AUSTRALASIAN CONFERENCE ASSOCIATION LTD v MERE SELA and Ors (HBC0357 of 2005)

HIGH COURT — CIVIL JURISDICTION

COVENTRY J

20, 21 September 2006, 31 January 2007

Real property — ownership — application for order to vacate land — whether payment of rents to Plaintiff acknowledged ownership of property — whether Defendants have equitable right for being in property passed upon them by Fijian customary manner — Plaintiff upon acquiring land failed to remove Defendants and forebears — Plaintiffs estopped from removing Defendants who are original grantees or direct descendants of original grantees and currently living on land — Constitution s 40(2)(b)(i)–(v) — High Court Rules O 113 — Land Transfer Act (Cap 131) ss 39(2), 42, 169, 178.

The Plaintiff Association purchased a parcel of land and registered the property in its name. Part of the property included the land upon which the Defendants and their ancestors were permitted to settle in the 1930s. In January 2005, the Defendants were required to vacate the land but they refused to do so.

The Plaintiff sought an order for the Defendants to vacate the land. It claimed to have permitted the Defendants to remain on the land for decades but that did not give them any title or right to remain there. It contended that it collected rent from the Defendants, hence, the Defendants acknowledged the Plaintiff's long-term ownership of the property.

The Defendants argued that they had an equitable right to be on the property. They contended that the land was passed upon them by the Fijian customary manner. They also claimed that the Plaintiff accepted their presence and it encouraged them to develop the property.

Held — (1) The court found that, under the circumstances, the estoppel could only extend to the original grantees and their direct descendants.

(2) The court found that the original permission was in perpetuity subject to the performance of customary obligations. There must be, in effect, the following three conditions:

(a) continuity of occupation;

(b) by the direct descendants of the original grantees; and

(c) the due performance of the custom obligations.

(3) If any of the obligations were not observed the right to remain on the land would be lost. Further, if a direct descendant never lived on the land or already moved to live elsewhere then he or she was not protected. Similarly, if a direct descendant now living on the land moved off the land in future then he or she could return with the protection of the estoppel.

(4) The court refused to make a declaration that the Plaintiff was entitled to possession of the whole of the land described in Certificate of Title No CT 7168.

(5) The court made a declaration that the Plaintiffs were estopped from removing those Defendants who were the original grantees or the direct descendants of the original grantees and who currently live on the land from that part of the relevant land according to the three obligations set out above.

Application dismissed.

Cases referred to

Hardeo Prasad v Abdul Hamid ABU0059/2004; [2004] FJCA 10; *Waimiha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd* [1923] NZLR 1137; [1923] GLR 353; *Plimmer v Wellington City Corporation* (1884) 9 App Cas 699, cited.

Inwards and Ors v Baker [1965] 2 QB 29; [1965] 1 All ER 446; [1965] 2 WLR 212; *Waltons Stores (Interstate) Ltd v Maher and Anor* (1988) 164 CLR 387; 76 ALR 513; 62 ALJR 110, considered.

I. Roche and *S. Leweniqila* for the Plaintiffs

A. Singh for the Defendants

S. Shameem, *M. Tubuna* and *B. Devi* for the Human Rights Commission

[1] Coventry J. From the mid to late nineteenth century and into the twentieth century many Solomon Islanders were brought to Fiji to work. According to the affidavits before me, in the mid-1930s Tamavua-i-Wai was overgrown virgin bush and scrub. The area known as Tamavua is now part of the conurbation of Suva, the capital of Fiji.

[2] The Defendants say that in the 1930s the Solomon Island people were living scattered among other communities. In 1935 they presented a traditional request to the chief, head of the Yavusa, the owners of Tamavua land. They explained their plight to the chief. Traditional presentations were accepted and the Solomon people were permitted to establish a settlement on the land. It was called Tamavua-i-Wai meaning Tamavua-on-the Water. To this day, the relationship with the Tamavua land owners has continued and is expressed in a customary way by attending customary occasions including funerals and weddings, and cleaning cemeteries when requested.

[3] The Australasian Conference Association Ltd, the Plaintiffs, state that on 13 April 1949 they purchased the land in Certificate of Title 7168, Lot 2 on DP 1518 at Princes Road, Tamavua. Part of that land includes part of the land upon which the Solomon people were permitted to settle in the 1930s. That overlapping area is the land in question in this case.

[4] Tamavua-i-Wai is roughly oblong in shape and runs along one side of the Tamavua River. The registered land titles for that area are also roughly oblong in shape but run at right angles to the Solomons settlement, with Tamavua-i-Wai extending over the river ends of the properties. The other ends run along Princes Road.

[5] Some 40–50 people live on the land in question. Most are the children and grandchildren, and their respective spouses, of the original settlers. A few elderly people have been living there since very early on. There are a number of houses of basic construction on the land, most of which have been connected to mains electricity and mains water. There is a small shop and a church.

