: and since the prior consent of the Board was not obtained, it follows that under the terms of s.12 of the ordinance, cap 104, this dealing with the land was unlawful. It is true that in Harman Singh and Backshish Singh v Bawa Singh [1958-59] FLR 31, the Court of Appeal said that it would be an absurdity to say that a mere agreement to deal with land would contravene s.12, for there must necessarily be some prior arrangement in all such cases. Otherwise there would be nothing for which to seek the Board's consent. In the present case, however, there was not merely agreement, but, on one side, full performance: and 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 to their lordships that this is one of the things that s.12 was designed to prevent. True it is that, confronted with the new buildings, the Board as lessor extracted additional rent from Mr Pardoe: but whatever effect this might have on the remedies the Board would otherwise have against Mr Pardoe under the lease, it cannot make lawful that which the ordinance declares to be unlawful."***

In the context of the present case, I am mindful of the rule of law enunciated in the following decisions;

Henry J.P. in **Phalad v Sukh Raj** (1978) 24 FLR 170 said;

> *"The cases already cited show that the Courts have held that the mere making of a contract is not necessarily prohibited by section 12. It is the effect of the contract which must be examined to see whether there has been a breach of section 12. The question then is whether, upon the true construction of the said agreement the subsequent acts of appellant, done in pursuance of the agreement, "alienate or deal with the land, whether by sale transfer or sublease or in any other manner whatsoever" without the prior consent of the Board had or obtained. The use of the term "in any other manner whatsoever" gives a wide meaning to the prohibited acts. For myself I have no doubt but that the true construction of the said agreement and the said agreement and the substantial implementation of such an agreement for sale and purchase, under which possession is completely parted with to the purchaser and immediate mutual rights and liabilities are created in respect of such exclusive possession, is a breach of section 12 if done before the consent is obtained."*

The words "alienate" and "deal with" as elaborated in section 12, are absolute and do not permit conditional acts in contravention. If before consent, acts are done pending the granting of consent, which come within the prohibited transactions, then the section has been breached and later consent cannot make lawful that which was earlier unlawful and null and void. This does not cut across the cases already cited which deal with the formation of the contract as contrasted with an immediately operative agreement and substantive acts in performance thereof."

Gould V.P in **Jai Kissun Singh v Sumintra**, 16 FLR p 165 said;

> *". . . .it is not necessary that the agreement between the parties* ***should have progressed to a stage at which formal documents of lease or assignment has been executed before the transaction became a dealing requiring prior consent.*** *That, having regard to the objects of the section, is only common sense. Otherwise, a purchaser under agreement could remain indefinitely in possession and control, exercising the rights of full ownership and even protecting himself by caveat. If an agreement is signed and held inoperative and inchoate while the consent is being applied for I fully agree that it is not rendered illegal and void by section 12. Where then, is the line to be drawn? I think on a strict reading of section 12 in the light of its object, an agreement for sale of native land would become void under the section as soon as it was implemented in any way touching the land, without the consent having been at least applied for ... ..."*
>
> (Emphasis Added)

In **Chalmers v Pardoe** (*supra*) said moreover,

> *"But even treating the matter simply as one where a licence to occupy, coupled with possession was given, all for the purpose, as Chalmers and Pardoe well knew, of erecting a dwelling house and accessory buildings it seems to their Lordships that when this purpose was carried into effect a "dealing" with the land took place."*

Returning to the case before me, acting on the strength of the authority in the aforementioned cases, I hold that the purported Sale and Purchase Agreement entered between the Defendant and Mohammed Yas, the Attorney of the Plaintiff, is an alienation, dealing in land within the meaning of Section 12 of the Native Land Trust Act due to the following reasons;

- The purported Sale and Purchase agreement bestowed a right to possession, upon a payment of $15,000.00 being the deposit of the purchase price.

- ❖ This does not provide any time to apply for written consent of the Native Land Trust Board.

- ❖ The purported Sale and Purchase agreement was implemented to the fullest by touching the land, i.e, by letting the Defendant into the possession of the land.

- ❖ Thus, the possession is parted to the Defendant. The mutual rights and liabilities are created in relation to possession.

It was not disputed that the NLTB (Native Land Trust Board) has not given consent to the purported Sale and Purchase agreement. Therefore, dealing with the Native Land had taken place without the written consent of the Native Land Trust Board and the dealing is illegal and void by Section 12 of the Native Land Trust Act. As a result, the inescapable conclusion is that, the said agreement is null and void *ab initio* and has no effect or force in the eyes of the law. (I arrived at a different conclusion in HBC 67 of 2014, as the factual basis on which the allegations contained in the Statement of Claim were distinguishable from the current proceedings for vacant possession.)

The consent of the Native Land Trust Board under the Native Land Trust Act stands as a mandatory requirement before any transaction or similar dealing is affected in respect of a Native Land.

Given the above, I am constrained to answer the first and second question posed at paragraph six (06) in the affirmative. Therefore, the first ground fails.

(8) Let me now move to examine the third **question** posed at paragraph six (06);

The Defendant says that he honoured the Sale and Purchase agreement by transfer of his two vehicles valued at $15,000, payment of $5000.00 being deposit of purchase price, the rental payment made to TLTB, Home Finance and the moneys expended on improvements and constructions on the land and the maintenance of the property.

Therefore, the Defendant contends that there is an **equity** arising out of expenditure of money.

The submission requires some examination of the law regarding **"Promissory or equitable estoppel."**

Spry in his "Principles of Equitable Remedies" 4th Edition 1990 page 179 sets out the basic principles of equitable proprietary estoppel as follows:

- ➢ *The Plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendants or expected that a particular*

legal relationship would exist between them and, in the latter case that the defendant would not be free to withdraw from the expected legal relationship.

- *The Plaintiff has induced the defendant to adopt that assumption or expectation.*
- *The Plaintiff acts or abstains from acting in reliance on the assumption or expectation.*
- *The defendant knew or intended him to do so.*
- *The Plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled.*
- *The defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.*

Lord Kingsdown in the case of **Ramsden v Dyson** (1865) L.R. 1 H.L. 129 said at p. 140;

> *"If a man under a verbal agreement with a landlord for a certain interest in land or what amounts to the same thing under the expectation created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation with the knowledge of the landlord and without any objections by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation."*

Also at p. 140 Lord Cransworth L.C. said:

> *"If a stranger begins to build on any land supposing it to be his own and I perceiving his mistake, abstain setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land in which he had expended money on the supposition that the land was his own."*

Promissory or equitable estoppel is described in Halsburys Laws of England, Fourth Edition, Volume 16, at paragraph 1514:

> *"When one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must*

accept their legal relations subject to the qualification which he himself has so introduced."

Snell's Equity (13th Ed), at para 39 – 12 states that:

"Proprietary estoppel is one of the qualifications to the general rule that a person who spends money or improving the property of another has no claim to reimbursement or to any proprietary interest in the property".

Proprietary estoppel, unlike promissory estoppel, is permanent in its effect. It is capable even of conferring a right of action. For it to apply there must exist essential elements or conditions. The Court, in Denny v. Jensen [1977] NZLR 635 identified four conditions namely, as p.638.

"There must be expenditure, a mistaken belief, conscious silence on the part of the owner of the land and no bar to the equity".

Megarry J in In re Vendervell's Trust (No. 2) [1974] CH 269 describes the essential elements this way, at p. 301,

"... the person to be estopped (I shall call him O, to represent the owner of the property in question), must know not merely that the person doing the acts (which I shall call) was incurring the expenditure in the mistaken belief that A already owned or would obtain a sufficient interest in the property to justify the expenditure, but also that he, O, was entitled to object to the expenditure. Knowing this, O nevertheless stood by without enlightening A. The equity is based on unconscionable behaviour by O; it must be shown by strong and cogent evidence that he knew of A's mistake, and nevertheless dishonestly remained wilfully passive in order to profit by the mistake".

