

**IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION**

CIVIL ACTION NO. HBC 72 OF 2014

BETWEEN : **AMBER LOUISE MASON** of 62 Desgrand Street Archerfield, Queensland, Domestic Duties as the Trustee of the Estate of Maya Kidman of 62 Desgrand Street, Archerfield, Queensland, Domestic Duties, Deceased, Testate by virtue of Re-Seal No. 65462
PLAINTIFF

AND : **PREM CHANDRA & AJENDRA PRASAD**
DEFENDANT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Ms. Fazilat Shah, with Ms. Nisha, for the Plaintiff.
Mr A. J. Singh, with Ms. Prasad, for the Defendants.

DATE OF TRIAL : 23rd – 25th January, 2023.

WRITTEN SUBMISSIONS: Filed by the Plaintiff on 16th February, 2023.
Filed by the Defendants on 13th March 2023.

DATE OF JUDGMENT : 16th October, 2023

JUDGMENT

A. INTRODUCTION:

1. This is an action commenced by the original Plaintiff, (now deceased), on 12th May 2014, by way of her writ of Summons and the Statement of claim, seeking the following reliefs against both the defendants;
 1. *A declaration that the Defendants are holding the property in trust for the Plaintiff.*
 2. *An Order that the Defendants immediately transfer the property to the Plaintiff at their cost.*
 3. *An account of all monies received by the Defendants as income from the property since the property was transferred to them and an Order that the Defendants pay such monies to the Plaintiff.*
 4. *Further or alternatively, judgment in the sum of F\$514,751.00 being the funds sent by the Plaintiff for the purchase of the property and/or in the sum of F\$39,751.00 being the difference between the funds of F\$514,751.00 sent by the Plaintiff for the purchase of the property and the purchase price of F\$475,00.00 for the property.*
 5. *Interest under the Law Reform (Miscellaneous Provisions) (Death & Interest) and Cap 27 from 12th April 2013 to payment.*
 6. *Costs on an indemnity basis.*

7. *Such further or other relief as to the Court may seem meet.*

2. Before reaching the trial stage, parties were involved in number of interlocutory applications. However, subsequent to the disposal of those applications by 26th September 2017, as the original plaintiff passed away on 30th July 2018, Ms AMBER LOUISE MASON, the daughter of the original plaintiff, being the Executor and Trustee of the Estate of the deceased plaintiff, on obtaining the Probate, was substituted on 2nd July 2020. Accordingly, the amended statement of claim was filed on 13th July 2020, with no changes in the pleadings or in the reliefs prayed for therein.
3. The defendants had their joint statement of defence filed on 13th June 2014 moving to dismiss the statement of claim with indemnity costs, reply to which was filed by the plaintiff on 28th August 2014.

B. BACKGROUND:

4. As per the statements of claim, the plaintiff states, *inter-alia*, THAT:
 - a. *"The Plaintiff is a widow living in Australia, but previously a citizen and resident of Fiji.*
 - b. *The Defendants are citizens and residents of Fiji and the 1st named defendant is an acquaintance of the plaintiff.*
 - c. *In or about 2012, the 1st named defendant recommended to the plaintiff to buy a property in Fiji and/ or the plaintiff expressed her interest to do so for which the 1st named defendant offered to assist the plaintiff.*
 - d. *In or about 2012 or in January 2013, the 1st named defendant advised the plaintiff to remit funds to the Bank Account of CHANDRA KANT LODHIA at ANZ branch Nadi to purchase a property.*
 - e. *Accordingly, in or about 29th January 2013 a sum of AUS \$300,000.00 was remitted to the said account, which sum on conversion was Fiji \$514,751.00.*
 - f. *On or about 12th April 2013 , the defendants entered into a sale & purchase agreement with one Ishwar Lal to purchase by them a property in Certificate of Title No- 11093 situated at Kennedy Avenue, Nadi for a sum of F\$475,000.00 and paid an advance of F\$47,500,00 into the Trust Account of Ms Vasantika Patel , Barrister & Solicitor.*
 - g. *The balance purchase price of \$467,500.00 being paid into MS Vasantika Patel's Trust account on 14th April 2013, transfer Deed was executed on 8th May 2013 in the names of both the defendants and the same was registered on 14th June 2013.*
 - h. *The defendants converted to their own use the said sum of F& 514,751.00 sent by the plaintiff to purchase of the property and wrongfully transferred the property into their own names. Though, the Plaintiff demanded the property to be re-transferred to her and for the return of the balance sum of the funds sent, the defendants have failed to do so denying their liability".*
5. The defendants in their joint statement of defence, *inter-alia*, took up the following stance. **THAT;**
 - a. *"The plaintiff married the 1st named defendant on 20th November 1995 and this marriage was dissolved on 25th June 2003(This date of dissolution is wrong).*
 - b. *Despite the divorce, the relationship continued and since 2010 the 1st named defendant travelled to Brisbane on numerous times and lived with the plaintiff.*
 - c. *The plaintiff began living with the 1st named defendant in Fiji at his home in Drasa –Lautaka from January 2013 and left in April or May 2013 when the he was away from Fiji.*
 - d. *The 2nd named defendant was married to the daughter of the plaintiff, but now divorced.*