[6] The Defendants say they were given the right to remain in perpetuity upon this land according to the laws and norms of the then prevailing system of land tenure and ownership. They say the Plaintiffs, whatever their registered title might be, cannot now remove them. Some residents of Tamavua-i-Wai from other areas of land have regularised their positions by getting state leases.

[7] The Plaintiffs, the Australasian Conference Association Ltd, ask for an order for vacant possession of the land. They state that on the 13 April 1949 they purchased the land. They have good registered title. Further, prior registered titles can be shown going back to the end of the nineteenth century. The system of land registration does not allow any person to go behind what is on the face of the register, save in a case of fraud.

[8] The Plaintiffs say that they have permitted the Defendants to remain on the land for decades. However, that does not give them any title or right to remain there.

[9] On 7 April 2004 the Plaintiffs held a meeting with the Defendants and informed them of their plans, which necessarily required the Defendants to vacate the land. They offered assistance and support in doing this. On 20 January 2005 letters were sent to the Defendants requiring them to vacate the land by 28 April 2005. The Defendants did not vacate the land.

The Plaintiff company is described as a subsidiary of "the Seventh Day Adventist Church's Trans Pacific Union Mission", (see para 1 affidavit of Waisea Vuniwa, filed on 2 June 2006). At other times the title "Central Pacific Union Mission" is used.

[10] An amended originating summons was filed by the Plaintiffs on 28 April 2006. That reads:

> By this summons which is issued on the application of the plaintiff Australasian Conference Association Limited of Princes Road Tamavua the plaintiff seeks the determination of the court on the following questions:
>
> 1. A declaration that the plaintiff is entitled to possession of the whole of the land described in Certificate of Title No CT7168;
> 2. A declaration that the defendants have no legal or equitable right to remain in occupation in any part of the said land;
> 3. A declaration that any purported transfer by Tamavua landowners in respect of the said land confers (sic) any interest paramount to the plaintiff's title;
> 4. An order that a Writ of Possession of the said land do issue;
> 5. Such further or other order as this Honourable Court considers appropriate;
> 6. An order that the defendants pay the plaintiff's costs of and incidental to these proceedings.

[11] By an earlier originating summons, the Plaintiffs had brought proceedings under O 113 of the High Court Rules for summary removal of the Defendants claiming that they had no right to be on the land and were squatters. By a judgment dated the 3 April 2006 I refused to grant any order under O 113. To save time and cost leave was granted, within these proceedings, to file the amended originating summons now being considered. It should be noted that at the time of that judgment there was only proof of registered title dating from the late 1940s.

[12] This case throws into sharp focus the problems that arise when there is in existence one system of land rights and ownership to which people adhere and have adhered for centuries and another is superimposed upon it. There are many and complex considerations. If the two systems of rights and ownership are the same or similar then few problems arise. When they are wholly different, great problems arise. These problems have exercised the minds of governments, administrators, chiefs and peoples throughout many countries. There have, with a greater or lesser degree of success, been provisions and programmes to resolve these difficulties.

[13] There have been changes away from systems of land tenure which incorporate spiritual involvement with land, which are based on group ownership, which preclude alienation, which allow the conferring of rights from gathering coconuts through to occupation for lengthy periods of time, and which are not recorded in writing.

[14] There are systems which allow individual ownership of land to the exclusion of others, its trading as a commercial commodity, the lack of a special relationship with the land itself, the writing down of boundaries and ownership

which, in the absence of fraud, are unassailable and the ability to remove others if their rights do not fit within those prescribed by the formalised written laws of the day.

[15] It is important in modern life for the economic activity and well-being of a country that there be certainty of land ownership, land rights and boundaries. There have been laws placing time limits on the assertion of customary rights, time limits on the acquisition of legal rights by prescription and their extinguishment once the time limit has passed.

[16] A disinterested person, who has no knowledge of systems of land tenure, reading this case might well come to the conclusion that it would be unfair to require the Defendants to vacate the land, given the circumstances in which they came into possession, the length of time they have been on the land and the fact the Plaintiffs purchased the land knowing they were there and continued to allow them to remain there for a further 70 years.

[17] On the other hand the Plaintiffs might respond that it is through their own goodness that they did not require the Defendants to leave soon after their purchase of the land. Further, the Defendants have had for the most part free occupation of the land for 70 years when other people were having to pay rent or purchase land to live on. They have given the Defendants plenty of notice, and have offered to help in relocation. They have done everything according to the law and more.

[18] This is a most difficult case in which to make a decision. I am indebted to all counsel for the professional and thorough way in which they have all researched and presented their cases. All parties, particularly the Fiji Human Rights Commission, have carried out long and detailed research not only into the current law but into the history of this piece of land, the titles and ownerships of it going back over a century and indeed to the very history of Fiji on and around this piece of land. The results of those enquiries and searches have been placed before me in various booklets, papers, reports, treaties and other documents.