In **Denny v. Jensen** [1977] 1 NZLR 635 at 639, Justice White very aptly summarised the doctrine as follows:-

"In Snell's Principles of Equity (27 Ed) 565 it is stated that proprietary estoppel is" ... capable of operating positively so far as to confer a right of action". It is "one of the qualifications" to the general rule that a person who spends money on improving the property of another has no claim to reimbursement or to any proprietary interest in that property. In ***Plimmer v Willington City Corporation*** *(1884) 9 App Cas 699; NZPCC 250 it was stated by the Privy Council that"... the equity arising from expenditure on land need not fail merely on the ground that the interest to be*

*secured has not been expressly indicated" (ibid, 713, 29). After referring to the cases, including Ramsden v Dyson (1866) LR 1 HL 129, the opinion of the Privy Council continued, " In fact, the court must look at the circumstances in each case to decide in what way the equity can be satisfied" (9 App Cas 699), 714; NZPCC 250, 260). In **Chalmers v Pardoe** [1963] 1 WLR 677; [1963] 3 All ER 552 (PC) a person expending money was held entitled to a charge on the same principle. The principle was again applied by the Court of Appeal in **Inwards v Baker** [1965]2 QB 29; [1965] 1 All ER 446. There a son had built on land owned by his father who died leaving his estate to others. Lord Denning MR, with whom Danckwerts and Salon LJJ agreed, said that all that was necessary:*

"... is that the licencee should, at the request or with the encouragement of the landlord, have spent the money in expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do". (ibid, 37, 449).

(Emphasis Added)

Hon. Mr Justice Deepthi Amaratunga observed in **Vishwa Nand v Rajendra Kumar** (Civil Action HBC 271 of 2012) that;

"The general rule, however is that "liabilities are not to be forced upon people behind their backs" and four conditions must be satisfied before proprietary estoppel applies. ***There must be an expenditure, a mistaken belief, conscious silence on the part of the owner of the land and no bar to the equity."***

(Emphasis Added)

Hon. Madam Justice Anjala Wati in **Wilfred Thomas Peter v Hira Lal and Farasiko** (Labasa HBC 40 of 2009) held that;

"I must analyse whether the four conditions have been met for the defence of proprietary estoppel to apply. The conditions are:

i. An expenditure
ii. A mistaken belief
iii. Conscious silence on the part of the owner of the land
iv. No bar to the equity

Returning back to the case before me, there is no dispute that the entry of the purported Sale and Purchase Agreement over the native land and the

subsequent occupation and possession of the land by the Defendant lacked the consent of the Native Land Trust Board. Therefore, the purported Agreement is implicitly prohibited by Section 12 (1) of the Native Land Trust Act. Thus, the provisions of Section 12 of the Native Land Trust Act have been breached. The purported Agreement is null and void *ab initio.*

The purported agreement is null and void *ab initio* and has no effect or force in the eyes of the law.

The doctrine of estoppel cannot be invoked to render valid, a transaction which the legislature has enacted to be invalid. [**Chand v Prakash**, 2011, FJHC 640, HB169. 2010]

Therefore, the purported agreement is not enforceable either at law or in equity to grant a legal right to the Defendant.

The Defendant gets no equity by reason of his expenditure on the land due to the illegality in the purported agreement.

His Lordship Gates considered somewhat a similar situation in "**Indar Prasad and Bidya Wati v Pusup Chand**" (2001) 1 FLR 164 and said;

"Section 13 of the State Lands Act would appear to be a complete bar to any equitable estoppel arising in the Defendant's favour."

"**Estoppel against a statute**" is discussed as follows in Halsbury's, Laws of England, 4th Edition, Volume 16, at paragraph 1515,

> *"The doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted is to be invalid, or to give the court a jurisdiction which is denied to it by statute, or to oust the court's statutory jurisdiction under an enactment which precludes the parties contracting out of its provisions. Where a statute, enacted for the benefit of a section of the public, imposes a duty of a positive kind, the person charged with the performance of the duty cannot be estopped be prevented from exercising his statutory powers. A petitioner in a divorce suit cannot obtain relief simply because the respondent is estopped from denying the charges, as the court has a statutory duty to inquire into the truth of a petition."*

In **Chalmers v Paradoe** *(supra)* the court held;

> *"The friendly arrangement entered into between the respondent and the appellant amounted to granting the appellant permission to treat a certain portion of the land comprised in the lease as if the appellant were in fact the lessee. Under this arrangement the respondent gave the appellant possession of part of the land. He*

granted to the appellant permission to enjoy exclusive occupation of that portion of the land, and to erect such buildings thereon as he wished. Such an arrangement could we think be considered an alienation, as was argued in ***Kuppan v Unni****. Whether or not it was an alienation it can, we think, hardly be contended that it did not amount to a dealing in land with the meaning of section 12. It is true that the 'friendly arrangement' did not amount to a formal sublease of a portion of the land or to a formal transfer of the lessee's interest in part of the land comprised in the lease. The least possible legal effect which in our opinion could be given to this arrangement would be to describe it as a licence to occupy coupled with possession, granted by the lessee to the appellant. In our opinion, the granting of such a licence and possession constitutes dealing with the land so as to come within the provisions of section 12, Ca. 104. The consent of the Native Land Trust Board was admittedly not obtained prior to this dealing, which thus becomes unlawful and acquires all the attributes of illegality. An equitable charge cannot be brought into being by an unlawful transaction and the appellant's claim to such a charge must therefore fail."*

On the strength of the authority in the above cases, I think it is quite possible to say that the mandatory requirement of Section 12 of the Native Land Trust Act and the legal consequences that flow from non-compliance defeat the Defendant's claim for an equitable charge or lien over the land for the sum expended on the property.

Therefore, I am constrained to answer the third question earlier posed at paragraph six (06) negatively. Therefore, the second ground fails.

In the context of the present case, I am mindful of the rule of law enunciated in the following decisions;

In **MISTRY AMAR SINGH v KULUBYA** 1963 3 AER p.499, a Privy Council case, it was held that a registered owner of the land was entitled to recover possession because his right to possession did not depend on the illegal agreements in that case but rested in his registered ownership and as the person in possession could not rely on the agreements because of their illegality he could not justify his remaining in possession. That case "concerned an illegal lease of 'Mailo' land by an African to a non-African which was prohibited by a Uganda Statute except with the written consent of the Governor. No consent was obtained to the lease. After the defendant had been in possession for several years the plaintiff gave notice to quit and ultimately sued him for recovery of the lands. He succeeded.

Also in **RAM KALI** f/n Sita Ram and SATEN f/n Maharaj (Action No. 93/77) **KERMODE J.** expressed a similar view:-

"It is not necessary to determine whether there was an alleged sale as the defendant contends or a tenancy as the plaintiff alleges. Either transaction was illegal without the consent of the Director of Lands. ... While the plaintiff did disclose the illegal tenancy her claim for possession is based on the independent and untainted

grounds of her registered ownership and she does not have to have recourse to the illegal tenancy to establish her case."

(9) Let me now move to examine the **fourth question** posed at paragraph six (06)

The point raised by the Defendant is that he has been living in the land since 22nd March 1988 and he is not a trespasser.

I ask myself, is this, a circumstance capable of giving rise to any form of "proprietary estoppel"?

The answer to this question is obviously "No"

I echo the words of Fatiaki J in **Wati v Raji** (1996) FJHC 105;

> *"Turning finally to the question of* ***'proprietary estoppel'. Suffice it to say that the mere occupation of a piece of land on a yearly tenancy for whatever length of time, is not a circumstance capable of giving rise to any form of 'estoppel', proprietary or otherwise, nor in my view is any 'equity' created hereby which the court would protect.***
>
> (Emphasis added)

On the strength of the authority in the above case, I am constrained to answer the fourth question earlier posed at paragraph six (06) negatively. Therefore, the third ground fails.

(10) Now let me move to examine the **fifth question** posed at paragraph six (06).

