IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 62 of 2018

IN THE MATTER of an application under section 169 of the Land Transfer Act (Cap 131)

BETWEEN	:	**RAJ DEVI** of Yalalevu, Ba, Fiji Islands, Domestic Duties.
		Plaintiff
AND	:	**HARISH AMRESH CHAND SHARMA** of Yalalevu, Ba, Fiji Islands, Lorry Driver.
		First Defendant
	:	**SHALLY SHALESHNI DEVI** of Yalalevu, Ba, Fiji Islands, Cashier.
		Second Defendant
Before	:	Master U.L. Mohamed Azhar
Counsels	:	Mr. A. Dayal for the plaintiff Ms. P. Preetika for the Defendants
Date of Judgment	:	18th May 2020

JUDGMENT

01. The plaintiff summoned both defendants pursuant to section 169 of the Land Transfer Act Cap 131 to show cause why they should not give up vacant possession to the Plaintiff of the premises situated on Certificate of Title No. 6132, being "Lot 2, DP No. 829 in the District of Ba, in the Islands of Viti Levu, containing an area of four acres, being residential property (hereinafter referred to as **the property**). The summons is supported by an affidavit sworn by the plaintiff herself. The plaintiff annexed 5 documents with her affidavit marking as **"RD 1"** to **"RD 5"**.

02. Upon service of plaintiff's summons, the defendants appeared through their solicitor and moved for further time to file their affidavit in opposition showing cause why they should not be ordered to deliver the vacant possession of the property to the plaintiff. The court granted them further time (14 days) and both filed their affidavits. Whilst the first defendant filed a detailed affidavit, the second defendant filed a very short affidavit and

stated that, she relied on the affidavit of the first defendant. The plaintiff thereafter filed the affidavit in reply.

03. The plaintiff in this case, like other majority plaintiffs in similar actions, brought this summons as the registered proprietor of the subject property. Explaining entry of the defendants to the subject property, the plaintiff stated that, there was a Sale and Purchase Agreement between them; however, it was terminated by her due to breach of terms by the defendant. The defendants too, base their defence on the said Sale and Purchase Agreement. In addition, they raised some preliminary issues in relation to form and contents of the summons filed by the plaintiff. Firstly, the summons filed by the plaintiff is not an "originating summons"; secondly, the summons does not state the cause of action and thirdly, the summons does not contain proper description of subject property. Further, the defendants claimed that they were not given 16 clear days as provided by the section 170 of the Land Transfer Act.

04. It is appropriate to deal the first issue now and others can be discussed when dealing with the requirements to be fulfilled by the plaintiff to invoke the jurisdiction of this court under section 169 of the Land Transfer Act Cap 131. The reason adduced by the counsel for the defendant to support her first preliminary issue is that, the summons does not read as "Originating Summons" but it is mere "Summons", whereas the Order 5 rule 3 stipulates proceedings under any Act must be begun by way of "Originating Summons". The plaintiff's summons in this case is as follows:

SUMMONS

LET *all parties concerned attend before a Master in Chamber at the High Court, Lautoka on the 3rd day of May 2018 at 8.30 am o'clock in the forenoon or so soon thereafter as Counsel can be heard on the hearing of an application by the above named Plaintiff that the Defendant to show cause why they should not give up vacant possession to the Plaintiff of the premises situate on Certificate of Title No. 6132, being "Lot 2, DP No. 829 in the District of Ba, in the Islands of Viti Levu, containing an area of four perches, being residential property* ***AND FOR THE FOLLOWING ORDERS:-***

1. *That the Defendant's to give Plaintiff vacant possession.*
2. *Costs of this application be paid by the Defendant's to the Plaintiff.*

The Plaintiff intends to read his affidavit filed herein at the hearing of this application.

05. Obviously, it reads as "Summons" and not as "Originating Summons" as claimed by the counsel for the defendant. The Order 5 of the High Court Rules provides that, the civil proceedings in the High Court may be begun by writ, originating summons, originating motion or petition. The Orders from 6 to 9 separately deals with the general provisions of each mode of beginning. Accordingly, the proceedings under any Act, unless

otherwise required or authorized by the Rules or that Act, to be made by some other means, must be begun by originating summons. In **Reserve Bank of Fiji v Gallagher** [2006] FJCA 37; ABU0030, ABU0031, ABU0032U.2005S (14 July 2006), the Fiji Court of Appeal held that:

> *Order 5 Rule 3 of the High Court Rules **mandates** the originating summons procedure only when an application is made under any Act.* (Emphasis added).