[19] I also have before me a large number of affidavits as follows:

For the plaintiffs
Lawrence Tanabose — 15th July & 11th November 2005
Paul Moko — 2nd June 2006
Waisea Vuniwa — 2nd June 2006
Tevita Balenivalu — 14th August 2006
For the defendants
Kitione Daniva — 2nd November 2005
Tovilu Adriu — 2nd November 2005
For the Human Rights Commission
Lui Wendt — 2nd November 2005, 23rd March and 27th July 2006
Kitione Daniva — 23rd March 2006
Joseph Camillo — 2nd June 2006
Tovilu Adriu — 27th July 2006
Viliame Tawake — 27th July 2006
Gitanjli Pillay — 27th July 2006
Nichola Rollings — 27th July 2006
Eroni Rakuita — 27th July 2006

[20] The parties have also supplied skeleton submissions. I can do no better in the preamble to this judgment than set out in brief those submissions. The Plaintiffs argue:

(1)–(7) …

(8) There is no issue that on the face of the title the plaintiff's freehold right to the properties is established.

(9) As the defendants had not submitted any further evidence (that is, beyond what was submitted for the Order 113 application) it is submitted that they do not have any grounds to oppose the plaintiff's application.

(10) The FHRC (Fiji Human Rights Commission) submission that granting of the plaintiff's application will deprive defendants of their interest in CT 7168 must not be upheld for the following reasons;

(i) There is no relevant interest enforceable at law or in equity;

(ii) Section 40 of the Constitution;

(a) Confers private rights enforceable against the State, not against another citizen;

(b) Does not operate retrospectively;

(c) Cannot be invoked as the defendants have not established nor has it been determined that they have an interest in CT 7168;

(d) Cannot apply to the defendants as they do not fall within the ambits of definition for a person or body of persons.

(iii) The existence of the original freehold title as Crown grant predates the event upon which the defendants rely. Therefore whether the Tui Tamavua or the Tui Suva granted descendants of Solomon Island labourers some interest in some land at some time in the past is irrelevant.

(iv) Indefeasibility negates all past impediments in title, absent fraud;

(v) The defendants have not established a proper class basis for each of their rights to claim mutatis mutandis, and hence the FHRC argument cannot run unless it is at least established that all the defendants are of Solomon Islands ancestry, which they are not, and hence may only be described as squatters.

[21] The Defendants' skeleton submissions can be summarised as follows:

1. …
2. The defendants rely on the affidavits filed on their behalf in the proceedings …
3. The defendants also rely on the affidavits filed by the intervener, the Human Rights Commission. The defendants say there is a synergy of purpose and the affidavits filed by the intervener can easily be adopted by the defendants.
4. In equity

   The defendants contend that they have an equitable right to be on the property. They were on the property prior to the transfer of the property to the plaintiff herein. The occupation continued when the plaintiff became the registered proprietor. It will be inequitable for the plaintiffs after a lapse of several decades to assert its legal rights when by its conduct it has recognised the status of the defendants to be on the property for more than half a century.

   The defendants are not trespassers on the land. They were given the land by the Fijian customary manner. Besides, the plaintiff accepted their presence on the land. It encouraged the defendants to develop the property.

   It is conceded that a buyer for value without notice acquires a good title. However, the principle does not apply here as the plaintiff had actual notice of the defendants presence on the land and has subsequently dealt with the defendants and acknowledged their presence and occupation for more than half a century.
5. *Adverse Possession*

   The defendants rely on the law relative to adverse possession as contained in the Land Transfer Act. The defendants say they are, in the alternative, entitled to a possessory title.

Traditional common law provided a method for someone to obtain title to land to use and possess. This concept has been recognised and codified in the Land Transfer Act.

(All above ingredients (of adverse possession) are present in the defendants' case.)

6. Breach of Constitutional Rights

The defendants rely on the submissions made by the Human Rights Commission on the above issue.

[22] The Fiji Human Rights Commission's arguments can be summarised as follows:

(History of events and applicable laws)

The defendants rely on their oral history that in 1935 the "subject property" was given to them by the Tamavua land owners …

The defendants assert that if the application of the plaintiff is successful, it would deprive the defendants of their interest in the property, which would result in a breach of section 40(1) of the Constitution. Any acquisition of their interest is, in any event, permissible only for public purposes and is subject to the payment of agreed compensation taking into account all the relevant factors stipulated in section 40(2)(b)(i)–(v) of the Constitution.

4.0 *The history of acquisition of CT 7168 and adjoining lands by the defendants.*

4.1 The Melanesian Labour Trade in the Pacific (a summary of this trade was set out)

4.2 Melanesian Settlements

The Anglican Church took some responsibility for the Melanesians from the 1880s. They say by then there were a number of settlements in existence around urban areas, for example in Flagstaff, Matata and Tamavua-i-Wai.

The Anglicans developed Wailoku near Tamavua to encourage the resettlement of the Solomon Islanders, seeking a government Crown Lease to about 250 acres to do so. This development was not as successful as it could have been due to the Church based nature of the settlement which limited the ability of the Solomon Island people to articulate their identity and culture as had been intended.

Most Solomon Island people still lived around mangrove swamp or "waste land" areas given to them by oral agreements with landowners or by the State for short periods of time.