The Defendant contends that; (Reference is made to paragraph 23 of the Affidavit in Opposition)

> *Para 23. In response to paragraph 3 and 4 of the said Affidavit I state that Mr Azaad Khan at all material times knew of my occupation of the said property since 22nd March, 1988. I had transferred my two vehicles valued $15,000 to the Plaintiff in consideration of purchasing the property. Later I had also paid off the home loan with HFC (Financial Institute) on or about 18th October, 2010. I had also paid lease rental from 22nd March, 1988 to 16th July 2012.* ***The Plaintiffs are not bona fide purchaser.***
>
> *(Emphasis Added)*

At this stage I ask myself, "What is the nature of the Defendant's interest in the land?"

Is it such as to avail it against the Plaintiffs (Purchasers) who took with full notice of it?

Did the Plaintiffs take the land on **"constructive trust"** to permit the Defendant to stay there for his life time or for long as he wished?

What is meant by the phrase "**Constructive Trust**"?

A "**Constructive Trust**" is a trust imposed by law. A Constructive Trust arises by operation of law. A Constructive Trust is an equitable remedy and they are discretionary in nature. (See; **Re Polly Peck International PLC (in administration) v MacIntosh (1998) 3 All E.R. 512 and 825.**

In a broad sense, the Constructive Trust is both an institution and a remedy of the law of equity. Please see; **Muschinski v Dadds (1985) 160 C.L.R. 583.**

Constructive Trusts are not always subject to the requirement of certainty of subject matter. In "**Giumelli v Giumelli (1999) 196 C.L.R. 101 at 112 Gleeson C.J., McHugh, Gummon and Callinan JJ,** found that some Constructive Trusts create or recognize no proprietary interest but rather impose a personal liability to account for losses sustained by constructive beneficiaries. In that situation there is no identifiable Trust property.

During the 1970's the United Kingdom's Court of Appeal, led by Lord Denning MR, adapted a free-ranging remedial basis for constructive trusts and came to the view that a constructive trust is "**imposed by law whenever justice and couscience require it**"; **Hussey v Palmer (1972) 3 All E.R. 744.**

Therefore, the law as I understand is this;

- As a species of Trust, Constructive Trusts inherently create equitable proprietary interests in favour of identifiable beneficiaries.
- Constructive Trust is a liberal process, founded upon large principles of equity.

Applying those principles to the case before me, what do we find?

The purported Sale and Purchase Agreement entered between the Defendant and Mohammed Yas in relation to the Native lease is illegal due to want of consent from the Native Land Trust Board. Therefore, the purported agreement is incapable of

enforcement. The purported agreement is void for want of consent from the Native Land Trust Board.

The Defendant's entry and occupation of the land by virtue of the purported Agreement is illegal and is in breach of Section 12 of the Native Land Trust Act.

I hold that no Constructive Trust can be created in relation to a Native lease without the prior written consent of the Native Land Trust Board. The Defendant is not a tenant, there is no tenancy and he has not paid any reut to NLTB as a tenant to endeavor to establish a semblance of an 'interest' in the Native land.

Breach of Section 12 of the Native Land Trust Act is a complete bar to any equitable estoppel arising in the Defendant's favour. (See; **Indra Prasad and Bidya Wati v Pushp Chand (2001) 1 F.L.R. 164**).

It is quite possible to say that the mandatory requirement of Section 12 of the Native Land Trust Act and the legal consequences that flow from non-compliance defeats the Defendant's claim for an equitable charge or Constructive Trust over the land. The situation in the case before me does not give rise to a Constructive Trust since the Defendant does not have an equitable interest in the land due to breach of Section 12 of the Native Land Trust Act.

I am clearly of the opinion that a Court of equity will not impose on the Plaintiffs (Purchasers) a Constructive Trust in favour of the Defendant, since the Defendant's entry and occupation of the land is illegal and is in breach of Section 12 of the Native Land Trust Act. The Defendant has no equity against the Plaintiffs. The Plaintiffs are not bound by the Notice of any illegal Agreement affecting the Native Land or a purported agreement which is not enforceable either at law or in equity granting a legal right. There is no valid contract binding the Plaintiffs. **The Defendant is not a tenant, there is no tenancy and he has not paid any rent to NLTB as a tenant to endeavor to establish a semblance of an 'interest' in the Native land.** Therefore, no Constructive Trust could be imposed on the Plaintiffs in favour of the Defendant.

In the circumstances, i have to say, with the greatest respect to Counsel for the Defendant and with no pleasure that I totally disagree with her argument in relation to Constructive Trust. I must confirm that I am not aware of any authority for such an argument, and I do not think that her argument can be supported on principle. Anything more shadowy, anything more unsatisfactory, anything more unlikely to produce persuasion or conviction on the mind of the Court, I can scarcely imagine.

The imposing of a constructive trust is entirely in accord with the precepts of equity. As Cardoz J. once put it:

> *"A constructive trust is the formula through which the conscience of equity finds expression." See* ***Beauty v Gugggenheim Exploration Co. (1919) 225 N.Y. 380, 386****; or, as Lord Diplock put it quite recently in* ***Gissing v Gissing*** ***(1971) A.C. 886, 905****, a constructive trust is created "whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the* ***cestui que*** *trust a beneficial interest in the land acquires."*

Therefore, I am constrained to answer the fifth question earlier posed at paragraph (06) negatively. (Therefore, the fourth ground fails)

(11) Let me now proceed to the **sixth question** posed at paragraph 6, viz, the issue of **fraud and the indefeasibility of title.**

The Defendant contends that;

> *Para 23.* *In response to paragraph 3 and 4 of the said Affidavit I state that Mr **Azaad Khan at all material times knew of my occupation of the said property since 22nd March, 1988.** I had transferred my two vehicles valued $15,000 to the Plaintiff in consideration of purchasing the property. Later I had also paid off the home loan with HFC (Financial Institute) on or about 18th October, 2010. I had also paid lease rental from 22nd March , 1988 to 16th July 2012. **The Plaintiffs are not bona fide purchaser.***
>
> *28.* *That I deny paragraph 6 of the said affidavit on the basis that the Plaintiffs are not bona fide purchaser and they has the knowledge of my occupancy since 1988. That I still think I have a right to claim under equity for the misrepresentations made by Mr. Azaad Khan.*
>
> *(Emphasis Added)*

Sections 38 and 39 (1) of the Land Transfer Act, can be regarded as the basis of the concept of "indefeasibility of title" of a registered proprietor. Under Torrens System of land law the registration is everything and only exception is **fraud.**

I should quote Section 38 and 39 (1) of the **Land Transfer Act**, which provides;

Section 38 provides;

> *Registered instrument to be conclusive evidence of title*
>
> *"38. No instrument of title registered under the provisions of this Act shall be impeached or defeasible by reason or on account of any informality or in any application or document or in any proceedings previous to the registration of the instrument of title.*

Section 39 (1) provides;

> *"39-(1) Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall except in case of fraud, hold the same subject to such encumbrances as may be notified on the folium if the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except...*

I am conscious of the fact that section 40 of the Land Transfer Act seeks to dispel Notice of a Trust or unregistered interest in existence in the following manner;

> *40. 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, or to see to the application of the purchase money or any 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."* (Underlining is mine).

With regard to the concept of **"indefeasibility of title of a registered proprietor"**, the following passage from the case of **"Eng Mee Young and Others (1980) Ac 331** is apt and I adapt it here;

> *"The Torrens system of land registration and conveyanncing as applied in Malaya by the National Land Code has as one of its principle objects to give certainty to land and registrable interests in land. Since the instant case is concerned with Title to the land itself their Lordships will confine their remarks to this, though similar principles apply to other registrable interests. By s.340 the title of any person to land of which he is registered as proprietor is indefeasible except in cases of fraud, forgery or illegality and even in such cases a bond fide purchase for value can safely deal with the*

registered proprietor and will acquire from him on indefensible registered title."