- e. *It was the defendants who informed the plaintiff that they wanted to buy a property in Fiji , and for this purpose the 1st named defendant needed his money held in the joint account No;2996-05820 with the plaintiff at ANZ bank in Brisbane-Australia.*
- f. *The money was remitted to Mr. Ladhia's account at ANZ Nadi branch on 29th January 2013 and for this purpose he attended the remittance process at the ANZ Bank, Brisbane.*
- g. *He had the full entitlement to the money remitted which is in a sum of F\$ 544,751.21 and as he wanted to buy a house , he obtained the money from his joint account with the plaintiff being present and with her full consent for him to use the money for him to buy a house for the defendants' benefit.*
- h. *Accordingly, he bought the property in both defendant's name, and their title thereto is indefeasible".*

6. The plaintiff in her Reply to defence filed on 28th August 2014;

- a. Having admitted the marriage with the 1st named defendant, took up a position that there was no sexual relationship, and despite the fact that she had obtained the divorce in the year 2000, they were in contact with each other from 2010 to 2013.
- b. She also admitted the existence of a joint Bank Account in both of their names at ANZ in Brisbane, and took up the position that she was coerced by the 1st named defendant to add his name thereto, and the only significant deposits made into said account were amounts received from the sale of two properties in Australia, namely;
 - i. Her property at 603, Boundary Road, Archerfield, Queensland 4018, sold for a sum of AUS \$ 260,000.00. (net amount realized was AUS \$239,855.86 as per the bank statement)
 - ii. Her daughter's property at 599, Boundary Road, Archerfield, Queensland 4018, sold for a sum of AUS \$ 220,000.00. (net amount realized was AU\$ 201,901.52 as per the bank statement)
- c. She reiterated that these funds belonged to her and her daughter and she sent the funds from Australia to Fiji for her purpose of acquiring a property in Fiji.

C. AGREED FACTS & ISSUES:

7. As per the PTC minutes, parties have recorded following agreed facts and issues;

Agreed Facts:

- 1. *THAT the Plaintiff is an Australian Citizen and the Defendants are Fiji Citizens.*
- 2. *THAT the Plaintiff and the Defendants are well known to each other.*
- 3. *THAT the Plaintiff married the 1st named Defendant on 20th November, 1995 and divorced him on the 19th day of October, 2000; the Parties had no issues of the Marriage.*
- 4. *THAT the Plaintiff's daughter was married to the second defendant.*
- 5. *THAT the Plaintiff and the 1st named Defendant opened a joint account number 299605820 at the ANZ Bank at Acacia Ridge, Queensland.*

6. Pursuant to a Transfer dated the 8th May 2013, the Defendants purchased Certificate of Title No. 11093 from on Ishwar Lal in the sum of FJD\$475,000.00 (Four Hundred Seventy Five Thousand Fijian Dollars)
7. THAT the said Chandar Kant Lodhia on the instruction of the 1st named Defendant deposited the sum of FJD\$475,000.00 (Four Hundred Seventy Five Thousand Fijian Dollars) being part of the funds from joint account received into his account to the trust account of Messrs Vasantika Patel, Solicitors of Nadi as Solicitors of the Vendor, Ishwar Lal.
8. UPON payment of the full purchase price the transfer was duly registered in favour of the Defendants on the 14th June, 2013.
9. On or about the month of March, 2015 the Plaintiff through her former solicitors demanded that the Defendants immediately transfer Certificate of Title No. 11093 unto the Plaintiff together with a demand that the Defendants refund the plaintiff the sum of \$39,751.00 (Thirty Nine Thousand Seven Hundred and Fifty One Dollars) being the surplus of the Plaintiff's funds in the account of Chandar Kant Lodhia.
10. The Certificate of Title No. 11093 is an unencumbered property situated at Kennedy Avenue, Nadi and the Defendants hold the Original Certificate of Title in their custody.

Agreed Issues:

11. Whether the Defendants have at all material times made no deposits in the said account.
12. Whether the Plaintiff at all material times has had no dealings with the said 2nd named Defendant and never authorised the 2nd named Defendant to buy any property or assets with the Plaintiff's funds either in his own name or that of the 2nd named Defendant.
13. Whether the subject purchase in the name of the Defendants was without the knowledge and/or consent of the Plaintiff.
14. Whether the 1st named defendant had any right of over the funds in joint account.
15. Whether the 2nd named Defendant had any right over the funds in joint account.
16. Whether the joint account was opened between the Plaintiff and the 1st named Defendant with the express purpose of purchasing a property in the name of the Plaintiff in Fiji.
17. Whether the 1st named Defendant at any material time held himself out as an agent for the Plaintiff in the matter of property acquisition in Fiji.
18. Whether the Defendants have jointly and severally converted the Plaintiff's monies.
19. Whether the money once deposited in the Joint Account was for an express purpose of purchasing a property for the Plaintiff or for either party to use.
20. Are the Defendants hold Certificate of Title No. 11093 in favour of the Plaintiff as constructive Trustees.
21. Was the 1st named Defendant entitled to use the funds acquired from his joint account with the Plaintiff for his benefit or was it conversion.
22. Can the Defendants title be impeached in the absence of fraud?