State officials working in the medical and housing fields always remarked on the unsatisfactory and insanitary conditions in which the Solomon Islanders lived but there was nothing done officially to alleviate their misery.

They were the most impoverished people of the urban centres, subject to the whim of landowners, the state and local authorities …

The Tamavua-i-Wai site, which is the present location of the defendants settlement along the eastern bank of the Tamavua River, was subdivided into freehold lots over time. Apparently there are a number of different freehold title holders who appeared to have bought lots after the defendants settled there in 1935.

The defendants say that the land they were given by the Tamavua landowners carried important social duties and they have fulfilled customary rights and obligations for the land over a period of 60 to 70 years. They do not see themselves as squatters.

5. *Tamavua-i-Wai History of Land Ownership*

5.1 Pre-cession

5.2 The Polynesian Company

5.3 Cession (Including particulars of several articles of the Deed of Cession)

6. Governor Everard Imthurn and the Sale of "Waste" Land: the early 1900s

Conclusion

The land bought by the Polynesian Company appears to be legitimately sold by Cakobau. However, exactly where the boundaries were is unclear from subsequent

claims and counterclaims by shareholders. There also appears to be some significant discrepancies between the acreage marked out and sold in 1869–1871 and that surveyed in 1905 and 1926.

The existence of a Tamavua "reserve", despite Cakobau's outright sale of Suva, is also intriguing. In addition, there are some important considerations arising out of tensions between the Deed of Cession as a legal document, and activities in relation to the Deed engaged in by Governors Gordon and Imthurn with respect to the Joske blocks and the reserve.

In any event, the Tui Tamavua felt entitled in 1935 to give certain areas to the Solomon Islanders for their use and occupation. This is not disputed by the Tui Suva. Solomon Islanders have an interest in the property which cannot be deprived by the State; they are protected by the relevant provisions of section 40 of their Constitution.

[23] The commission's submissions addressed the question of indefeasibility of title and the Torrens system of land registration. Questions were raised as to the exact boundaries and whether there had been a "land grab" of native reserve at some time. Reliance was also placed on the case of *Hardeo Prasad v Abdul Hamid* ABU0059/2004; [2004] FJCA 10 (*Prasad*) quoting the case of *Waimiha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd* [1923] NZLR 1137; [1923] GLR 353 concerning "wilful blindness or voluntary ignorance which according to the authorities, is equivalent to actual knowledge, and therefore amounts to fraud".

[24] The case of *Inwards* (see below) was also relied upon in the alternative to raise an equitable interest.

[25] It is a tribute to all the deponents in this case that there are no significant disagreements on the facts or the history of this land and its occupancy and ownership by various persons. I do note that the Plaintiffs say there are persons on the land who are not Solomon Islanders or descendants of the original grantees. This in itself raises the question whether the Defendants assert their claim as descendants of the original grantees or in respect of any Solomon Islander.

[26] The salient facts are as follows:

(1) On 10 October 1874 the deed of cession of Fiji to Great Britain was signed.

(2) Until independence in 1970 Fiji had its own laws but was overall governed by and according to the laws of Great Britain.

(3) In 1970 Fiji Islands became independent with its own Constitution.

(4) A system of land registration was introduced to Fiji for some of the land from the late nineteenth and early twentieth century. That system was in effect at Independence and has continued without repeal since.

(5) The land which is the subject of this case was apparently first registered in the late nineteenth century. Registered transfers of the property took place after then. Title CT 7168 was issued in January 1947. There are some concerns over exact boundaries.

(6) In 1935 the Fijian chiefs who, according to Fijian custom, had the right to deal with the land in question granted to the Defendants' forebears permission to remain on the land in perpetuity subject to the observance of certain customary obligations. Those customary obligations have been observed.

(7) The Defendants parents and grandparents moved onto the land in 1935 and made their homes there. They did so in the belief they were lawfully there and with the expectation they could stay in perpetuity. The then

registered owners of the land either must have been aware of that fact or in the ensuing years up to the sale of their land have to come to know that fact. If they were wholly unaware, then they cannot have ever visited the land or taken any interest in it. When they did come to know of the presence on the land of the Defendants a few enquiries would have elicited the basis on which they were there. It is likely such enquiries were made and such knowledge gained.

(8) There is no evidence that between 1935 and 1949 the legal title holders of the land did anything to remove the Defendants or their forebears from the land or, indeed, gave any kind of notice or indication stating they were there on sufferance, as bare licensees or squatters.

(9) At the time of subsequent sales, vendors and purchasers must have been aware of the presence of the Defendants and their forebears on the land. Those vendors and purchasers either knew the Defendants regarded themselves as having permission to remain on the land indefinitely or were wilfully blind or voluntarily ignorant of these issues.

(10) The Plaintiffs purchased the freehold title in 1949.