In "**Prasad v Mohammed**" **(2005) FJHC 124; HBC 0272J.1999L (03.06.2005) His Lordship Gates,** succinctly stated the principles in relation to **fraud** and **indefeasibility of title** as follows;

> *[13] In Fiji under the Torrens system of land registration, the register is everything: Subramani & Ano v Dharam Sheela & 3 Others [1982] 28 Fiji LR 82. Except in the case of fraud the title to land is that as registered with the Register of Titles under the Land Transfer Act [see sections 39, 40, 41, and 42]: Fels v Knowles [1906] 26 NZLR 604; Assets Co Ltd v Mere Roihi [1905] AC 176, PC. In Frazer v Walker [1967] AC 569 at p.580 Lord Wilberforce delivering the judgment of the Board said:*
>
> *"It is to be noticed that each of these sections except the case of fraud, section 62 employing the words "except in case of fraud." And section 63 using the words "as against the person registered as proprietor of that land through fraud." The uncertain ambit of these expressions has been limited by judicial decision to actual fraud by the registered proprietor of his agent: Assets Co Ltd v Mere Roihi.*
>
> *It is these sections which, together with those next referred to, confer upon the registered proprietor what has come to be called "indefeasibility of title.* ***"The expression, not used in the Act itself, 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."***
>
> *[14] Actual fraud or moral turpitude must therefore be sown on the part of the plaintiff as registered proprietor or of his agents Wicks v. Bennet [1921] 30 CLR 80; Butler v Fairclough [1917] HCA 9; [1917] 23 CLR 78 at p.97*
>
> (Emphasis Added)

In the case of **SHAH –v- FIFTA** (2004) FJHC 299, HBC 03292J, 2003S (23rd June 2004) the Court took into consideration Sections 38, 39 and 40 of the Land Transfer Act Cap 131. Under Section 38 of the Lands Transfer Act Cap 131 it states that;

> *"No instrument of title registered under the provisions of this Act shall be impeached or defeasible by reason of or an account of any informality or in any application or document or in any proceedings previous to the registration of the instrument of title".*

Pathik J in this case; **SHAH –v- FIFITA***(supra)* emphasised on section 40 of the Land Transfer Act Cap 131 as follows:

> *"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, or to 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 rules 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".*

Fraud for the purpose of the Land Transfer Act has been defined by the Privy Council in **Assets Company Ltd v Mere Roihi** [1905] AC 176 at p.210 where it was said:

> *".... by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Lands Act, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty or fraud if he honestly believes it to be a genuine document which can be properly acted upon."*

Fraud: Sufficiency of evidence;

In **Sigatoka Builders Ltd v Pushpa Ram & Ano**. (Unreported) Lautoka High Court Civil Action No. HBC 182.01L, 22 April 2002 the Court held in relation to "Fraud: sufficiency of evidence";

> *"Though evidence of fraud and collusion is often difficult to obtain, the evidence here fails a good way short of a standard requiring the*

court's further investigation. In ***Darshan Singh v Puran Singh*** *[1987] 33 Fiji LR 63 at p.67 it was said:*

> ***"There must, in our view, be some evidence in support of the allegation indicating the need for fuller investigation which would make Section 169 procedure unsatisfactory.*** *In the present case the appellant merely asserted that he had paid the money for the purchase of the property. This was denied by both Prasin Kuar and the respondent.* ***There was nothing whatsoever before the learned judge to suggest the existence of any evidence, documentary or oral, that might possibly assist the appellant in treating the case as falling within the scope of Section 169 of the Land Transfer Act and making an order for possession in favour of the respondent."***
>
> *In that case it was also held that a bare allegation of fraud did not amount by itself to a complicated question of fact, making the summary procedure of Section 169 in appropriate see too* ***Ram Devi v Satya Nand Sharma & Anor****.*
>
> *[1985] 31 Fiji LR 130 at p.135A. A threshold of evidence must be reached by the Defendant before the Plaintiff can be denied his summary remedy. In* ***Wallingford v Mutual Society****[1880] 5 AC 685 at p. 697 Lord Selbourne LC said:*
>
> *"With regards to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon; in a manner which would enable any Court to understand what it was that was alleged to be fraudulent."*
>
> (Emphasis Added)

It is clear from the above mentioned judicial decisions that a bare allegation of fraud does not amount by itself to a complicated question of fact, making the summary procedure inappropriate.

Therefore, in the "Torrens System" registered interests can be set aside if they have been procured by fraud, where fraud refers to active fraud, personal dishonesty or moral turpitude.

The well-known case of **"Frazel v Walker" (1967) 1 A.C. 569** held that apart from fraud, or from errors of misdescription which can be rectified, the registered proprietor holds his title immune from attack by all the word, but claims in *personam* will still subsist.

In **Suttan v O'Kane 1973 2 N.Z.L.R. 204; Both the leading Judgments contain lengthy reviews of earlier cases of fraud in respect of a person who procures**

himself to be registered proprietor in cases where he then knows, or later becomes aware, of an unregistered interest.

Richmond J. and Turner P. were in agreement that a person who knows of another's interest and procures registration which cheats the other of that interest is guilty of fraud and his title can be impeached:

> *"It is well settled that knowledge of a breach of trust or of the wrongful disregard and destruction of some adverse unregistered interest does itself amount to fraud. In* ***Locher v Howlett*** *it is said by Richmond J: 'It may be considered as the settled construction of this enactment that a purchaser is not affected by knowledge of the mere existence of a trust or unregistered interest, but that he is affected by knowledge that the trust is being broken, or that the owner of the unregistered interest is being improperly deprived of it by the transfer under which the purchaser himself is taking'.."*

per Salmod J. in **Waimiha Sawmilling Co. Ltd. v. Waione Timber Ltd 1923 NZLR 1137 at 1173 – N.Z. Court of Appeal, affirmed in the Privy Council 1926 A.C. 101.**

A few quotations from authorities relied on by the Lordships are relevant;

> *"If the defendant acquired the title, said Prendergast C.J. in* ***Merrie v McKay*** ***(1897) 16 NZLR 124****, "Intending to carry out the agreement with the Plaintiff, there was no fraud then; the fraud is in now repudiating the agreement, and in endeavoring to make use of the position he has obtained to deprive the Plaintiff of his rights, under the agreement. If the Defendant acquired his registered title with a view to depriving the Plaintiff of those rights, then the fraud was in acquiring the registered the title. Whichever view is accepted, he must be held to hold the land subject to the Plaintiff's rights under the agreement, and must perform the contract entered into by the Plaintiff's vendor'*

Merrie v McKay was cited with approval by Salmond J in **Wellington City Corporation v Public Trustee 1921 NZLR 423 at 433**. There Salmond J. said;

> *"It is true that mere knowledge that a trust or other unregistered interest is in existence it not of itself to be imputed as fraud. A purchaser may buy land with full knowledge that it is affected by a trust, and the sale may be a breach of trust on the part of the seller, but the purchaser has the protection of s. 197 unless he knew or suspected that the transaction was a breach of trust. Fraud in such a case consists in being party to a transfer which is known or suspected to be a violation of the equitable rights of other persons. Where, however, the transfer is not itself a violation of any such rights, but the title acquired is known by the purchaser to be subject to some equitable encumbrance, the fraud consists in the claim to hold the land for an unencumbered estate in willful disregard of the*

rights to which it is known to be subject. Thus in ***Thompson v. Finlay*** *it was held that a purchaser of land breached the Land Transfer Act who takes with actual notice of a contract by the seller to grant a lease to a third person is bound by that contract. Willaims J. says "If there is a valid contract affecting an estate, and the interest is sold expressly subject to that contract, it would be a distinct moral fraud in the purchaser to repudiate the contract, and the Act does not protect moral fraud". Specific performance of the contract to lease was decreed against the purchaser accordingly."*

For a similar decision, see the decision by Prendergast, C.J. in

- **Finnovan v Weir**
  5 N.Z, S.C. 280 p.

- **Merrci v McKay**
  16 N.Z, L.R. 124 p

As I understand the law, the "**fraud**" in acquiring the registered title is this;

"**A purchaser is not affected by knowledge of the mere existence of a Trust or unregistered interest, but that he is affected by knowledge that the trust is being broken, or that the owner of the unregistered interest is being improperly deprived of it by the transfer under which the purchaser himself is taking.**"

The situation in the case before me is completely different.