23. *Is the Plaintiff entitled to refund the monies that was sent form the joint account to the 1st Defendant if so, is she further entitled to interest.*

D. TRIAL:

8. At the trial, the substituted Plaintiff, **Ms Amber Louise Mason (PW-1)** and **Ms Bharti Kumar (PW-2)** a Bank officer from ANZ, Lautoka, testified on behalf of the Plaintiff. The 1st named defendant **Prem Chandra (DW-1)**, the 2nd named defendant **Ajendra Prasad (DW-2)**, a Bank officer namely, **Mr. Vinod Kamal (DW-3)** from the Bank of Baroda – Lautoka Branch, and one **Mr. Chandra Kant Lodhia (DW-4)** gave evidence on behalf of the defendants.
9. PW-1, Ms Amber Louise Mason, during her evidence, which also covered the contents of the Affidavit evidence of her deceased mother, testified on the events that occurred in the year 1995 as to how they got introduced to both the defendants in Fiji, how the proposal for the, purported, marriage of her mother to the 1st named defendant and that of her to the 2nd named defendant came up and how the said marriages took place in November 1995.
10. She also testified on how the Visa Applications for the defendants were made to the Australian Embassy in Suva soon after the said marriages, and about the rejection of visas, how the 2nd named defendant came to Australia in the year 1999, what he in fact did during his short stay of 3 weeks there, and how the both marriages came to an end in uncontested divorce proceedings that took place in Australia in the year 2000.
11. The other segment of PW-1's evidence was in relation to the events that took place both in Australia and Fiji from the year 2010 till their departure on 30th April 2013 after staying at the 1st defendant's place in Fiji from July 2012. Her evidence included, inter alia, about the sudden visit made by the 1st and 2nd named defendants to the plaintiff's residence in Australia in the year 2010, their stay with them, the proposal to buy a property in Fiji, the transferring of their Australian properties unto the 1st defendants' name for the purpose of applying for permanent visas, the transferring of the property unto Mr. Chandra Kant Lodhia, depositing the sale proceeds in a joint account held by the plaintiff with the 1st named defendant and about the remittance of AUS \$300,000.00 by the plaintiff to Mr. Lodhia's account at ANZ, Nadi Branch Fiji.
12. During her evidence, the PW-1 reiterated that neither the 1st named defendant nor the 2nd named defendant, after their said marriages to the respective parties (mother & daughter), had acquired any interest in any properties of her or those of her mother's in Australia. She also testified that all the properties she and her mother had in Australia were pre-marital properties, both the defendants had nothing to do with those properties and the funds that was available in the joint account at ANZ Brisbane was held by her mother as the sole person entitled to it.
13. She testified further that none of the defendants had claimed any shares or right in any of her properties or those of her Mother, the defendants were devoid of any claim for the properties and their present claim for such right as "matrimonial property settlement" is an afterthought that came up only after the institution of this Civil claim by her mother.

14. The evidence of the "PW-2", the Bank Officer Ms Bharti Kumar from ANZ Lautoka, was on the inward remittance of a sum of AUS\$300,000.00 into Mr. Lodhia's account at ANZ Nadi branch on 30th January 2013, which in terms of FJ\$ was 544,751.21 and about the withdrawal of F\$514,751.00 on 31st January 2013 by way of a check. The witness was unable to state about the balance sum of F\$30,000.00 as she had not brought the details thereto. However, parties were not at variance on this.
15. The 1st and the 2nd named defendants too through their evidence have spoken about as to how they got introduced to the plaintiff and her daughter (PW-1) in the year 1995, as to how the proposals for the said marriages came up and how the said marriages took place, and particularly in relation to the Applications for Australian Visa, which were eventually rejected. The 1st named defendant testified about his first visit to Australia in the year 2010, which was 15 years after the said marriage, and 10 years after the uncontested divorce, and about his stay at the plaintiff's place and about the transferring and the selling of properties belonged to the plaintiff and her daughter "PW-1". He also spoke about events that occurred in Fiji when plaintiff and her daughter were living at his house in Drasa from July 2012 till 30th April 2013.
16. I, find that the testimonies adduced by the plaintiff and both the defendants hereof are quite lengthy and mostly irrelevant for this court to decide the pivotal issue in hand. Thus, instead of reproduction of the same, I will refer to in this judgment only the most relevant parts thereof, if and when needed, which will assist me in the determination of the issues, particularly "***What was the intention of the parties and in particular that of the deceased Plaintiff, Maya Kidman?***"; on the 29th day of January, 2013 when the deceased Plaintiff transferred the funds to the said Chandra Kant Lodhia's account".
17. I also find that once the above issue in paragraph 16 above is decided, most of the issues raised on behalf of the parties, as per the PTC minutes, would become redundant.

E. SUBJECT PROPERTY:

18. The subject matter in this action is, undisputedly, comprised in the Certificate of Title No- 11093, being the lot 55 on DP No- 2631 known as "Waqadra" in the extent of 29. 5/10 perches situated in Nadi in the Island of Vitilevu, for the deceased plaintiff Maya Wati Kidman, and her Estate.

F. TRUST OR GIFT:

19. Both parties are not at variance on the onus of proving the existence of the trust, and its terms, lies on the person propounding it, which in this case is on the plaintiff. ***Nagaiya v Subhaiya [1969] 15 FLR 212 (7 November 1969).***
20. In ***Gissing v Gissing [1970] UKHL 3; 1971 AC 886 at 904 Lord Diplock*** examined the existence of a trust and said: Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based upon the proposition that the person in whom the legal estate is vested holds it as **Trustee upon trust to give effect to the beneficial interest of the claimant as cestui que trust...."**
21. The principles relating to existence of the trust applied by Marsack J.A. in ***Nagaiya v Subhaiya [1969] 15 FLR 212 (7 November 1969)*** (majority decision) are:

1. Who provides the money for the payment of the property?
2. The actions or the conduct of the members of the family in respect of the property in dispute.
3. The existence of a trust; and lastly
4. Any trust said to have been set up was in favour of certain particular person.