06. By operation of the above mentioned mandatory rule, the proceedings under the Land Transfer Act too must be begun by way of an "originating summons". Undoubtedly, the plaintiff used this summons to originate the proceedings under the Land Transfer Act Cap 131. Thus, the question is whether the instant summons should be dismissed for the word "Originating" as argued by the counsel for the defendants. In fact, the argument of the defendants' counsel is not a novel one to the courts. Similar objection to a summons was taken up way back in 1894 in **Re Holloway, Ex P.Pallister,** (1894) 2 QB 163 C.A. In that case Holloway had formally acted as the solicitor for Pallister and had in his possession deeds and papers belonging to Pallister. Pallister took out a summons for release of his documents through his new solicitor against Holloway and it came up before the Master. On that returnable day Holloway did not appear and the Master granted orders in terms of the summons. Grantham, J., later varied the said order by limiting it to the documents of one case as to which the solicitors had given undertaking to deliver them up. Later, Holloway appealed to the Court of Appeal to discharge the entire order on the basis that the summons issued was not an "originating summons" as per the rules.

07. In the Court of Appeal their Lordships unanimously dismissed the appeal and held that, that the real definition of an "originating summons" is, a summons by which an action may be commenced otherwise than by writ. **Lord Esther, M.R.**, in that case briefly explained the genesis of originating summons and then gave the widely admitted definition of "originating summons at pages 166 and 167 that:

> No doubt there are some difficulties, contradictions, and discrepancies to be found in the rules; they arise from the infirmity of human language. But I think no one who considers the matter fairly can entertain any doubt in this case as to the intention. The definition in Order LXXI of the term "originating summons" is not a very happy one. It would, I think, have been better to say that an "originating summons" is that mode of commencing an action by summons which is now allowed instead of commencing it by a writ. That is really what is meant; and on one who reads the rule with a fair mind and a knowledge of the previous practice could doubt that that was the intention. At the time when the Rules of 1883 were made the term "originating summons" had already become well known in the Chancery Division. It was found that the old mode of commencing a suit in the Court of Chancery by a bill gave many opportunities for delay and expense, and in order to avoid this delay and expense the system was devised of a summons originating proceedings in chambers, which in the course of time came to be called an "originating

summons." This procedure was invented for the purpose of quickly determining simple points. When these " originating summonses" had been used for some years in the Court of Chancery and the Chancery Division, it was decided to extend them to the other Divisions of the High Court, and, though I agree that there is some difficulty on the language used, yet I think that the subject-matter shews conclusively, and, indeed, the legal sense of every lawyer will admit, that the real meaning of the definition of an "originating summons" is, a summons by which an action may be commenced otherwise than by writ. ..... There has been no irregularity in the present case, and, in my opinion, the appeal should be dismissed with costs.

08. In the same case, Lord Justice Kay and Lord Justice A.L. Smith concurring with the Master of Rolls, held at page 169 as follows:

KAY, L.J.

I am of the same opinion. Summonses may be classed under three heads: (1.) Summonses issued in a pending action. No one would dream of calling these "originating."

(2.) Summonses to originate proceedings in the nature of an action which may be used in certain cases instead of a writ. No one would call these summonses anything but "originating." The 3rd class includes such summonses anything but "originating." The 2rd class includes such summonses as the present - a summons up [on a solicitor to deliver up documents belonging to his client. It is not a summons in an action. It does not doubt originate proceedings against the particular solicitor. It is a summons under either the statutory or the general jurisdiction of the Court to order a solicitor to deliver up to his client documents which he has undertaken to deliver up. It is not issued in any pending proceeding, and it does not commence an action. In my opinion, the term "originating summons," as defined in Order LXXI., does not include such a summons as this. An "originating summons" means only a summons by which proceedings are commenced which must formerly have been commenced by a bill or a writ. The proceedings in this case have, therefore, been quite regular.