As I said earlier, the Defendant in the case before me has no equitable interest and legal interest in the land due to breach of section 12 of the Native Land Trust Act. Therefore the Courts of equity will not impose a Constructive Trust on the Plaintiffs for the benefit of the Defendant.

The Plaintiffs obtained registration on 03rd April 2013 and their title is not subject to an equitable claim or encumbrance, because at the time of registration there was no any legal agreement affecting the Native Land or an agreement which is enforceable either at law or in equity. There was no valid Contract/Agreement binding the Plaintiffs, because the Defendant does not acquire legal interest or equity under the purported Agreement due to breach of Section 12 of the Native Land Trust Act.
A person who knows of another's legal interest and procures registration which cheats the other of that **legal interest** is guilty of fraud and his title can be impeached.

I have no doubt personally and I am clearly of the opinion that the Plaintiffs are not guilty of fraud and their title cannot be impeached because;

- The Defendant has **no equitable or legal interest** in the land due to breach of Section 12 of the Native Land Trust Act.

- ❖ The Defendant does not acquire **legal interest** or equity under the Agreement due to its illegality.

- ❖ The Plaintiffs knowledge that there is an Agreement **which is not enforceable either at law or in equity** to grant a legal right, is in existence, is not of itself to be imputed as fraud.

- ❖ The Defendant is not a tenant, there is no tenancy and he has not paid any rent to NLTB **as a tenant** to endeavor to establish a semblance of a '**legal interest**' in the land.

- ❖ **The Plaintiffs registration of the transfer is not a violation of some equitable encumbrances, legal interest or valid legal contract of some other party.**

Therefore, I am constrained to answer the <u>sixth question</u> earlier posed at paragraph six (6) in the affirmative. Therefore, the fourth ground fails.

(12) Let me now move to consider the **07th question** posed at paragraph (6).

The Defendant has instituted proceedings in the High Court of Lautoka, (Civil Action No: 67 of 2014) against the Plaintiffs seeking damages for fraudulent misrepresentation and unjust enrichment. The action was struck out on 05th June 2015 since the Statement of Claim does not disclose a reasonable cause of action. An appeal has been filed against the interlocutory Order.

The question I ask is whether or not the pendency of a civil claim is enough to sustain a right to possession for the time being in the defendant?

The Fiji Court of Appeal in **<u>Dinesh Jamnadas Lalji and Anor v Honson Limited</u> F.C.A Civ App. 22/85** as per Mishra J.A. said:

> *"At the hearing, the appellant's main submission was that, as proceedings relating to the same matter were already before the Supreme Court, the application should be dismissed. The learned Judge, quite correctly in our view, held that existence o such proceedings was, by itself, not a cause sufficient to resist an application under Section 169 of the Land Transfer Act".*

Also in **<u>Muthsami s/o Ram Swamy v Nausori Town Council</u> (Civ. App. No. 23/86 F.C.A.)** Mishra J.A. expressed the same view as above in the following words:

> *".... That mere institution of proceedings by Writ did not by itself shout out a claim under Section 169 of the Land Transfer Act in a proper case. It was for the appellant to show, on Affidavit evidence,*

some right to remain in possession which would make the granting of an Order under Section 169 procedure improper".

Although the Defendant has alleged fraud, and which is also subject matter of the said action instituted by the Defendant, there are no complicated questions of fact to be investigated. The procedure under s 169 is most appropriate here. On this aspect in Ram Narayan s/o Durga Prasad v Moti Ram s/o Ram Charan (Civ. App. No. 16/83 FCA) Gould J.P. said:

> *"... the summary procedure has been provided in the Land Transfer Act and, where the issues involved are straight forward, and particularly where there are no complicated issues of fact, a litigant is entitled to have his application decided in that way". (My emphasis)*

Clearly, from these authorities, the pendency of related Writ proceedings is not by itself – sufficient to shut out a claim for vacant possession.

Therefore, I am constrained to answer the 07th question posed at paragraph (6) negatively. Therefore, the fifth ground fails.

Now let me move to consider the 8th question earlier posed at paragraph (6).

The Defendant contends;

(Reference is made to paragraph (6) of the Defendant's Affidavit in Opposition)

Para 6. ***I also paid the lease rental from 22nd March 1988 to 16th July 2012 for the said property to TLTB.*** *TLTB and Mohammed Shamsher Azaad Khan (registered owner) knew that I was residing on the said property and that I was paying such rental. However, after 16th July 2012, Mohammed Shamsher Azaad Khan paid rental to TLTB. This was done without my knowledge and contrary to what we had agreed upon. (Annexed herewith and marked 'WM3' is a true copy of receipts issued to me by TLTB after I made lease payments under the said lease). Nonetheless, currently I am the one paying both lease rental and the city rate for the said property.*

The defendant heavily relied on the decisions in "**Wilfred Thomas Peter v Hira Lal and Farasiko**" (Labasa HBC 40 of 2009), "**Ali v Hussain**" (2013) FJHC 685 and **NLTB v Subramani (2010) FJCA 9.** I have considered the three judicial decisions. In "**Ali v Hussain** and **NLTB v Subramani**" the NLTB has played an active part in the transfer of the property and has consented to the transfer. But in the present case, as I understand the evidence adduced by way of affidavits, the Native Land Trust

Board has never consented to the purported "Sale and Purchase Agreement". The Native Land Trust Board has played no part in the dealing. The annexure "**WM-3**" clearly shows that the Defendant has paid the lease rentals to TLTB on behalf of the tenant/Lessee Mohammed Shamsher, the first Plaintiff. The Defendant's name was recorded on the receipt as lease payee and not as tenant. Thus, the TLTB has played no part in the dealing or alienation. (I arrived at a different conclusion in HBC 67 of 2014, as the factual basis on which the allegations contained in the Statement of Claim were distinguishable from the current proceedings for vacant possession.)

In "**Wilfred Thomas Peter v Hira Lal and Farasiko**" (*supra*) prior consent has been sought from the District Officer and the Minister of Lands before the subdivision, so Section 13 (1) of the Crown Lands Act has been fulfilled. Therefore, I do not think the said three decisions are of assistance to the Defendant because they are clearly distinguishable from the present case.

Therefore, I am constraint to answer the 8th question earlier posed at paragraph six (06) negatively.

Therefore, the sixth and the final ground adduced by the Defendant fails.

(13) It is not in dispute that the improvements carried out by the Defendant including contributions made towards the development of the property lacked the knowledge and the prior consent of the Native Land Trust Board. Thus, the issues of compensation from improvements cannot justify continual occupation of the property. Any prejudice to the Defendant from the improvements to the land he has made can be dealt with by way of a separate action against the landlord seeking compensation for those improvements.

The Fiji Court of Appeal in **Ram Chand v Ram Chandar, Appeal No:- ABU 0021, 2002** observed that the mere fact that a tenant carries out improvements without the consent of his or her landlord does not give him a right to continue occupation of the land, if the landlord is otherwise lawfully entitled to it. The fact that improvements are made is not really an answer to a landlord's application for possession.

(14) To sum up, for the reasons which I have endeavoured to explain, it is clear beyond question that the Defendant has failed to show cause to remain in possession as required under Section 172 of the Land Transfer Act.

At this point, I cannot resist in reiterating the judicial thinking reflected in the following judicial decisions;

In the case of **Morris Hedstrom Limited v Liaquat Ali,** CA No, 153/87, the Supreme Court held,

> *"Under Section 172 the person summonsed may show cause why he refused to give possession of the land if he*

> *proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure.* ***That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for a right must be adduced."***
>
> (Emphasis is mine)

In **Shankar v Ram,** (2012) FJHC 823; HBC 54.2010, the Court held;

> *"What the Defendant needs to satisfy is not a fully – fledged right recognized in law, to remain possession but some tangible evidence establishing a right or some evidence supporting an arguable case for such a right to remain in possession. So, even in a case where the Defendant is unable to establish a complete right to possession, if he can satisfy an arguable case for a right still he would be successful in this action for eviction, to remain in possession."*

Being guided by those words, I think it is right in this case to say that the Defendant has failed to adduce some tangible evidence establishing a right or supporting an arguable case for such a right. It is not disputed that at the time the Plaintiffs commenced the proceedings they were the registered owners of the Native lease. Under Section 169 the Plaintiffs are entitled to seek possession of the property on the **strength of their title**. Their rights to possession do not depend on the purported Sale and Purchase agreement but on their **registered ownership**. The purported Sale and Purchase agreement is of no consequence to a claim by the Plaintiffs based on their being the **registered owners**.