22. In **Din v Kumar [2008] FJHC 187; Civil Action 62.2006 (25 August 2008)** Justice Singh at paragraph 18 stated that:

"[18] Very convincing evidence is required to establish a trust. In Nagaiya v Subaiya 15 FLR 212 Justice Marsack at page 216 stated that where "it is sought to establish that the registered proprietor is in fact holding as trustee, then, in my view, there must be cogent and compelling evidence of the existence of such a trust. This evidence should prove how the trust came into existence and who are the persons on behalf of whom the property is held by the trustee" In Stack v Dowden – [2007] UKHL 17; 2007 2 ALL ER 929 the House of Lords held that in considering the beneficial interest one has to consider all the relevant circumstances to discern the common intention of the parties with respect to the property in light of whole course of conduct in relation to it."

23. Madam Justice Shameem , in **Nisha v Munif [1999] FJHC 133; 45 FLR 246 (13 October 1999)**, discussing the leading local case on the creation of equitable trusts in property in **Sheila Maharaj v Jai Chand [1986] 1 AC 898** stated at page 5 that:

"The Defendant claimed an equitable trusts and estoppel. At page 125 of the Judgment, the Privy Council said:

"The authority now classic is the speech of Lord Diplock in Gissing v Gissing [1970] UKHL 3; [1971] AC 886, 902 -911 and later reviewed in the judgments of the Court of Appeal in Grant v Edward [1986] EWCA Civ 4; [1986] 2 All ER 426 which concerned an unmarried couple. In such cases a contract or an express trust as at the time of the acquisition may not be established, because of lack of certainty or consideration or non-compliance with statutory requirements of writing; but a constructive trust may be established by an inferred common intention subsequently acted upon by the making of contributions or other action to the detriment of the claimant party. And it has been held that, in the absence of evidence to the contrary, the right inference is that the claimant acted in the belief that she (or he) would have an interest in the house not merely out of love and affection. (Emphasis added)

24. Shameem –J in the same case at page 6 said:

"In the early case of Bannister v Bannister [1948] 2 All ER 133, the Plaintiff sold a house at a low price to the defendant on terms that she be permitted to live there rent free so long as she liked. The property was then transferred to the defendant. It was held that the defendant held the property on trust during the life of the plaintiff to allow her to live in it as long as she liked. The Court of Appeal held that in equity a constructive trust existed to prevent a legal owner from defeating a beneficial interest belonging to another.

G. ANALYSIS:

25. At the outset, as stated above, it must be pointed out that the majority of the evidences adduced by both the Counsel are redundant and/ or irrelevant in determining the core issues that demand adjudication in this matter. Particularly, the events occurred and what

were said and done during the period of the purported marriages in the year 1995 are not in issue and thus do not demand any adjudication. Further, what transpired between the parties when they all met in Australia in the year 2010 are also irrelevant, except for anything in relation to the contributions, if any, made by the defendants towards the purchasing of any properties in Australia, or in relation to making any deposits on their own into the joint bank account.

26. It is to be observed that the defendants hereof have not prayed for any relief, except for the dismissal of the Plaintiff's action with costs. Thus, I shall endeavour to ascertain whether the totality of the evidence, adduced by and on behalf of both the Plaintiff would provide me cogent and compelling reason/s to arrive at a finding on the existence of a Constructive Trust in equity, as argued by the learned Counsel for the plaintiff or whether the action should be dismissed as prayed for by the Defendants.
27. As far as the question of common interest is concerned, it has to be borne in mind that the defendant's stern position hereof is that the property in question was purchased only for the benefit of both the defendants, while the plaintiff holds a position that the property was purchased for her use and benefits. Thus, the Court is now called up on to decide the actual intention of both the parties, on the preponderance of the evidence adduced.
28. While ascertaining as to what was the intention of the parties at the time material (as to whether Gift or Trust), finding of objective answers to certain issues raised by the parties as per the PTC minutes, also might help and justify the answer to the said pivotal issue highlighted in paragraph 16 above.
29. The issue number 1 above, as per PTC minutes, poses the question whether the defendants have at all the times material made no deposits into the said joint account held by the plaintiff and the 1st named defendant at ANZ Brisbane. It is to be observed that nowhere in the Statement of defence or in the issues raised or at least in their evidence, the defendants have taken up such a position that they had in fact made any deposits into the said Account.
30. The plaintiff's evidence, as substantiated by the ANZ Bank Statement under No-19 of the Plaintiff's Bundle of documents, clearly demonstrates that the only substantial deposits made therein were the proceeds of the sale of the 2 properties owned by the plaintiff and her daughter "PW-1". The fact that those properties had been temporarily transferred to the 1st named defendant for the purpose of securing permanent visa for the 1st Defendant, has not been challenged by the defendants at all.
31. The 1st defendant, except for his claim that he spent few days with the plaintiff in Fiji soon after the, purported, marriage in the year 1995, did not have a single opportunity of going and being with the plaintiff in Australia till the year 2010, which was after a long period of 15 years. The Visa for this visit was, admittedly, made possible for the 1st defendant through a Foot-Ball team. By that time the plaintiff had obtained divorce from the 1st defendant in the year 2000, which proceedings in Australia were uncontested. The impugned Bank Account was opened only on 11th July 2012. Had the 1st defendant contributed in purchasing the relevant properties in Australia or subsequently deposited any funds on his own into the said account, which was highly impossible under the given circumstances, he should have raised it in his statement of defence. He neither did a job in

Australia nor raised any sum of money there or moved funds from Fiji for him to have made any contribution to the Bank balance.

