

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 263 of 2020

BETWEEN : **YOGESH CHAND** of 1 Daffodil Drive, Keysborough,
Melbourne, Victoria, 3173, Australia.

PLAINTIFF

AND : **AJESH CHAND** of 53 Calaisa Circuit, Cranbourne West,
Melbourne, Victoria 3977, Australia.

1st DEFENDANT

AND : **AVINESH CHAND** of 8 Ravenswood Court, Carrum
Downs, Victoria 3201, Australia

2nd DEFENDANT

AND : **REGISTRAR OF TITLES**

3rd DEFENDANT

AND : **ATTORNEY-GENERAL OF FIJI**

4th DEFENDANT

Coram : **Banuve, J**

Counsels : **Kohli & Singh for the Plaintiff**
No Appearances for the 1st and 2nd Defendants
Attorney-General's Chambers for the for the 3rd and 4th
Defendants.

Date of Hearing : **12 March 2025**

Date of Judgment : **26 May 2025**

JUDGMENT

A. INTRODUCTION

1. A Writ of Summons with a Statement of Claim indorsed was filed on 2 September 2020 plead the following;
 - (i) The Plaintiff and the 1st and 2nd Defendants are brothers and are along with another brother Sudesh Chand are tenants in common each holding $\frac{1}{4}$ share of the property, comprised in CT 42320, comprising an area of one hectare, six thousand, one hundred and eighty nine square meters.
 - (ii) The Plaintiff had instituted Civil Action 371 of 2019 against the 1st Defendant on 6 December 2019 seeking the following orders;
 - a. Specific Performance of an Agreement between the Plaintiff and the Defendant dated 26 July 2019 for the sale by the Defendant to the Plaintiff on his share in the said property.
 - b. If the Defendant fails to execute the conveyancing documents pertaining to the said property then the Deputy Registrar of the High Court execute all the conveyancing documents pertaining to the transfer of the Defendants share to the Plaintiff.
 - c. Damages for breach of contract.
 - d. Costs.
2. On 11 June 2020, a judgment was delivered by Justice Seneviratne that *inter alia* specific performance of an agreement between the Plaintiff and the Defendant dated 26 July 2019 for sale by the Defendant to the Plaintiff of his share in CT 42320.
3. That the orders, as per the judgment, was sealed on 18 June 2020.
4. The Plaintiff lodged a copy of the sealed order with the 3rd Defendant for registration of the same on to the said property.

5. In order to defeat the interest of the Plaintiff, the 1st Defendant executed a transfer of the said property by way of love and affection in favor of the 2nd Defendant on 10 October 2019.
6. The 2nd Defendant was aware of the sale agreement that was mutually agreed between the Plaintiff and the 1st Defendant at all material times.
7. The acts of the 1st and 2nd Defendant in the conveyancing transaction was fraudulent.

Particulars of Fraud

- a. The 1st Defendant executing a Transfer in favor of the 2nd Defendant knowing full well that Civil Action 371 of 2019 was pending against him.
 - b. The 2nd Defendant accepting the transfer of the 1st Defendant's ¼ share knowing full well that the Plaintiff and the 1st Defendant had already entered into a sale agreement.
 - c. The 1st and 2nd Defendants colluding to defeat the interest of the Plaintiff whereby the 2nd Defendant paid no consideration for the ¼ share he received from the 1st Defendant.
8. The Plaintiff prays that;
 - a. The transfer of the property comprised in CT 42320, Lot 2, DP 10095 from the 1st to the 2nd Defendant be set aside;
 - b. The 1st Defendant to abide by the orders of Justice Seneviratne made on 11 June 2020.
9. The 1st and 2nd Defendants had filed a Statement of Defence on 11 December 2020.
10. The Defence filed by the 1st and 2nd Defendants was struck off with costs by the Acting Master on 11 March 2024 on the basis of non-appearance personally or by

counsel to progress their case, and the matter to proceed only against the 3rd and 4th Defendants.