I disallow the grounds adduced by the Defendant refusing to deliver vacant possession.

Finally, the Plaintiffs moved for 'indemnity costs' on the following ground.

Reference is made to paragraph 6.2 of the Plaintiff's written submissions.

> *Para 6.2* *The Plaintiffs are seeking costs on an indemnity basis since the Defendant's conduct and actions by filling an unmeritorious action and appeal therefrom demonstrates that his refusal to give up possession of said lease has been purposeful to keep the Plaintiffs from possession and use of its property.*

It is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing **"indemnity costs"**.

Order 62, Rule (37) of the High Court Rules empower courts to award indemnity costs **at its discretion.**

For the sake of completeness, Order 62, Rule (37) is reproduced below.

Amount of Indemnity costs (O.62, r.37)

> *37.- (1)* *The amount of costs to be allowed shall (subject to rule 18 and to any order of the Court) be in the discretion of the taxing officer.*

G.E. Dal Pont, in "Law of Costs", Third Edition, writes at Page 533 and 534;

'Indemnity' Basis

> *"Other than in the High Court, Tasmania and Western Australia, statute or court rules make specific provision for taxation on an indemnity basis. Other than in the Family Law and Queensland rules – which define the 'indemnity basis' in terms akin to the traditional 'solicitor and client basis' – the 'indemnity basis' is defined in largely common terms to cover all costs incurred by the person in whose favour costs are ordered except to the extent that they are of general law concept of 'indemnity costs'. The power to make such an order in the High Court and Tasmania stems from the general costs discretion vested in superior courts, and in Western Australia can arguably moreover be sourced from a specific statutory provision.*

Although all costs ordered as between party and party are, pursuant to the 'costs indemnity rule', indemnity costs in one sense, an order for 'indemnity costs', or that costs be taxed on an 'indemnity basis', is intended to go further. Yet the object in ordering indemnity costs remains compensatory and not penal. References in judgments to a 'punitive' costs order in this context must be seen against the backdrop of the reprehensible conduct that often justifies an award of indemnity costs rather than impinging upon the compensatory aim. Accordingly, such an order does not enable a claimant to recover more costs than he or she has incurred."

Now let me consider what authority there is on this point.

The principles by which Courts are guided when considering whether or not to award indemnity costs are discussed by Hon. Madam Justice Scutt in "**Prasad v Divisional Engineer Northern** (No. 02)" (2008) FJHC 234.

As to the **"General Principles",** Hon. Madam Justice Scutt said this;

- *A court has 'absolute and unfettered' discretion vis-à-vis the award of costs but discretion 'must be exercised judicially': **Trade Practices Commission v. Nicholas Enterprises** (1979) 28 ALR 201, at 207*
- *The question is always 'whether the facts and circumstances of the case in question warrant making an order for payment of costs other than by reference to party and party': **Colgate-Palmolive Company v. Cussons Pty Ltd** [1993] FCA 536; (1993) 46 FCR 225, at 234, per Sheppard, J.*
- *A party against whom indemnity costs are sought 'is entitled to notice of the order sought': **Huntsman Chemical Company Australia Limited v. International Cools Australia Ltd** (1995) NSWLR 242*
- *That such notice is required is 'a principle of elementary justice' applying to both civil and criminal cases: **Sayed Mukhtar Shah v. Elizabeth Rice and Ors** (Crim Appeal No. AAU0007 of 1997S, High Court Crim Action No. HAA002 of 1997, 12 November 1999), at 5, per Sir Moti Tikaram, P. Casey and Barker, JJA*
- *'... neither considerations of hardship to the successful party nor the over-optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs. But additional costs may be called for if there has been reprehensible conduct by the party liable': **State v. The Police Service Commission; Ex parte Beniamino Naviveli** (Judicial Review 29/94; CA Appeal No. 52/95, 19 August 1996), at 6*
- *Usually, party/party costs are awarded, with indemnity costs awarded only 'where there are exceptional reasons for doing so': **Colgate-Palmolive Co. v. Cussons Pty Ltd** at 232-34; **Bowen Jones v. Bowen Jones** [1986] 3 All ER*

*163; **Re Malley SM; Ex parte Gardner** []2001] WASCA 83; **SDS Corporation Ltd v. Pasonnay Pty Ltd &Anor** [2004] WASC 26 (S2) (23 July 2004), at 16, per Roberts-Smith, J.*

- *Costs are generally ordered on a party/party basis, but solicitor/client costs can be awarded where 'there is some special or unusual feature of the case to justify' a court's 'exercising its discretion in that way': **Preston v. Preston** [1982] 1 All ER 41, at 58*
- *Indemnity costs can be ordered as and when the justice of the case so requires: **Lee v. Mavaddat** [2005] WASC 68 (25 April 2005), per Roberts-Smith, J.*
- *For indemnity costs to be awarded there must be 'some form of delinquency in the conduct of the proceedings': **Harrison v. Schipp** [2001] NSWCA 13, at Paras **[1], [153]***

- *Circumstances in which indemnity costs are ordered must be such as to 'take a case out of the "ordinary" or "usual" category ...":**MGICA (1992) Ltd v. Kenny & Good Pty Ltd (No. 2)** (1996) 140 ALR 707, at 711, per Lindgren J.*
- *'... it has been suggested that the order of costs on a solicitor and client basis should be reserved to a case where the conduct of a party or its representatives is so unsatisfactory as to call out for a special order. Thus, if it represents an abuse of process of the Court the conduct may attract such an order': **Dillon and Ors v. Baltic Shipping Co. ('The Mikhail Lermontov')**(1991) 2 Lloyds Rep 155, at 176, per Kirby, P.*
- *Solicitor/client or indemnity costs can be considered appropriately 'whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known ... he had no chance of success': **Fountain Selected Meats (Sales) Pty Ltd v. International Produce Merchants Ltd & Ors**[1988] FCA 202; (1998) 81 ALR 397, at 401, per Woodward, J.*
- *Albeit rare, where action appears to have commenced/continued when 'applicant ... should have known ... he had no chance of success', the presumption is that it 'commenced or continued for some ulterior motive or ... [in] willful disregard of the known facts or ... clearly established law' and the court needs 'to consider how it should exercise its unfettered discretion': **Fountain Selected Meats**, at 401, per Woodward, J.*
- *Where action taken or threatened by a defendant 'constituted, or would have constituted, an abuse of the process of the court', indemnity costs are appropriate: **Baillieu Knight Frank (NSW) Pty Ltd v. Ted Manny Real Estate Pty Ltd** (1992) 30 NSWLR 359, at 362. per Power, J.*
- *Similarly where the defendant's actions in conducting any defence to the proceedings have involved an abuse of process of the court whereby the court's time and litigant's money has 'been wasted on totally frivolous and thoroughly unjustified defences': **Baillieu Knight Frank**, at 362, per Power, J.*

- *Indemnity costs awarded where 'the defendant had prima facie misused the process of the court by putting forward a defence which from the outset it knew was unsustainable ... such conduct by a defendant could amount to a*

*misuse of the process of the court': **Willis v. Redbridge Health Authority** (1960) 1 WLR 1228, at 1232, per Beldam, LJ*