32. His affirmative answer, to a leading question posed by his Counsel under his examination in chief -vide page 109 of the transcript- to the effect "**At the time of the divorce was there any discussion about the property settlement?**" is nothing but an utter lie. Here is a man, who opted not to contest the divorce proceedings, talks about the matrimonial property settlement for the first time after 23 year from the date of the divorce, particularly in the absence of any pleadings in the statement of defence, prayers or in issues raised in this regard.

33. In page 134 of the transcript following questions and answers there to during the cross examination merit the reproduction, which go as follows;

Q: *Did you make any monetary or financial provision for her during the 5 years?*

A: *Yes my lord there was an arrangement between us. She said that you look after yourself there and I'll look after myself in Australia my lord.*

Q: *Thank you Mr. Chandra. So you make no contribution whatsoever to her Australian property, correct?*

A: *When we got married my lord I didn't marrybecause of the greed of the property my lord.*

Q: *So why would Maya want to pay you a half share if you made no contribution whatsoever to the marriage?*

A: *Because we loved each other very much my lord.*

Q: *But Maya Kidman divorced you in 2000, didn't she?*

A: *Yes his lordship.*

Q: *So obviously there was no love then when she divorced you, would you accept that?*

A: *There was love in between us his lordship and we were talking to each other.*

34. Following answers of the 1st named defendant also material in deciding the answer to this issue. Vide page 137 of the Transcript.

Q: *Yes thank you Mr. Chandra but do you accept that that money in the account was Ms. Kidman's alone and not yours?*

A: *The bank advised me my lord they instructed me that the money wherever arrives from in the bank account it belongs to both of us my lord. And they made me do the signature my lord, the bank.*

Q: *So Mr. Chandra when you believe that was both your monies, do you accept though that there was no single dollar put in by you into the account?*

A: **There was no contribution yet my lord.** *They were giving me my lord and I was, like in situation I was not hesitant to have property. I didn't wanted to hurt her my lord. She gave all the things from her heart my lord.*

Q: *Mr. Chandra I am going to repeat my question because I believed that was unanswered. Can you confirm please to this honourable court that not a dollar was put in there that was your money?*

A: **Yes my lord there was no contribution from my side.**

35. Therefore, without any further analysis of his evidence in this regard, I decide to answer the issue number 1 above affirmatively in favour of the plaintiff.

36. As far as the issue number 2 is concerned, which pertains to the 2nd named defendant, the 1st named defendant under his cross examination as per page 160 of the transcript, has accepted that the 2nd named defendant too did not make any contribution towards the

acquisition of properties in Australia, and none of them is entitled for any shares as per the Australian Laws.

37. The 2nd named defendant in his evidence has accepted that he too did not make any contribution for the acquisition of the properties. He pleads ignorance as to what transpired during the transfer of the disputed property in their favour (vide page 191 of the transcript). He appears to be supporting the claim of the 1st named defendant, with no any valid ground to sustain his claim, by merely saying that Maya Kidman promised with him too to buy a property for both of them.
38. The evidence clearly demonstrate that the Plaintiff and her daughter PW-1, having disposed the ancestral and other properties in Australia, had decided to reside in Fiji.
39. In preparation for the settlement for the intended property in Fiji, the deceased Plaintiff and her daughter "PW1" had disposed the respective properties in Australia, deposited the sale proceeds on 23rd July 2012 and on 7th August 2012 respectively into the joint account that the deceased Plaintiff had opened on 11th July 2012 inserting the 1st named defendant as a mere joint account holder. The evidence clearly demonstrate that the deceased Plaintiff, who had already come and settled down at the 1st named defendant's place in July 2012, proceeded to Australia on 25th January 2013 and had on 29th January 2013 remitted AUS \$ 300,000.00 to Mr. Lodhia's Account in Fiji for the 1st named defendant to look for and buy a property for the plaintiff to live in Fiji.
40. It is not in evidence that the plaintiff had intended to have the 1st or the 2nd defendants to reside with her and her daughter in the new property to be purchased in Fiji. However, the defendant's position is that the sole intention was to buy a property for them and not for the Plaintiff.
41. The evidence shows that, due to various issues the deceased Plaintiff and her daughter had to face at the 1st named defendant's place in Drasa as the captives of the defendants, on 30th April 2013 they had to escape from and leave the place with the intervention and the assistance of the Police and the grand Mother of the PW-1, who happened to be the Mother of the Plaintiff. Given the circumstances, in my view, the evidence of the "PW-1" that there was threats to them during their stay at the 1st named defendant's place in Fiji is not to be taken lightly. It was the subsequent wife of the 2nd named defendant, namely Ms Poonam Devi, had alerted the plaintiff and her daughter about certain impending danger. The defendants could have rebutted this allegation by calling the said Poonam Devi. But for the reason best known to the defendants, she was not called. It clearly appears that the absence of the deceased plaintiff and her daughter after 30th April 2013 had been a conducive atmosphere for the defendants to have their surreptitious plan executed by having the disputed property transferred and registered in their names, by keeping the plaintiff and her daughter in total dark.
42. The overall evidence and the circumstances clearly demonstrate that the joint account in question was opened for the sole purpose of having the sale proceeds deposited therein, and to have the required amount remitted for the purchase of their own house in Fiji with the assistance of the 1st named defendant, who had by that time managed to convince the deceased plaintiff to do so. The plaintiff did acted accordingly by placing her complete trust in the 1st defendant, which was later breached as alleged by the plaintiff.