11. The 3rd and 4th Defendants filed a Statement of Defence on 8 December 2020.
12. The Plaintiff filed written submissions on 2 April 2020, which the Court has found of assistance in clarifying its position.

B. THE PLAINTIFF'S POSITION

Issues to be Determined.

13. **Whether or not Transfer No 892064 from the 1st Defendant to the 2nd Defendant should be set aside?**
 - (i) In his evidence at trial, the Plaintiff informed the Court that he had entered into a Sale and Purchase Agreement with the 1st Defendant, on 26 July 2019, for the purchase of the property described as CT 42320, Lot 2, DP 10095 for the sum of \$37,000.00, which the latter did not intend to honor, leading to the filing of Civil Action No. 371 of 2019 against him. An order for specific performance of the Agreement of 26 July 2019 was obtained against the First Defendant on 11 June 2020 and perfected on 18 June 2020.
 - (ii) Upon production of the Orders with the Registrar of Titles the Plaintiff was advised that the 1st Defendant had transferred CT 42320 Lot 2, DP 10095 to the 2nd Defendant vide Transfer No 892064, executed on 10 October 2019 and registered on 17 June 2020.
 - (iii) In his evidence, the Plaintiff also informed the Court that the 1st Defendant had already been paid a deposit of \$3,000.00 towards the purchase of CT 42320, Lot 2, DP 10095 and that the 2nd Defendant was fully aware of the Sale and Purchase Agreement as prior to the purchase there was a discussion between the 4 brothers in which there was agreement that the Plaintiff would purchase the 1st Defendant's ¼ share at fair market value.
 - (iv) The Plaintiff was not a bona fide purchaser for value as the transfer was done by way of love and affection.

C. THE LAW

14. Upon the registration of a dealing regarding Torrens system land, indefeasibility of title is conferred, regardless of any invalidity or defect in the instrument registered or in the process leading up to registration, subject to a number of exceptions, the relevant one, in this instance, being fraud. In order for the fraud exception to apply, the fraud must be brought home to the registered proprietor or to his or her agent-*Assets Co Ltd v Mere Roihi* [1905] AC 176.
15. The precise content of what constitutes statutory fraud is unclear as fraud is not defined in the *Land Transfer Act* [Cap 131],¹ and so the meaning to be ascribed to fraud, has largely been left to the courts.
16. A comprehensive definition of fraud was provided by the Privy Council in *Assets v Co Ltd v Mere Roihi*²;

“ by fraud...[what] is meant [is] actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud...Further...the fraud which must be proved in order to invalidate the title of a registered purchaser for value...must be brought home to the person whose registered title is impeached 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 shewn 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 of fraud, if he honestly believes it to be a genuine document which can properly be acted upon ”
17. Courts have considered fraud as not including constructive or equitable fraud, but entails actual fraud, i.e., dishonesty of some sort, which is ‘brought home to the registered proprietor or his or her agent’. Fraud by whom the registered proprietor claims title does not affect the registered proprietor, unless the current registered

¹ Section 2(1), also- Skead & Carruthers-“Fraud Against the Registrar –An Unnecessary, Unhelpful and No Longer Relevant Complication in the Law of Fraud Under the Torrens System”-*Monash University Law Review* (Vol 40, No 3)

² [1905] AC 176, 210

proprietor or agent had knowledge of the fraud or failing to make inquiries when suspicions are aroused.