(11) Before the Plaintiffs purchased the land in title CT 7168 in 1949 they must have seen that the Defendants and their forebears were in occupation of part of it. They either made enquires as to who the people on the land were, how they came to be there and how long they had been there or ignored these issues. The Plaintiffs must have become aware that the Defendants and their forebears regarded themselves as being on the land with permission in perpetuity or simply were wilfully blind or voluntarily ignorant of the state of affairs. (Although the case of *Prasad* (above) citing with approval the dictum of Salmon J in *Waimiha* was referred to by the FHRC, there was no specific suggestion of fraud against these Plaintiffs in respect of "wilful blindness or voluntary ignorance".)

(12) After acquiring the land the Plaintiffs did nothing until 2004 to remove the Defendants and their forebears nor, on the face of the affidavits before me, did they serve any kind of notice or make any promulgation that their presence was as bare licensees or squatters. The only assertion of right contrary to the Defendant's interests was the requirement of "rent" from some people at certain times.

(13) There has been from time to time collection of "rent" from some of those on the land. This was sporadic and haphazard and not carried out in any systematic way. No proceedings for eviction were taken when there was a failure to pay the "rent". Some "rent agreements" were signed. The Plaintiffs have in recent years permitted, on application, a number of persons to reside on the land. I will address these issues in more detail later in this judgment.

(14) Over the years a number of dwellings have been constructed on the land. Electricity and water have progressively been laid on for most of the dwellings, a small shop exists and operates, there is a recently built church and parts of the land have been cultivated for the provision of vegetables. Most of this development has been during the period of legal ownership of the Plaintiffs. On the affidavits before me, there has been encouragement or at least no objection to these developments. There have been no warnings they are only permitted upon sufferance. It is

pertinent to note that when electricity and water have been laid on that the permission of the Fijian Tamavua chiefs has been sought and granted.

(15) One of the grandfathers of the Defendants and some of their children are buried on the land.

(16) It was not until 2004, 70 years after first occupation, that the Plaintiffs sought to remove the Defendants. They state they wish to develop the whole site for a "University like campus and possibly new headquarters for Fiji and the region", (para 5, affidavit of Waisea Vuniwa filed 2 June 2006). This is not consistent with the Plaintiffs documents, (tab 12, affidavit of Tevita Balenivalu, filed 14 August 2006) where the intention appears to be to subdivide the land into lots and sell them off, or sell the land as a whole. Nothing fundamental to this judgment turns on this apparent inconsistency.

[27] The Plaintiffs regard the Defendants as "squatters" and removable at any time. It is not known if they sought legal advice at the time of purchase or in the years up to 2003–04 and, if so, what that advice was. It is similarly not known how the Plaintiffs' predecessors in title regarded the Defendants' forebears.

[28] (a) How am I to regard the question of "rents"?

As far as the Defendants forebears were concerned they regarded their presence on the land as being with the permission of the custom landowners and in perpetuity but with the requirement to perform certain custom obligations. The Defendants forebears did not regard themselves as being "the owners" of the land. In my judgment, in the minds of those on the land the fact that there might be a registered title holder of the land did not alter the fact the Defendants regarded themselves as being permitted to remain on the land in perpetuity. The registered titleholder would be in an analogous position to them as the custom land owners.

(b) Further, I do not find the payment of "rent" as such undermines this position. Such payments would, to all intents and purposes, appear to be a due to someone having a right in the land but one which did not affect by payment thereof their permission to remain in perpetuity on the land. It was analogous to the custom obligations which the Defendants have observed towards the custom owners.

(c) At tabs 13–18, 22 and 23 (affidavit of Tevita Balenivalu) there are documents showing rental agreements with some of those on the land from time to time for various periods from the years 1957 (with Central Pacific Union Mission), 1959–62, 1964–5, 1970, 1984–97 and to 2002. Some persons on the land were given permission to be there after application to the Plaintiffs and rent was charged, (see: for example tab 22). These latter people were and are there as a result of that permission and not by descent from the original Solomon Islanders or, apparently, as Solomon Islanders.

It is not possible in most cases to say whether the rent was being collected from those on the land as Solomon Islanders from the original permission, their descendants or as those permitted to be on the land by the Plaintiffs.

(d) There appear to be two types of "rental" agreement used, an earlier one and a later one. "Acceptance" of them has been by signature, thumbprint and cross. The earlier one relates apparently to those already on the land

and the later one, apparently to those coming on after gaining permission from the Plaintiffs. The filling in of detail, particularly in the earlier ones, has been haphazard. In the majority there is no description of which part of the land is being let. The later agreement (used for Applicants) has an acknowledgement that vacant possession must be given if the land is sold for "development". The earlier agreement does not have this specific statement.

(e) Were these signings of agreements and payments of rent an acknowledgment by the Defendants and their forebears that they were there as squatters with no recognisable interest? I leave aside for the moment those there by permission of the Plaintiffs. It is pertinent in this regard that "rents" have only been required of some occupants and only from time to time. In most cases no defined premises or area of land let to the "tenant" is discoverable. No eviction or threat of eviction was made upon non-payment.