43. The claim made by the 1st defendant that the funds in the joint Account was fully owned by him is not supported by any documentary or other evidence, and the Court finds that his claim is an unconscionable act on the part of the 1st defendant. The annexure no-21 in the Plaintiff's bundle of document shows that it did not at all require the signature of the 1st named defendant to remit the money. Only the deceased plaintiff had signed and authorised it. This, among the other evidence, demonstrate that the funds were fully owned by none other than the plaintiff Maya Kidman. The 1st defendant, who had, admittedly, not contributed to the Bank deposit, with no any recognised standing in Australia or a valid claim against the deceased plaintiff, could not have made any claim for the money in the joint Account with the plaintiff. His claim is frivolous and vexatious, which demands denunciation.
44. The overall evidence adduced, convinces this Court that the defendants hereof have calculatedly coerced and convinced plaintiff and her daughter, firstly to transfer their Australian properties in both the defendant's names, and thereafter caused them to dispose those properties and the funds to be deposited in a joint account, and finally to transfer the funds to Fiji in order to achieve their ulterior motive of buying a property in Fiji at the expense and detriment of the deceased Plaintiff and her daughter. The 1st defendant has breached the Trust that the Plaintiff had placed in him to the effect that he would assist her in buying a property for her in Fiji. I find that all the issues raised hereof should be, necessarily, answered in favour of the Plaintiff.

Common Intention:

45. It is demonstrated through the evidence of the "PW-1" that her Mother, the original plaintiff has had the intention of buying a property in Fiji through the assistance of the 1st named defendant, who had apparently volunteered to act as an agent of the plaintiff in Fiji. There is no evidence to show that the plaintiff had any justifiable reason to buy a property in Fiji for the benefit of the defendants. She had disposed her valuable properties in Australia in order to fund this purchase. The plaintiff also had got her daughter to dispose her half share in another property and had obtained a loan from her to fulfil this requirement.
46. As per the evidence, she has not had any specific reason to buy a house for the benefit of the defendants in Fiji by financing it in the aforesaid manner. The 1st defendant has taken the deceased plaintiff to show the intended property to be purchased. Why the 1st defendant should take the plaintiff if the property was not for the plaintiff.
47. The evidence in chief of the "PW-1" in page 20 of the transcript merits the reproduction which goes as follows.

Q. Did your mother ever talk to you about purchasing property in Fiji?

A: Initially she didn't, but after she had seen the two defendants took her around to the Kennedy Avenue property then she told me that she was interested in purchasing a property.

Q: Ms. Mason I'd like you to be clear about this. Was the property your mother wanted to purchase, was that for herself or was that for someone else?

A: She wanted to purchase it for herself my lord. She wanted to move from Brisbane to Fiji because the first defendant said it was a good idea for her to move. Maybe she'd get better or whatever it maybe. My mom agreed.

Q: You talked about your mother seeing a property in Fiji, who was it that introduced her to that property?

A: It was the first defendant my lord.

Q: Is it correct that your mother agreed to sell her property to raise funds to buy the property in Fiji?

A: That is correct my lord.

Q: Which property did she sell?

A: 603 Boundary Road, Archerfield my lord.

Q: Were you also asked to sell a property of yours?

A: Yes I was my lord.

Q: Which property did you sell?

A: My inheritance 599 Boundary Road, Archerfield my lord.

Q: So just to clarify again this is a property that you inherited from your father's estate?

A: Correct my lord.

48. The defendants were not homeless persons in Fiji. What the defendants have done after converting the property into their name is renting and earning income at the expense of the Plaintiff and her daughter. If it was a matrimonial property settlement as claimed by the 1st defendant, why should the plaintiff and her daughter come and settled down in Fiji with the defendant in July 2012. Why should he take the Plaintiff Maya Kidman to see the property and take advice from Mr. Lodhia, being introduced by the 1st defendant, with regard to bringing of funds from Australia? (Vide his evidence in page 116 of the transcript.
49. PW -1 has categorically stated about the intention that her deceased mother had to come and settle down in Fiji, which they did in July 2012 as an initial step. Series of questions arose and remained unanswered by the evidence of the defendants. If it was for the matrimonial property settlement, why the money was deposited in the joint Account? And why the plaintiff came and settled in Fiji in July 2012 after disposing the properties in July 2012? Why the funds should be transferred through Mr. Lodhia, who was a stranger to the Plaintiff? Why did the 1st named defendant travelled to Brisbane on 25th January 2013, along with the Plaintiff and her daughter, when the money could easily have been remitted to Fiji by him or through Mr. Lodhia, if the money in fact belonged to him?
50. The 1st named defendant knew very well that the funds had to be brought to Fiji for the purpose none other than buying a property for the benefit of the Plaintiff and not to have converted into his use and benefit.
51. The 1st named defendant introduced Mr. Lodhia in to these dealings, in order to convince the plaintiff to part with the funds for his ulterior motive as he was able to give a professional look for the dealing with the intervention of Mr. Lodhia. The 2nd named defendant was used by the 1st named defendant for his wrongdoing, by most generously giving him the co-ownership of the property in dispute at the expense of the plaintiff and her daughter.
52. The 1st named defendant was, allegedly, living together with the 2nd named defendant for over 20 years at his own residence in Matawalu in Fiji. The 1st named defendant, who was