A. L. SMITH, L.J.

The argument for the appellant must go to this extent that every summons which is not issued in an action already pending is an "originating summons" within the meaning of the rules. The argument is based upon the language of the definition contained in Order LXXI. Having, however, regard to the previous practice, I read the definition as meaning – an "originating summons" is a summons by which proceedings are

commenced which formerly could not have been commenced without a writ or a bill.

09. The High Court Rules of Fiji too defines 'Originating Summons' in line with the above decision of the English Court of Appeal. According to Order 1 rule 2 an 'Originating Summons' means every summons other than a summons in a pending cause or matter.

10. Accordingly, every summons by which an action may be commenced otherwise than by writ is an "Originating Summons" as settled by the English Court of Appeal centuries ago. Furthermore, every summons other than a summons in a pending cause or matter is an "Originating Summons" as per the above interpretation in Order rule 2. The deciding factor is whether a summons was used to initiate proceedings or was it brought in an existing cause or matter. The plaintiff used the instant summons in this case to commence the proceedings to eject the defendants from the subject property. It is not a summons that was filed in an existing case. Therefore, it is an originating summons for the purpose of Order 5 rule 3. In **Satyapal Nandan v. Sahidan Bibi** [1972] SC HBC 90/72S delivered on 11.07.1972, Acting Judge Tuivaga accepted a summons which was used to originate the proceedings under section 169 of the Land Transfer Act 1971 as it fell within the interpretation given for 'originating summons' in the then applicable Rules. As a result, I reject the first preliminary issue of raised by the counsel for the defendants. Now I turn to discuss the summary procedure under the Land Transfer Act Cap 131.

11. The procedure under the section 169 of the Land Transfer Act Cap 131 is a summary procedure to promptly and speedily restore the registered proprietor to the possession of the subject property when the occupier is unable to show his or her right to possess the particular property. The Fiji Court of Appeal in **Jamnadas v Honson Ltd** [1985] 31 FLR 62 held at page 65 that, this section provides a speedy procedure for obtaining possession when the occupier fails to show cause why an order should not be made. The rationale for this speedy remedy, available for the last registered proprietors, stems from the fundamental principle of the statute that, the register is everything and in the absence of any fraud, the registered proprietor has an indefeasible title against the entire world. The Fiji Court of Appeal in **Subaramani v Sheela** [1982] 28 FLR 82 (2 April 1982) held that:

> *The indefeasibility of title under the Land Transfer Act is well recognised; and the principles clearly set out in a judgment of the New Zealand Court of Appeal dealing with provisions of the New Zealand Land Transfer Act which on that point is substantially the same as the Land Transfer Act of Fiji. The case is Fels v. Knowles 26 N.Z.L.R. 608. At page 620 it is said:*
>
> *"The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world."*

12. The *Locus Standi* of the person who seeks order for eviction is set out in section 169. The requirements of the summons, namely the description of land and the time period to be

given to the person so summoned, are mentioned in section 170. The other two sections namely 171 and 172 provide for the two powers that the court may exercise in dealing with the applications. The burden to satisfy the court on the fulfillment of the requirements under section 169 and 170 is on the plaintiff and once this burden is discharged, it then shifts to the defendant to show his or her right to possess the land. The exercise of court's power, either to grant the possession to the plaintiff or to dismiss the summons, depends on how the said burden is discharged by the respective party to the proceedings.

13. The plaintiff in paragraph 3 of her supporting affidavit states that she became the registered of the subject property on 10th of April 2015. In support of her averment, she annexed a copy of Certificate of Title No.6132 certified by the Registrar of Title, which is marked as **"RD 1"**. The first defendant in his affidavit states that he denies the contents of the said paragraph 3 of the plaintiff's affidavit even though the **"RD 1"** is duly certified by the Registrar of Title. The section 18 of the Land Transfer Act provides that, the instrument of title to be evidence of proprietorship and it reads:

Instrument of title to be evidence of proprietorship

> ***18.*** *Every duplicate instrument of title duly authenticated under the hand and seal of the Registrar shall be received in all courts as evidence of the particulars contained in or endorsed upon such instrument and of such particulars being entered in the register and shall, unless the contrary be proved by the production of the register or a certified copy thereof, be conclusive evidence that the person named in such instrument or in any entry thereon as seized of or as taking an estate or interest in the land described in such instrument is seized or possessed of such land for the estate or interest so specified as from the date of such certificate or as from the date from which such estate or interest is expressed to take effect.*

14. The above section in its unambiguous language provides that, a duplicate of an instrument of title duly authenticated by the Registrar of Title shall be conclusive evidence of the particulars of that instrument. If any person disputes such contents, such person must produce the register or certified copy thereof. The **"RD 1"**, being an authenticated copy of instrument of title, is the conclusive evidence to the fact that, the plaintiff is the registered proprietor of the subject property. The first defendant denies the proprietorship of the plaintiff just for the sake of it and he has nothing to prove contrary to what the plaintiff proved. Accordingly, the locus of the plaintiff to summon the defendants under section 169 of the Land Transfer Act Cap 131 is proved.

15. The next matter is the particulars to be stated in the summons as required by section 170 of the Land Transfer Act (Cap 131). It is now appropriate to discuss the other preliminary issue raised by the counsel for the defendant in relation to contents of the summons. The counsel for the defendant cited Order 7 rule 3(1) and submitted that, the summons of the plaintiff did not comply with the above rule as it did not include the question for determination and particulars to identify the cause of action against the defendants. The counsel cited several cases to support her submission. As mentioned above, it was found that the old mode of commencing a suit in the Court of Chancery by a bill gave many opportunities for delay and expense, and in order to avoid this delay and expense the

system was devised of a summons originating proceedings in chambers. This procedure was invented for the purpose of quick determination of simple points. As a result, the Order 7 rule 3(1) requires a person who brings an originating summons to briefly state the question to be determined by the court. However, Order 1 rule 8 provides that, if any statute or law specifically prescribes a particular practice or procedure, the rules shall not apply or shall have limited application in so far any such practice or procedure imports the application of the rules. That rule reads:

Proceedings to which these Rules do not apply (O.1 r.8)

> *8.-(1) Where, for the time being, by or under any law in force in Fiji, specific provision is made for regulating the practice and procedure in, or in relation to, any particular form of proceedings in the High Court, these Rules shall not apply thereto except in so far as any such provision applies, incorporates, or imports the application of these Rules, whether by express reference thereto or by reference to the rules of Court of, or the practice or procedure in, the High Court.*

16. The instant summons is filed pursuant to section 169 of the Land Transfer Act Cap 131 to eject the defendants from the subject property. This procedure is *sui generis* and the relevant sections of Land Transfer Act specifically provide for such procedure which includes the locus of the person who can take out the summons, requirement of the summons, mode of hearing and the orders that can be made by the court. Thus, the rules of the High Court relating to the originating summons have no or little application to this special procedure under the Land Transfer Act. The rules of the High Court need not to be employed in relation to writ of possession, as it has been the practice, unless the any person resists possession of the proprietor, because section 173 provides that, once the order for possession is obtained, the plaintiff or his bailiff may enter the property without writ if no person in possession or the person or persons in possession voluntarily gives and surrenders possession to such plaintiff or his bailiff. As a result, I am unable to accept the argument of the counsel for the defendant that, the instant summons does not comply with Order 7 rule 3(1) and hold that, the real question is whether the summons complies with the special requirements of section 170 of the Land Transfer Act.

17. The first requirement is that the summons should contain the description of the land. However, the section does not specify what description of land entails and what adequate or full description of the land is. It appears from the said section that, it actually requires the description which can give full knowledge to the persons so summoned of the land and premises from which he ought to be evicted, without causing misunderstanding or misidentification of it. If there is any misunderstanding of premises which is the subject matter of the proceeding, it should be brought by the person who is so summoned to show cause and in the absence of any such allegation of misunderstanding, the description given by any applicant seems to be sufficient and adequate under the section 170 of the Land Transfer Act. This view is supported by the decision of High Court in **Wati v Vinod** [2000] 1 FLR 263 (20 October 2000) and the decision of Court of Appeal in **Premji v Lal** [1975] FJCA 8; Civil Appeal No 70 of 1974 (17 March 1975).