(f) In my judgment, the fact there have been payments of monies by some of the Defendants or their forebears in respect of their presence on the land cannot be regarded as an acknowledgement that their view of their presence on the land is other than that which they held from the beginning. In his affidavit filed on 11 November 2005 at para 6, Lawrence Tanabose refers to a letter of Lui Wendt of 15 February 2005 as acceptance the Defendants "had no rights to the land and had to accept the law of the land …" A careful reading of Lui Wendt's letter, signed by other Defendants, does not produce this meaning.

[29] In the case of *Inwards and Ors v Baker* [1965] 2 QB 29 at 36; [1965] 1 All ER 446 at 448; [1965] 2 WLR 212 (*Inwards*) Lord Denning MR stated:

> It is quite plain from those authorities (cited previously) that, if the owner of land requests another, or *indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord* that he will be able to remain there, that raises an equity in the licensee such as to enable him to stay. He has a licence coupled with an equity. Counsel for the plaintiffs urged before us that the licensee could not stay indefinitely. The principle only applied, he said, when there was an expectation of some precise legal term; but it seems to me, from *Plimmer's* case (*Plimmer v Wellington City Corporation* (1884) 9 App Cas 699), in particular, that the equity arising from the expenditure on the land *does not fail "merely on the ground that the interest to be secured has not been expressly indicated … the court must look at the circumstances in each case to decide in what way the equity can be satisfied."* …
>
> *All that is necessary is that the licensee should, at the request or with the encouragement of the landlord have spent the money in the expectation of being allowed to stay there. If so, the court will not allow the expectation to be defeated where it would be inequitable so to do*. (Underlining added)

[30] At QB 38; All ER 449, Danckwerts LJ stated:

> *it is not necessary, think, to imply a promise*. It seems to me that this is one of the cases of an equity created by estoppel, or equitable estoppel as it is sometimes called by which *the person who has made the expenditure is induced by the expectation of obtaining protection*, and equity protects him so that an injustice may not be perpetrated. (Underlining added)

[31] The issues of promissory estoppel and equitable estoppel were discussed in the High Court of Australia in the case of *Waltons Stores (Interstate) Ltd v Maher and Anor* (1988) 164 CLR 387; 76 ALR 513; 62 ALJR 110 (*Waltons*

Stores). The headnote at CLR 388; ALR 542 reads as follows: (the title "plaintiff" and "defendant" should be exchanged for the purposes of this case before me):

> Per Brennan J. To establish an equitable estoppel it is necessary for a plaintiff to prove that,
>
> (i) The plaintiff assumed that a particular legal relationship then existed between him and the defendant or expected that a particular relationship would exist between them and, in a latter case, that the defendant would not be free to withdraw from the expected legal relationship;
>
> (ii) The defendant induced the plaintiff to adopt that assumption or expectation;
>
> (iii) The plaintiff acts or abstains from acting in reliance on the assumption or expectation;
>
> (iv) (The defendant knew or intended him to do so);
>
> (v) The plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled;
>
> (vi) The defendant has failed to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.
>
> For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt the assumption or expectation will be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendants' property, a diminution of his rights or an increase in his obligations and, knowing that the plaintiffs reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, he fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs.

[32] Before I consider these doctrines in detail there is an important issue of nomenclature. In this case the Plaintiffs have described the Defendants as "squatters". There is no legal definition of a "squatter". However, it has come to mean a person who enters onto another's land without any right to do so and remains there or who was lawfully on that land but later loses any legal right to be there. In the case of most squatters they know they have no right to be on the land or are there without caring whether or not they have such a right. The issue is worldwide and stems from increasing population numbers, shortage of land, loss of their own land by squatters and economic necessity. There are, of course, those who squat on land even though they could reasonably live somewhere else. The law in Fiji provides for the summary removal of squatters on land through s 169 Land Transfer Act (Cap 131) and O 113 of the High Court Rules.

[33] The Defendants in this case and their forebears did not enter onto this land knowing they had no right to be there, or not caring whether they did so or not. Their arrival and subsequent occupation has been, as far as they are concerned, on the basis of and in accordance with the norms of land tenure which they knew and had known for centuries.

[34] The Defendants and their forbears have observed the requirements which go with their occupation. On the face of the affidavits before me the registered title holders of the land have done nothing sufficient to disabuse them of this stance. The Defendants can reasonably say "we are not squatters, we came on in all sincerity according to law". This in itself, of course, does not mean that they have a right to remain on the land. However, they can point to their length of occupation, their development of the land, the laying on of electricity and water, the presence of a shop and a church and the fact that one of their grandparents and some of their children are buried on the land.

[35] In my judgment, the Defendants do meet the requirements of an equitable estoppel as set out by Lords Denning and Danckwerts in the *Inwards* case particularly where Lord Denning states "… if the owner of land requests another

or *indeed allows another*, to expend money on the land under *an expectation* created or *encouraged* by the landlord that he will be able to remain there …". It could be argued that the expectation to remain on this land was neither created nor encouraged by the Plaintiffs. Their view might have been they could remove the Defendants at any time. However, in my judgment, the Plaintiffs have since their acquisition of the land, by their actions and inactions necessarily raised and maintained until 2004 the expectation that the Defendants view of their right to be on the land would not be challenged.