without a permanent job or steady income in Fiji, all of a sudden buys a large property in Nadi for FJ\$475,000.00. What was the need for this at the expense of the plaintiff, unless it was for the plaintiff for her own use and benefit? The subject property still remains let on rent.

53. The defendant's own witness Mr. Lodhia, in his evidence has admitted that Ms Maya Kidman wanted to invest in Fiji. Mr. Lodhia, who initially told that both Prem chandra and Maya Wati wanted to invest in a Residential property and it was going to be purchased in Prem Chandra's and Maya Wati's names, later changed his testimony to suit the defendants and said it was for Prem Chandra and Ajay Prasad. Mr. Lodhia also stated that to his understanding it was matrimonial property settlement. This in fact is the straw that the defendants were clutching at last to come out of the water.
54. He also said that both Maya Wati and Prem Chandra had met him around 10 times in a short span of time to discuss about bringing the funds and buying the property. The pertinent question that arises is that if it was a matrimonial property settlement, and the property was to be purchased for the defendants in their names alone, why the plaintiff Maya Wati should have taken trouble in having to travel up and down, after disposal of valuable properties in Australia that belonged to both mother and daughter. Mr. Lodhia's evidence in this regard is totally unreliable and cannot be accepted and acted upon. Clearly, he was a biased and twisting the evidence to suit the defendants.
55. The position taken up by the 1st defendant in his evidence that the plaintiff Maya Kidman bought the property in question for him owing to the love she had towards him is ludicrous. If the love towards him was so deep to the extent of losing the valuable properties belonged to her and her daughter, number of questions arise as to why did the plaintiff divorce him in the year 2000, Why they didn't get remarried after meeting him in the year 2010, Why she had made a complaint against him to the Police in Fiji, and why should he come up with the purported property settlement claim, in his evidence for the first time, after 23 years, in the absence of an iota of pleadings on it? All these questions remained unanswered. However, the evidence of the "PW-1" to the effect that her mother intended buy the property in Fiji only for herself has remained unchallenged by the defendants.
56. If "PW-1" Amber Louise Manson had intended to give the 2nd defendant his share of her property, then why should it go through the 1st defendant's so-called joint account? The position maintained by the 1st defendant was that all the monies in the said joint Account with Maya Kidman belonged to him, to be used at his will. This claim negates the 2nd defendant's claim, if any, against the "PW-1" Ms Amber, as the 1st defendant claim that the entire money in the account belongs to him. The 2nd defendant did not take part in the process of remittance of funds or house purchasing and transfer of it. He was a silent partner until the 1st defendant achieved his goal. The plaintiff's evidence in relation to whole transactions remained strong and the defendants failed to challenge appropriately and debilitate it.
57. The plaintiff and her daughter, having disposed their properties in Australia and remitted necessary funds for the purchase of a house for them in Fiji, come all the way to start a new life in Fiji and took temporary residence at the 1st defendant's place, to see finally that the 1st defendant had converted the property into his and the 2nd defendant's names. Clearly, no evidence adduced to show that there was even a semblance of love or affection

towards the defendants from the plaintiff or her daughter, being the consideration for the purported gift, as claimed by the 1st defendant.

58. The overall evidence demonstrate that the sole purpose of the transfers of the first property unto the 1st defendant by the plaintiff Maya Kidman in Australia, by way of gift was only to facilitate the permanent visa status for him in Australia. The proceeds of the sale of this property ended up in the joint account as coerced by the 1st defendant. The daughter too, adhering to her mother's request, allowed the proceeds of her half share in the other property also to be deposited to the said joint account. A sum of AUS \$300,000.00 was remitted by the plaintiff with the only hope of buying a house in Fiji for the Plaintiff by placing the utmost trust in the 1st defendant, who finally left her down the garden path.
59. The evidence also show that the 1st defendant agreed to assist the plaintiff in purchasing a house in Fiji and accordingly caused the plaintiff to remit the funds through Mr. Lodhia. After successful remittance, the 1st defendant had taken the plaintiff for discussions with Mr. Lodhia and to see the subject property in Nadi. But, the plaintiff and/ or her daughter were not taken to see the Solicitor, who officiated the Agreement to sell and the Transfer. Careful analysis of the entire process clearly shows that the 1st defendant did everything with the sole purpose of converting the property for his benefit. Maya Kidman knew nothing about this plan orchestrated by the 1st defendant and that the trust placed by her would be breached by failing to honour the expressed under-taking given to her by the 1st defendant.
60. Undoubtedly, the 1st defendant was a fiduciary to the plaintiff Maya Kidman, by placing himself in a position of a trustee to act as per the undertaking given by him unto the plaintiff to buy the property in Fiji in her name. He has breached the trust by not having the property registered in her name, by attending the necessary formalities. Thus, both the defendants are answerable to the plaintiff. I am inclined to follow the decision in *Abe v Azim [2010] FJHC34; HBC 144 of 2006 L (22nd January 2020)* in this regard.
61. The defendants who initially took up the position that the transfer of the money was a gift, take up a subsequent position that they wanted to buy a property in Fiji and the plaintiff provided monies for them.
62. The position put forward on behalf of the defendants that their claim was on account of alimony settlement goes against their position taken up in their statement of defence, wherein they have said that the plaintiff wanted to buy a property in Fiji for both the defendants; and the money that was lying in the joint account belonged only to the 1st defendant. This contradictory position should necessarily go against the defendants.
63. The facts and circumstances in the case in hand convince me to fall in line with the decision of Hon. Justice. D. Wickramasinghe- (As she then was) in *Nair V Raman [2012] FJHC 1019; HBC 107 2006 L (13th April 20012)*.
64. Learned Counsel for the defendants in his written submissions seem to be finding fault with the propriety of the pleadings on the part of the plaintiff. Once the agreed facts and issues are recorded and accepted by the PTC minutes, the trial proceeds on those agreed facts and issues. The pleadings go to the back seat. Now the defendants cannot revisit the pleadings.