18. Indefeasibility of title is part of the law of Fiji. Title to land passes on registration of an instrument regardless of any invalidity or defect in the registered instrument.³

D. ANALYSIS

19. The Court notes that the competing interests which it must address are the unregistered interest of the Plaintiff, on one hand, against the registered interest of the Second Defendant over property covered by CT 42320, Lot 2, DP 10095, on the other.
20. Whilst the allegation of fraudulent conduct are levelled against the First Defendant, he had transferred the title to CT 42320 to the Second Defendant on 10 October 2019, so when the order for specific performance was issued against him in Civil Action No 371 of 2019, on 18 June 2020, he was no longer the registered proprietor of the subject land, thus the Third Defendant refused to register the said order for specific performance against the subject title, on that basis.
21. In order to succeed in this suit, the Plaintiff must establish that the Second Defendant had knowledge of the fraudulent conduct of the First Defendant, and it was brought home to him or his agent, or he had failed to make enquiries when his suspicions were aroused. If the Plaintiff is unable to do this, then the Second Defendant's title is indefeasible, as against the Plaintiff, regardless of any invalidity or defect in the process leading to registration.
22. The determination of this issue lies at the heart of the principle of immediate indefeasibility introduced under the Torrens system of land registration, and proof of fraud, as the limited exception to indefeasibility, particularly in the peculiar instance, as here, where an unregistered proprietor has been defrauded of his interest.⁴

³ *Subramani v Sheela* [1982] 28 FLR 82; *Star Amusement Ltd v Navin Prasad & Others* –CBV 0005 of 2012;

⁴ The other category is where a prior registered interest has been defrauded of his or interest. -Skead and Carruthers –“Fraud against the Registrar”, Faculty of Law-University of Western Australia.

23. The fraudulent conduct which the Plaintiff is said to have committed was in entering into a Sale and Purchase Agreement with the 1st Defendant on 26 July 2019, for the purchase of CT 42320, Lot 2, DP 10095 for the sum of \$37,000.00, and accepting the payment of a deposit of \$3,000, and then subsequently executing a transfer of the said property to the 2nd Defendant on 17 June 2020, with a nominal consideration, (*love and affection*) and despite the subsistence of a civil proceeding (Civil Action 371 of 2019) for specific performance against him.
24. The issue is that the First Defendant is no longer the title holder to the subject property, rather the Second Defendant is the holder of title. In order to invalidate his title the Plaintiff needs to establish that fraud was “brought home” to the Second Defendant,⁵ and the Plaintiff must;
- (i) Establish ‘**actual fraud**,’ dishonesty of some sort, not constructive or equitable fraud;
 - (ii) Fraud against the First Defendant from whom he obtained title does not impeach the title of the Second Defendant, unless he had knowledge of the fraud, in the manner to be discussed.
 - (iii) Alternately, evidence must establish that the Second Defendant’s suspicions were raised about the First Defendant’s conduct, but that he abstained from making further enquiries for fear of discovering the truth.

Evidence of Fraud-The Second Defendant

25. The Court accepts that there may have been some element of dishonesty in the conduct of the First Defendant that amounts to ‘statutory fraud,’ as clarified by the Privy Council in *Assets v Mere Roihi*, and section 40 of the *Land Transfer Act* [Cap 131], that may impeach the title of the Second Defendant, if he knew of the questionable conduct of the First Defendant *or* despite having his suspicions, chose not to investigate it further.

⁵ *Assets Company Ltd v Mere Roihi* [1905] AC 176 at 210 and *Cassegrain v Gerard Cassegrain & Co Pty Ltd* [2015] HCA 2, paragraph 32.

26. The Plaintiff particularizes fraud against the Second Defendant as follows, in paragraph 109 (b) of the statement of Claim;
- a. *The 2nd Defendant accepting the transfer of the 1st Defendant ¼ share knowing very well that the Plaintiff and the 1st Defendant had already entered into a sale agreement.*
 - b. *The 1st and 2nd Defendants colluding together to defeat the interest of the Plaintiff and 1st Defendant whereby the 2nd Defendant paid no consideration for the ¼ share he received from the 1st Defendant.*
27. Did the Second Defendant know of the fraudulent conduct of the First Defendant or the prior unregistered interest of the Plaintiff in the subject property (CT 42320), before it was transferred to him by the First Defendant on 17 June 2020?
28. Awareness or knowledge in itself may not be sufficient to establish statutory fraud against the Second Defendant. This is evident in the wording of section 40 of the *Land Transfer Act* [Cap 131] itself. which states;
- “Except in the cases 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 provisos of this Act shall be required or in any manner concerned to inquire or ascertain the circumstance 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 any unregistered interest (underlining and italics for emphasis)*
- (i) Whilst fraud was particularized in the Statement of Claim, against the Second Defendant, no affirmative evidence was adduced by the Plaintiff to prove that the Second Defendant *knew* of the alleged fraudulent conduct of the First Defendant. The Court notes that section 40 of the Act, affirms that there is no duty placed on the Second Defendant to inquire into whether the property transferred to him by the First Defendant on 17 June 2020, was affected by a prior unregistered interest of the Plaintiff.⁶