[36] If one applies the six point test of Brennan J:

(i) The Defendants (in the *Waltons Stores* case the Plaintiff) assumed that a particular legal relationship existed and continued to exist between them and the various registered titleholders including the Plaintiffs, namely that the original grantees and their descendants had permission to remain on the land subject to observance of customary obligations.

(ii) The Plaintiffs and earlier titleholders, induced the Defendants to continue and to adopt that assumption by their actions and inactions until 2004.

(iii) The Defendants have acted or abstained from acting in reliance on this assumption. In fact, the Defendants have done both, in that they have invested in the development of the land and have not sought land elsewhere upon which to live and have buried some of their deceased relatives there.

(iv) The fact the Plaintiffs knew or intended them so to do is exemplified by the facts in this case.

(v) The Defendants' action or inaction will occasion detriment if the assumption or expectation is not fulfilled. That detriment is clear from the fact that they would have to move off the land, find land elsewhere and either move or leave behind their houses and developments. There are also the graves to consider.

(vi) The Plaintiffs have failed to act to avoid that detriment by fulfilling the assumption and expectation. It is also not so much the Defendants' failure to act as the Plaintiffs act which produces the detriment to the Defendants, namely their potential loss of occupancy.

The corollary to the second element is also present in that if the Plaintiffs have not actively induced the Defendants to adopt an assumption or expectation they will be held to have done so if the assumption or expectation can be fulfilled only by a diminution of the Plaintiffs' rights and an increase their obligations and, knowing that the Defendants reliance on the assumption or expectation will cause detriment to them if it is not fulfilled, the Plaintiffs have failed to deny to the Defendants the correctness of the assumption or expectation on which the Defendants are conducting their affairs. The corollary is particularly pertinent in this case.

[37] On the basis of these cases and given the peculiar factual history of this case it would be inequitable to do other than say that the Plaintiffs are estopped from removing the Defendants from the land.

(a) The forebears of the Defendants and the descendant Defendants came on to or are on the land in the belief and on the assumption that it was lawful so to do and with the expectation that they could stay there in perpetuity. They have continued to occupy the land on this assumption and with that expectation.

(b) The various registered owners of the land before the Plaintiffs did nothing over 14 years to notify their non-acceptance of that belief, assumption and expectation or remove the Defendants from the land.

(c) The current registered owners, the Plaintiffs, must have known in 1949 of the presence of the Defendants on the land and either knew or could easily have ascertained how the Defendants and their forebears came to be on the land and how they regarded their presence on the land. If they did not know then they must have been wilfully blind or voluntarily ignorant.

(d) The collection of "rents" and signing of rental agreements does not amount to sufficient acknowledgment of the Plaintiffs' position to in perpetuity.

(e) No notices or declarations or other actions have been taken to indicate to those Defendants who are descendants or their forebears that their presence was only tolerated as bare licensees or squatters. There is the unstated question whether the situation prior to 2004 could have continued for decades and further generations, yet the Plaintiffs still been able to acquire vacant possession at some date in the future.

(f) The Plaintiffs must have known throughout the decades that dwellings of a more and more permanent nature were being erected, that utilities, electricity and water, were coming on to the land and houses were being connected, the ground was being cultivated for vegetables for eating, there was a small shop and a church was erected.

[38] In my judgment, given all the circumstances, there have, as far as the forebears and their descendants are concerned been clear indications from the previous and current registered title holders that they were saying "we know you are on the land, we know how you came on to the land, we know in what way you regard your presence on the land or we close our eyes to these questions and we are content for you to be there". That is the position that has prevailed for nearly 70 years.

[39] I do not consider, given the peculiar facts of this case, that this decision detracts from the system of land registration in Fiji or indefeasibility of title. There are many pieces of land that are occupied by "squatters". Each proceeding must be examined upon its own facts.

[40] The matter however does not rest there. I must consider the Land Transfer Act (Cap 131). This Act is entitled "an Act to Amend the Law Relating to the Transfer of Land and to the Registration of Title to the Land". By s 178 it repeals its predecessor, the Land (Transfer and Registration) Ordinance and the Statute of Limitations Declaration Ordinance. Those former acts and the Land Transfer Act are clearly directed to the matters I have set out in para 15 above.

[41] Several sections of this Act are pertinent to the questions before me and have been properly referred to by counsel for the Plaintiffs.

[42] I set out the sections particularly relied upon:

> 2. (1) …
>
> "Register" means the Register of Titles to land to be kept in accordance with the provisions of this Act;
>
> *Part II*
>
> Laws inconsistent not to apply to land subject to Act.
>
> 3. All written laws or Acts and practice whatsoever so far as inconsistent with this Act shall not apply or be deemed to apply to any land subject to the provisions of this Act or to any estate or interest therein.