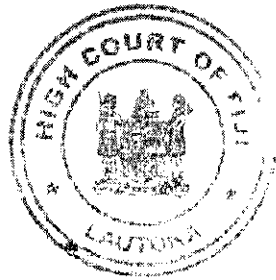
65. I have found, as stated above, that the major parts of evidence led by both the parties at the trial are redundant as there were no issues to be tried by analysing such evidence. The matters pertaining to the party's first meeting and introduction to each other in 1995, their purported marriages, making Visa applications and rejection thereof and the subsequent visits made by the defendants to Australia were not in issue. The purported Matrimonial Property Settlement was neither in the pleadings nor in the issues framed.
66. It is true, as alluded to by the counsel for the defendants, that there was no allegation of fraud specifically pleaded with regard to the title of the defendants. All what the Plaintiff alleges is that the defendants have jointly and severally converted the plaintiff's monies to their own benefit, when the money had been remitted by the plaintiff on trust placed on the 1st defendant for the expressed purpose of purchasing a property for the plaintiff.
67. The Plaintiff has correctly taken up a position that the defendants are holding the certificate of title No.11093 in favour of the plaintiff on constructive trust. The plaintiff does not move to have the defendant's title cancelled or nullified on the basis of fraud, though certain elements of fraud is, obviously, present in the activities of the defendants.
68. Accordingly, what the plaintiff is praying for as a substantial reliefs are a declaration that the defendants are holding the property in trust for her, and for a further relief of transferring of the property unto her name from the defendants or alternatively for the repayment of the full amount so remitted with interest. Thus, the argument advanced by the counsel for the defendants will not hold water.
69. For the reasons discussed above, this Court arrives at the finding that the defendants in this case were and are holding the disputed property on trust on behalf of the plaintiff Maya Kidman, after it was purchased by the defendants making use of the funds made available by the plaintiff Maya Kidman. The claim of constructive trust by the Plaintiff should succeed.
70. The transfer of funds in a sum of AUS\$ 300,000.00 on 29th January 2013 from the joint Account # 2996 05820 held by the plaintiff at ANZ Brisbane, unto the Account # 0190 95000 8192319 held by Mr. C. Lodhia at ANZ Nadi Branch in Fiji, was not for any purpose other than buying a property in Fiji for the plaintiff in her name assisted by the 1st defendant. Sadly, the 1st defendant has breached the fiduciary duties as a trustee and / or agent of the plaintiff Maya Kidman, by having the transfer and the registration of the title of the subject property executed in his own name and that of the 2nd defendant.

H. FINAL ORDERS:

- a) It is hereby declared that the 1st and 2nd defendants hold the subject property in trust for the plaintiff/ estate.
- b) It is ordered that the 1st and 2nd defendants **immediately** transfer the said property unto the plaintiff/ her estate, at their costs.
- c) The 1st and 2nd defendants are ordered to submit a Statement of Account of all monies received by them as income from and out of the said property since the

date of transfer unto their names, and further ordered to pay such monies to the plaintiff's estate within 6 weeks from the date of this judgment.

- d) Alternatively, a judgment is entered in favour of the plaintiff in a sum of **F\$514,751.00** (Five Hundred Fourteen Thousand and Seven Hundred Fifty One Fijian Dollars), being the funds sent by the Plaintiff for the purchase of the property, as prayed for in paragraph 4 of the prayer to the statement of claim, to be paid with interest within 6 weeks from today.
- e) The defendants shall pay Interest on account of relief (d) above, under the Law Reform (Miscellaneous Provisions) (Death & Interest) and Cap 27, from 12th April 2013 till the date of payment in full.
- f) Costs on an indemnity basis, if not agreed.



A.M. Mohamed Mackie
Judge

At the High Court of Lautoka on this 16th day of October, 2023.

SOLICITORS:

For the Plaintiff:

Messrs: Fazilat Shah Legal, Barristers & Solicitors

For the Defendants:

Messrs: Anil J Singh Lawyers, Barristers & Solicitors