⁶ *Savusavu Airport Heights Ltd v Fong* [2011] FJHC 707; HBC281.2010 (3 November 2011) per Master Amaratunga

- (ii) Further, the Plaintiff did not affirm through evidence that the Second Defendant was 'wilfully blind' to the fraudulent conduct of the First Defendant. Some assistance on what may constitute 'wilful blindness' may be derived from the comments of Tadgell, J in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133;

'a form of cognizance, which law and equity alike equate to subjective knowledge from which dishonesty may be inferred... [which is] more than a failure to see or look ...[and] connotes a concealment, deliberately and by pretence, from oneself – a dissembling or dissimulation. In other words wilful blindness connotes a form of designed or calculated ignorance'

- (iii) No evidence was adduced by the Plaintiff, at trial, to establish wilful blindness on the part of the Second Defendant, in relation to the fraudulent conduct of the First Defendant.
- (iv) Rather than affirming that the Second Defendant knew of the fraudulent conduct of the First Defendant, the Plaintiff affirmed rather, that he could not prove fraud against the Second Defendant, as illustrated in these passages from the **Transcript of Court Proceedings**;

Ms Singh: Now can you tell us why are you trying to plead fraud against Avinesh Chand as well.

Mr Chand: Because he knows very well that the land was sold to me. Ajesh's ¼ it was sold to me and he knew very well . And he was convincing Ajesh and influencing him to sell it to him and cut Yogesh from there and sell it to him.

His Lordship: Is there evidence of it?

Mr Chand: No

29. In short, the Court finds that the Plaintiff has not discharged the burden of proving on the balance of probabilities, that the Second Defendant knew of the alleged fraudulent conduct of the First Defendant, (transferring the subject property to him on 17 June 2020 despite entering into an Agreement for Sale of

CT 42320 to the Plaintiff on 26 July 2019 and the subsistence of Civil Action No. 371 of 2019, against the First Defendant), nor, did he establish, through evidence, that the Second Defendant suspected the First Defendant of fraudulent conduct, prior to transferring the subject property to him on 17 June 2020, and willfully turned a blind eye to it.

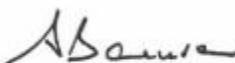
30. There is one final issue that the Plaintiff relies on to impeach the Second Defendant's title , that being the Second Defendant was not a bona fide purchaser of value of the subject property, (CT 42320) ,from the First Defendant, as the transfer was done by way of love and affection. The Court is of the view that this ground does not assist the Plaintiff, if fraud and/or unconscionable conduct has not been established, in evidence. Assuming no proof of consideration was provided for the transfer from the First Defendant to the Second Defendant, it can be described as a voluntary transfer or gift.⁷The fact that the document was devoid of consideration made it incomplete and uncertain, but did not amount to fraud.⁸

ORDERS

1. **The Relief sought in the Writ of Summons, with indorsed Statement of Claim, filed on 30 April 2024 are refused and dismissed.**
2. **Parties to bear their own costs.**

Dated this 26th day of May, 2025.




Savenaca Banuve
Judge

⁷ *Kumar v Wati* [2017] FJCA 126;ABU0011.2014 (14 September 2017)

⁸ *Muschinski v Dodds* [1985] HCA 78;(1985) 62 ALR 429 at 452 per Deane, J