18. The plaintiff's summons gives the description of the property and it states the extent as 4 perches and whereas the dispute is in four acres. The defendant argues it is the wrong description. In fact, the summons correctly mentions other description of the land and the plaintiff too in the affidavit in reply has corrected it being a typographical error. Furthermore, the Sale and Purchase Agreement between the parties too describes the disputed land as being four acres which has been admitted by the defendants. It is obvious that, the there is no misunderstanding of the disputed land that can make the summons irregular.

19. The other procedural requirement is the time to be given to a person so summoned to appear for hearing. The section 170 mandatorily requires 16 clear days after service of summons to appear in court. However, the purpose of legislation, that the person so summoned should be gives sufficient time to prepare his or her defence, should carefully be considered when interpreting this mandatory requirement. I reproduce the relevant sections for the purpose of discussion.

Particulars to be stated in summons

170. *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.*

Order for possession

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.*

20. The Fiji Court of Appeal in **Chand v Chandar** [2003] FJCA 10; ABU0021U.2002S (28 February 2003) briefly explained the procedure under this section and held that:

> *Section 169 of the Land Transfer Act (Cap.131) provides that the registered proprietor of land 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 of the land to the applicant. Section 170 provides that 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. By s.171, on the day appointed for the hearing of the summons, if the person summoned does not appear, the Court may act in his absence. By s.172, if the person summoned appears, he may show cause why he refuses to give up 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 or he may make any order or impose any terms he may think fit. The dismissal of the summons is not to prejudice the right of*

the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled.

21. It is clear from the above sections, especially from the phrases underlined above in both sections and the explanation by the Court of Appeal that, the summons's returnable date is the hearing date. If the defendant does not appear on that date, and the court is satisfied with the requirements of section 169 and 170, it may order for immediate possession. If the person appears on that date, he must show cause why he should not be ordered to vacate the property. The reason for giving mandatory period of 16 days is to enable such person to prepare his or her defence. If the hearing is taken place on that day without giving 16 clear days from the service of summons, then it would be fatal and there is no option than dismissing the summons for not complying with mandatory requirement. However, it has now become the practice that, the hearing of the summons is fixed for another date. This is partly because the defendants move for further time to allow them to file their affidavits to show cause and partly because of the work load which does not permit hearing on that returnable date. The defendants are given further time to file the affidavit and thereafter the plaintiffs are allowed to file an affidavit in reply. The hearing of the summons is usually fixed after these two affidavits are filed and served. Most of the times, it easily takes more than a month from the original returnable date to fix any summons for hearing. In this situation, even though the defendants are initially not given 16 days to appear and show cause due to the late service of summons by the plaintiffs, they are given sufficient time thereafter, mostly more than 16 days, to prepare their defence. If such time is given which exceeds more than the required period, such defendants cannot claim irregularity later, having enjoyed more than 16 days in total. The very reason is that the purpose of the legislation, that the defendants must be given sufficient times to prepare their affidavits, is achieved.

22. The purpose of the legislation, which requires mandatory 16 days, was not to introduce rigid technicalities which would militate against full justice being done by the Court. The procedural rules, whether they derive from a statute or common law, are there to ensure all litigants to a dispute have fair opportunity to present their cases. Therefore, in cases where there is no wrong done, and nobody is taken by surprise or put at a disadvantageous position, it is perfectly alright for the court to fix a hearing date other than the original returnable date, if the defendant were given sufficient time later to prepare the defence, even though the summons was returnable on a date earlier than 16 days. In this case, the counsel for the defendants submitted that, the summons was returnable on 14 days from the date of service and therefore the summons was irregular and the same should be dismissed. The record shows the summons was returnable on 03.05.2018 and defendants had only 14 days after service. There is a shortage of two days. However, on that date (03.05.2018) the counsel appeared for the defendants moved for further time to file affidavit in opposition showing cause of her clients. The court allowed the application and granted further 14 days and the defendants filed their respective affidavits after further 14 days from the original returnable date. Accordingly, the defendants had total of 28 days from the date of service of summons to prepare their defence. Thereafter, the defendants had the opportunity to read the affidavit in reply filed by the plaintiff and the hearing was fixed very much later as the defendants were absent and unrepresented on two consecutive days. Even after hearing, the defendants' counsel sought further 14 days to file her legal submission. Accordingly, the defendants had neither been ambushed nor been disadvantaged by being taken by surprise by the said

shortage of two days, because they were given ample time thereafter to prepare their defence. Hence, I am unable to agree with the argument of the counsel for the defendants.