- *'Abuse of process and unmeritorious behaviour by a losing litigant has always been sanctionable by way of an indemnity costs order inter parties A party cannot be penalised [for] exercising its right to dispute matters but in very special cases where a party is found to have behaved disgracefully or where such behaviour is deserving of moral condemnation, then indemnity costs may be awarded as between the losing and winning parties': **Ranjay Shandil v. Public Service Commission** (Civil Jurisdiction Judicial Review No. 004 of 1996, 16 May 1997), at 5, per Pathik, J. (quoting Jane Weakley, 'Do costs really follow the event?' (1996) **NLJ** 710 (May 1996))*
- *'It is sufficient ... to enliven the discretion to award [indemnity] costs that, for whatever reasons, a party persists in what should on proper consideration be seen to be a hopeless case': **J-Corp Pty Ltd v. Australian Builders Labourers Federation Union of Workers (WA Branch)(No. 2)** (1993) 46 IR 301, at 303, per French, J.*
- *'... where a party has by its conduct unnecessarily increased the cost of litigation, it is appropriate that the party so acting should bear that increased cost. Persisting in a case which can only be characterised as "hopeless" ... may lead the court to [determine] that the party whose conduct gave rise to the costs should bear them in full': **Quancorp Pty Ltd &Anor v. MacDonald &Ors**[1999] WASC 101, at Paras [6]-[7], per Wheeler, J.*
- *However, a case should not be characterised as 'hopeless' too readily so as to support an award of indemnity costs, bearing in mind that a party 'should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain' for 'uncertainty is inherent in many areas of law' and the law changes 'with changing circumstances': **Quancorp Pty Ltd &Anor v. MacDonald &Ors** [1999] WASC 101, at Paras [6]-[7], per Wheeler, J.*
- *The law reports are replete with cases which were thought to be hopeless before investigation but were decided the other way after the court allowed the matter to be tried: **Medcalf v. Weatherill and Anor** [2002] UKHL 27 (27 June 2002), at 11, per Lord Steyn*
- *Purpose of indemnity costs is not penal but compensatory so awarded 'where one party causes another to incur legal costs by misusing the process to delay or to defer the trial and payment of sums properly due'; the court 'ought to ensure so far as it can that the sums eventually recovered by a plaintiff are not depleted by irrecoverable legal costs': **Willis v. Redbridge Health Authority**, at 1232, per Beldam, LJ*
- *Actions of a Defendant in defending an action, albeit being determined by the trial judge as 'wrong and without any legal justification, the result of its own careless actions', do 'not approach the degree of impropriety that needs to be established to justify indemnity costs ... [R]egardless of how sloppy the [Defendant] might well have been in lending as much as $70,000 to [a Plaintiff], they had every justification for defending this action ... The judge was wrong to award [indemnity costs] in these circumstances. He should have awarded costs on the ordinary party and party scale': **Credit Corporation (Fiji) Limited v. Wasal Khan and MohdNasir Khan** (Civil*

Appeal No. ABU0040 of 2006S; High Court Civil Action No. HBC0344 of 1998, 8 July 2008), per Pathik, Khan and Bruce, JJA, at 11

Defining 'Improper', 'Unreasonable' or 'Negligent' Conduct in Legal Proceedings as Guide to Indemnity Costs Awards: *Cases where 'wasted costs' rules or 'useless costs' principles have been applied against solicitors where their conduct in proceedings has led to delay and/or abuse of process can provide some assistance in determining whether conduct in proceedings generally may be such as to warrant the award of indemnity costs. These cases specifically relate to solicitors' conduct rather than directly touching upon the indemnity costs question; nonetheless the analysis or findings as to what constitutes conduct warranting an award of costs can be helpful. See for example:*

- ***Ridehalgh v. Horsefield and Anor****[1994] Ch 205*
- ***Medcalf v. Weatherill and Anor****[2002] UKHL 27 (27 June 2002)*
- ***Harley v. McDonald*** *[2001] 2 AC 678*
- ***Kemajuan Flora SDN Bh v. Public Bank BHD &Anor****(High Court Malaya, Melaka, Civil Suit No. 22-81-2001, 25 January 2006)*
- ***Ma So So Josephine v. Chin Yuk Lun Francis and Chan Mee Yee*** *(FACV No. 15 of 2003, Court of Final Appeal Hong Kong Special Administrative Region, Final Appeal No. 15 of 2003 (Civil)(On Appeal from CACV No. 382 of 2002, 16 September 2004)*
- ***SZABF v. Minister for Immigration (No. 2)*** *[2003] FMCA 178*
- ***Heffernan v. Byrne*** *[2008] FJCA 7; ABU0027.2008 (29 May 2008)*

Some of the matters referred to include:

- *At the hearing stage, the making of or persisting in allegations made by one party against another, unsupported by admissible evidence 'since if there is not admissible evidence to support the allegation the court cannot be invited to find that it has been proved, and if the court cannot be invited to find that the allegation has been proved the allegation should not be made or should be withdrawn:* ***Medcalf v. Weatherill and Anor****, at 8, per Lord Bingham*

- *At the preparatory stage, in relation to such allegations – not necessarily having admissible evidence but there should be 'material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it:* ***Medcalf v. Weatherill and Anor****, at 8, per Lord Bingham*
- *Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples of wasting the time of the court or an abuse of its processes resulting in excessive or unnecessary costs to litigants:* ***Harley v. McDonald****, at 703, Para* ***[50]*** *(English Privy Council)*
- *Starting an action knowing it to be false is an abuse of process and may also involve knowingly attempting to mislead the court:* ***Ma So***

***So Josephine v. Chin Yuk Lun Francis and Chan Mee Yee** (FACV No. 15 of 2003, Court of Final Appeal Hong Kong Special Administrative Region, Final Appeal No. 15 of 2003 (Civil)(On Appeal from CACV No. 382 of 2002, 16 September 2004), at Para **[43]**, per Ribeiro, PJ (Li, CJ, Bokhary and Chan, PJ and Richardson, NPJ concurring)*

- *Lending assistance to proceedings which are an abuse of the process of the court – using litigious procedures for purposes for which they were not intended, 'as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest' or evading rules intended to safeguard the interests of justice 'as by knowingly failing to make full disclosure on ex parte application[s] or knowingly conniving at incomplete disclose rue of documents': **Ridehalgh v. Horsefield** [1994] Ch 205, at 234, per Bingham, MR*
- *Initiating or continuing multiple proceedings which amount to abuse of process: **Heffernan v. Byrne** [2008] FJCA 7; ABU0027.2008 (29 May 2008), per Hickie, J.*

***Specific Circumstances of Grant/Denial Indemnity Costs:** Specific instances supporting or denying the award of indemnity costs include:*

- *Indemnity costs follow per a '**Calderbank** offer', that is, where a party makes an offer or offers prior to trial, which is/are refused, and that party succeeds at trial on a basis which is better than the prior offer: **Calderbank v. Calderbank**[1975] 3 WLR 586*
- *However, no indemnity costs awarded where **Calderbank** letter contains no element of compromise, making it not unreasonable for the party not to accept the offer. The question is '... whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs ...': **SMEC Testing Services Pty Ltd v. Campbelltown City Council** [2000] NSWCA 323, at Para**[37]**, per Giles, JA Hence, if the* offer is not a genuine offer of compromise and/or there is no appropriate opportunity provided to consider and deal with it, then no indemnity costs follow: **Richard Shorten v. David Hurst Constructions P/L; D. Hurst Constructions v. RW Shorten** [2008] Adj LR 06/17 (17 June 2008), per Einstein, J. (NSW Supreme Court, Equity Division T&C List); **Leichhardt Municipal Council v. Green** [2004] NSWCA 341, at Paras**[21]-[24]**, **[36]**, per Santow, JA, Stein, JA (concurring); **Herning v. GWS Machinery Pty Ltd (No. 2)** [2005] NSWCA 375, at Paras**[4]-[5]**, per Handley, Beazley and Basten, JJA; **Elite Protective Personnel v. Salmon** [2007] NSWCA 322, at Para **[99]**; **Donnelly v. Edelsten**[1994] FCA 992; [1994] 49 FCR 384, at 396

- *Indemnity costs awarded:*
  - *upon a winding-up petition's being presented on a debt known to the petitioner to be genuinely disputed on substantial grounds;*
  - *the clearly established law being that a winding up order will not be granted in such circumstances, meaning that the petitioner 'had no chance of successfully obtaining a winding up order';*
  - *where in these circumstances the filing of the petition 'constituted a deliberate tactical manipulation of the winding up process by the [petitioner, the State Government Insurance Commission 'SGIC'] for the purposes of bringing very substantial pressure to bear' on Bond Corp Holdings 'BCH';*
  - *this in the circumstances meant that the 'filing of the petition was an abuse of process of the court in the true sense of that expression';*
  - *the discretion to stay the petition should not be exercised because this would 'cause BCH serious harm' meaning it would be 'extremely difficult for BCH to be able to conduct its business normally if the petition [were] not dismissed': citing* ***Re Lympne Investments*** *[1972] 1 WLR 523, at 527, per Megarry, J.; also* ***Re Glenbawn Park Pty Ltd****[1977] 2 ACLR 288, at 294, per Yeldham, J.*
  - *an abuse of process 'having been established in the circumstances outlined, justice requires the award of solicitor and client, or, rather, "indemnity" costs' so that 'the SGIC should be ordered to pay all the costs incurred by BCH except insofar as they are of an unreasonable amount or have been unreasonably incurred, so that, subject to [these] exceptions, BCH be completely indemnified by the SGIC for its costs', citing* ***Foundation Selected Meats (Sales) Pty Ltd v. International Produce Merchants*** *[1988] FCA 202; (1988) 81 ALR 397, at 410, per Woodward J.:* ***Re Bond Corp Holdings Ltd*** *(1990) 1 ACSER 350, at 13, per Ipp, J.*

- *Indemnity costs are appropriate where an applicant (in an unfair dismissal):*
  - *'insists' over a respondents' objections that an application should proceed to trial rather than await the outcome of other possible litigation (including a police investigation);*
  - *fails repeatedly, despite allowances, to meet deadlines for lodgment of a witness statement;*

- *fails to advise her lawyers of her whereabouts so denying them of the ability to inform the court of reasons for seeking an unqualified adjournment less than a week prior to trial;*
- *fails to comply with directions to provide a current address, consult a medical specialist and obtain a report of fitness to attend the trial;*
- *fails to appear at the final hearing when on notice that the application will be dismissed in event of such failure:* ***Nicole Pender v. Specialist Solutions Pty Ltd*** *(No. B599 of 2004. 17 May 2005), per Bloomfield, Commissioner*

- *Indemnity costs denied as against a Plaintiff who discontinued a claim for a permanent injunction to restrain a Defendant's industrial action, where the Defendant had filed a chamber summons seeking to have the Plaintiff's claim struck out as an abuse of process:* ***Cooperative Bulk Handling Ltd v. Australian Manufacturing Workers Union (WA Branch)*** *(Unreported, WASC, Lib. No. 970190, 30 April 1997), per Wheeler, J.*

- *Indemnity costs cannot be awarded in a criminal appeal, albeit 'in criminal appeals, as in civil cases, unreasonable conduct by the unsuccessful party might increase a usual award':* ***Sayed Mukhtar Shah v. Elizabeth Rice and Ors*** *(Crim Appeal No. AAU0007 of 1997S, High Ct Crim Action No. HAA02 of 1997, 12 November 1999), at 4, per Sir Moti Tikaram, P., Casey and Barker, JJA*

- *Indemnity costs awarded then reversed on appeal where solicitor held liable for costs (under a 'wasted costs' order) in initiating action for clients where solicitor taken to have known that the basis of the clients' action was wholly false"*

The oral and written submissions of Counsel for the Plaintiffs have not addressed why *'indemnity costs'* should be awarded **in the current proceedings for vacant possession.**

The Court has not been pointed to any "*reprehensible conduct*" in relation to the **current proceedings for vacant possession**. Indeed, as was set out by in ***Carvill v HM Inspector of Taxes*** (Unreported, United Kingdom Special Commissioners of Income Tax, 23 March 2005,Stephen Oliver QC and Edward Sadler)(Bailii:[2005]UKSPCSPC00468,http://www.bailii.org/cgibin/markup.cgi?doc=/uk/cases/UKSC/2005/SPC00468.html),"*reprehensible conduct*" requires two separate considerations (at paragraph 11):

"The party's conduct must be unreasonable, but with the further characteristic that it is unreasonable to an extent or in a manner that it earns some implicit expression of disapproval or some stigma."

I have not found, any evidence of "reprehensible conduct" in the litigation in relation to the present proceedings before me.

In my view, the Defendant has done no more than to exercise his legal right to contest the Plaintiff's Summons for vacant possession. This simply does not approach the degree of impropriety that needs to be established to justify indemnity costs. The Defendant is not guilty of any conduct deserving of condemnation as disgraceful or as and abuse of process of the court and ought not to be penalised by having to pay indemnity costs.

In the context of the present case, I am comforted by the rule of law enunciated in the following decisions;

In **Ranjay Shandill v Public Service Commission** [Civil Jurisdiction Judicial Review No:- 004 of 1996] Pathik J held;

> *"[A party] cannot be penalised [for] exercising its right to dispute matters but in very special cases where a party is found to have behaved disgracefully or where such behaviour is deserving of moral condemnation, then indemnity costs may be awarded as between the losing and winning parties."*

In **Quancorp PVT Ltd &0020Anor v. MacDonald & Ors** [1999] WASC 101, Wheeler J held;

> *".... 'hopeless' too readily so as to support an award of indemnity costs, bearing in mind that a party 'should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain' for 'uncertainty is' inherent in many areas of law' and the law changes' with changing circumstances"*

Furthermore, is it a correct exercise of the Court's discretion to direct the Defendant to pay costs on an indemnity basis to the Plaintiff because the Plaintiff had undergone hardships during the present proceedings for vacant possession?

The answer to the aforesaid question is in the negative which I base on the following judicial decisions;

- **Public Service Commission v Naiveli**
  Fiji Court of Appeal decision, No: ABU 0052 11/955, (1996) FJCA 3

- **Thomson v Swan Hunter and Wigham Richardson Ltd, (1954) ,(2) AER 859**

- **Bowen Jones v Bowen Jones (1986) 3 AER 163**

In "**Public Service Commission v Naiveli**";(*supra*),The Fiji Court of Appeal held;

> ***"However, neither considerations of hardship to the successful party nor the over optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs.*** *But additional costs may be called for if there has been reprehensible conduct by the party liable – see the examples discussed in Thomson v. Swan Hunter and Wigham Richardson Ltd [1954] 2 All ER 859 and Bowen-Jones v. Bowen Jones [1986] 3 All ER 163."*
>
> (Emphasis added)

On the strength of the authority in the aforementioned three (03) cases, I venture to say beyond a peradventure that neither considerations of hardship to the Plaintiffs nor the over optimism of the unsuccessful Defendant would by themselves justify an award beyond party and party costs.

(E) CONCLUSION

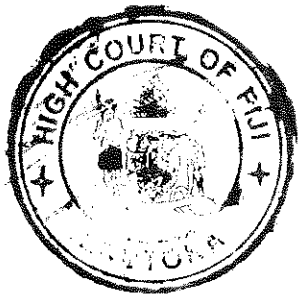
Having had the benefit of oral submissions for which I am most grateful and after having perused the affidavits, written submissions and the pleadings, doing the best that I can on the material that is available to me, I have no doubt personally and I am clearly of the opinion that the Defendant has failed to show cause to remain in possession as required under Section 172 of the Land Transfer Act.

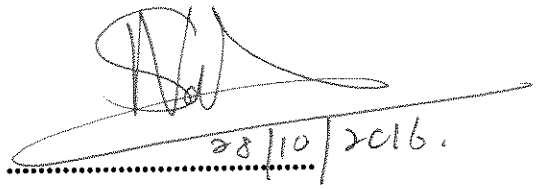
In these circumstances, I am driven to the conclusion that the Plaintiffs are entitled to an order as prayed in Summons for immediate vacant possession.

(F) FINAL ORDERS

(1) The Defendant to deliver immediate vacant possession of the land described in the Originating Summons, dated 18th April 2016.

(2) The Defendant to pay costs of $750.00 (summarily assessed) to the Plaintiff within 14 days hereof.





Jude Nanayakkara
Master

At Lautoka
28th October 2016