23. The section 171 requires the proof and production of '*consent*' if any such consent is necessary. The court in **Prasad v Chand** [2001] FJLawRp 31; [2001] 1 FLR 164 (30 April 2001) clearly held that, the consent of the Director for the application under 169 is not necessary.

24. The above discussion clearly indicates that, the plaintiff in this matter passed the threshold under sections 169 and 170 of the Land Transfer Act Cap 131. The burden now shifts to the defendants to show cause their defence to remain in possession of the properties. The Supreme Court in **Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87 explained the duty of a defendant in application of this nature and held that:

> *"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 such a right must be adduced."* (Emphasis added)

25. The duty on the defendants as per the above authority is, not to produce any final or incontestable proof of their right to remain in the properties, but to adduce some tangible evidence establishing a right or supporting an arguable case for their right to remain in possession of the properties in dispute. **Black's Law Dictionary** defines "tangible evidence" as "physical evidence that is either real or demonstrative" (10th Edition, page 678). Thus, duty of the defendants is to produce some real or demonstrative physical evidence and not bare assertions. A bare assertion is not sufficient for this purpose.

26. Furthermore, the Fiji Court of Appeal in **Ali v Jalil** [1982] FJLawRp 9; [1982] 28 FLR 31 (2 April 1982) explained the nature of the orders a court may make in terms of the phrase used in section 172 of the Land Transfer Act, which says "*he (judge) may make any order and impose any terms he may think fit*". The Court held that:

> *"..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"*. (Emphasis added).

27. According to above decisions, the court is to decide whether a defendant adduced any real or demonstrative physical evidence establishing a right or supporting an arguable case for such a right, or even he failed to adduce such evidence whether an open court hearing is required or not, given the circumstances of a case.

28. The defendants rely on the Sale and Purchase Agreement they entered into, with the plaintiff and the subsequent conducts of the parties. The defendants further claimed that, the plaintiff breached the said agreement and did not even give the necessary documents to obtain the necessary approval for surveying and sub-division. On the other hand, the plaintiff herself in her affidavit in support attached a copy of the said agreement marking it as **"RD 3"** and averred that, she terminated it due to the breach of the defendants to obtain necessary consents from both the director of land and director of country and city planning. The plaintiff also attached a copy of the letter sent to the defendants terminating the said agreement and demanding the vacant possession of the property. The question is whether this agreement and the subsequent conducts of the parties can confer any right on the defendants to possess the disputed property?

29. The agreement specifically states in paragraph 9 (a) that, the defendants had already taken possession of the portion the land approximately 1000 m^2 on payment of advance of $ 4,000.00 and the balance was to be paid before 14.02. 2018. The agreement is also evident that, the defendants built a residential dwelling on that land agreed upon by them. All these happened with the consent and permission of the plaintiff pursuant to the said agreement that, the said portion of the land would be sold to the defendants.

30. The Privy Council in the famous case involving a land issue in Fiji, that is **Charmers v Pardoe** (1963) 3 ALL ER 552, held at page 555:

> There can be no doubt on the authorities that where an owner of land has invited or expressly encouraged another to expend money on part of his land on the faith of an assurance or promise that that part of the land will be made over to the person so expending his money a court of equity will prima facie require the owner by appropriate conveyance to fulfill his obligation; and when, for example for reason of title, no such conveyance can effectively be made, a court of equity may declare that the person who has expended the money is entitled to an equitable charge or lien for the amount so expended. That was in fact the order in the Unity Joint Stock Mutual Banking case (1858), 25 Beav. 72, though it appeared in that case that the land-owner had never actually engaged or promised to make over the appropriate land. The facts of the case were most unusual and as ROMILLY, M.R., said at page 79:
>
> > "The court must look at the circumstances in each case to decide in what way the equity would be satisfied."

31. The Privy Council in fact expounded how the equity works in this type of cases. However, there was a breach of statute in that case and the Privy Council did not allow the equitable remedy, because no equity will arise if to enforce the right claimed would contravene some statute.

32. **Snell's Principles of Equity** (28th Edition 1982) at pages 560 and 561 set down the conditions for the proprietary estoppel together with the illustrations and it states:

> (a) Expenditure. In many cases A has spent money on improving property which in fact belongs to O, as by building a house on O's land, or by doing repairs to O's house and paying mortgage instalments and other outgoings, or by contributing to a joint venture to be carried out on O's land, or by paying premiums required to maintain O's life insurance policy.
>
> (b) *Expectation or belief.* A must have acted in the belief either that he already owned a sufficient interest in the property to justify the expenditure or that he would obtain such an interest. But if A has no such belief, and improves land in which he knows he has no interest or merely the interest of a tenant (or licensee), he has no equity in respect of his expenditure.
>
> (c) *Encouragement.* A's belief must have been encouraged by O or his agent [or] predecessor in title. This may be done actively, as where a father persuades his son to build a bungalow on the father's land, or a mother assures her daughter that she will have the family home for her life, or a man assures his former mistress that the house in which they lived together is hers.
>
> (d) *No bar to the equity.* No equity will arise if to enforce the right claimed would contravene some statute, or prevent the exercise of a statutory discretion or prevent or excuse the performance of a statutory duty

33. In case before me the plaintiff admitted that, the defendants entered into the disputed land pursuant to the agreement they signed and built the residential dwelling. Thus they fulfilled the first three conditions. The question is whether there is a bar to the equity. The land in dispute is a Crown Grant issued under Part 3 of the Crown Lands Act No. 15 of 1945 (now known as State Lands Act) and not a 'Protected Lease' that falls under section 13 of that Act. Only in case of a 'Protected Lease' the consent of the Director of Lands is necessary. Hammett Ag. CJ in **Ram v Pal** [1963] 9 FLR 141 held that:

> In this connection one point appears to have been overlooked. This arises out of the wording of section 15 of the Crown Lands Ordinance (Cap. 138), of which the material part reads:
>
> "(1) Whenever in nay lease under this Ordinance there has been inserted the following clause:-

'This lease is a protected lease under the provisions of the Crown Lands Ordinance' (hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with land comprised in the lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same without the written consent of the Director of Lands first had and obtained..."

It appears, therefore, that it is only when a lease is expressly stated to be "a protected lease", that the consent of the Director of Lands to its transfer becomes necessary. If it is not "a protected lease" the consent of the Director of Lands does not appear to be necessary before it can be transferred or sold.

34. Hammett Ag. CJ mentioned as section 15, but he meant the current section 13 as he produced that section 13 which mandates the consent of the Director of Lands for the protected lease. The Fiji Court of Appeal approved the above decision of Hammett Ag. CJ in **Ganpati v Somasundaram** [1976] 22 FLR 194. It follows that, the consent of the Director of Lands is not necessary for transfer or alienation of a Crown Grant issued under Part 3 of the State Lands Act 1945. Therefore, there is no bar to equity in this case and the defendants can claim proprietor estoppel as they have equitable interest in the disputed property.

35. The summary of the discussion is that, the plaintiff is the last registered proprietor of the properties described in the summons and fulfilled all the necessary requirements under section 169 of the Land Transfer Act. On the other hand, the defendants have adduced real or demonstrative physical evidence establishing a right or supporting an arguable case for such a right. Thus, the issues in this matter cannot be decided on the affidavit, but should be determined in trial proper. It follows that the summons filed by the plaintiff seeking vacant possession of the disputed land must be dismissed. Further considering the nature of the case, I am not making any order for cost.

36. Accordingly, I make following final orders:

a. The summons filed by the plaintiff is dismissed, and

b. The parties to bear their own cost

HIGH COURT OF FIJI
LAUTOKA

U.L.Mohamed Azhar
Master of the High Court

At Lautoka
18/05/2020