Scope of Act

4. All land subject to the provisions of the Land (Transfer and Registration) Ordinance and every estate or interest therein and all instruments and dealings affecting any such land, estate or interest shall from the commencement of this Act be deemed to be subject to the provisions of this Act.

What Lands subject to Act

(It is not disputed that the land in question in this case is subject to this Act)

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 a register or a certified copy thereof, be conclusive evidence that the person named in such instrument or in any entry thereon as seised of or as taking an estate or interest in the land described in such instrument is seised or possessed of such land for the estate or interest so specified as from the date of such certificate or as from the dates from which such a estate or interest is expressed to take effect.

Part V — Effective Registration

Registered Instrument to be Conclusive Evidence of Title

38. No instrument of title registered under the provisions of this Act shall be impeached or defeasible by reason or on account of any informality or in any application or documents or in any proceedings previous to the registration to the instruments of title.

Estate of Registered Proprietor Paramount, and His Title Guaranteed.

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

(a) the estate or interest of a proprietor claiming the same land, estate or interest under a prior instrument of title registered under the provisions of this Act;

(b) so far as regards any portion of land that may by wrong description or parcels or of boundaries be erroneously included in the instrument of title of the registered proprietor not being a purchaser or mortgagee for value or deriving title from a purchaser or mortgagee for value;

(c) any reservations, exceptions, conditions and powers contained in the original grant.

(2) Subject to the provisions of Part XIII (Prescription), no estate or interest in any land subject to the provisions of this Act shall be acquired by possession or user adversely to or in derogation of the title of any person registered as the proprietor of any estate or interest in such land under the provisions of this Act.

Proprietors Protected Against Ejectment

42. (1) No action for possession, or other action for the recovery of any land subject to the provisions of this Act, or any state or interest therein, shall lie or be sustained against the proprietor in respect of the estate or interest of which he is registered, except in any of the following cases:

(a) the case of a mortgagee as against a mortgagor in default;

(b) the case of a lessor as against the lessee in default;

(c) the case of a person deprived of any land, estate or interest by fraud, as against the person registered as the proprietor of that land, estate or interest through fraud, or as against the person deriving otherwise as a transferee bona fide for value from or through a person so registered through fraud;

(d) (Misdescription of land and boundaries);

(e) (Prior instrument of title).

(2) In any case other than as aforesaid the production of a register or of a certified copy thereof shall be held in every court of law and equity to be an absolute bar and estoppel to any such action against the registered proprietor of the land, estate or interest subject to the action, any rule of law or equity to the contrary notwithstanding.

(3) …

[43] It is not disputed that the land in question in this case is subject to the provisions of the Land Transfer Act. Given the wording of s 42 it is clear that had the Defendants been the Plaintiffs in this case then their action would not have been sustainable. Can the estoppel as I have found it in this case nevertheless act as a shield but not a sword consistently with this Act?

[44] The Defendants in this case do not seek to place in question the particulars entered upon the register. They accept that the Plaintiffs have the interest as therein described. It is pertinent to note that the Land Transfer Act, namely s 42, does not permit an action for possession to be brought or sustained against a proprietor in respect of any estate or interest of which he is registered. Some five exceptions are set out; none of them apply to this case. The fact is that it is the Defendants who are in occupation of part of the Plaintiffs land and it is the registered title holders, the Plaintiffs, who are seeking to recover it from them.

[45] I do note that there is no section similar to s 42 where the proprietor is the Plaintiff. One must of course, in this regard, look very carefully at ss 3 and 39.

[46] By s 39, the registered proprietor, except in the case of fraud, holds his estate or interest "subject to such encumbrances as may be notified in the folium of the register by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except …" There are then three exceptions which do not apply in this case. There is no suggestion that any interest of or encumbrances emanating from these Defendants has been notified on the folium of the register. Subsection 2 is particularly pertinent.

[47] Section 2 defines "encumbrances" as including "all private estates, interests, rights, claims and demands which can or may be had, made or set up in respect of land, and includes a mortgage".

[48] The estoppel claimed by the defendants to remain on the land is not something which was raised after purchase with no possibility it could have been known about at the time of purpose. Indeed, quite the opposite. Had the Plaintiffs sought to remove the Defendants and their forebears in the time following upon their purchase then provisions of the kind set out in s 39 would probably have been a complete answer to the Defendants. It must be remembered that the Plaintiffs purchase predated even the Land (Transfer and Registration) Ordinance 1955. I have not had placed before me the legislation prevailing at the time which would have affected this issue.

[49] It is to be noted in this regard that the prescription provisions of Pt XIII of the Act provide a limit of 1 year from the Acts commencement for application to be made to the registrar for a certificate of title: see s 77.

[50] The estoppel arises from the Plaintiffs' actions and inactions since purchase precluding them from exercising those rights which but for those actions and inactions they could have exercised under the Land Transfer Act. Further, I do not find this is inconsistent with the Act so as to make it inapplicable in accordance with s 3.

[51] Accordingly I find that despite the provisions of the Land Transfer Act, within the factual circumstances of this case, an estoppel, can and does arise which prevents the Plaintiffs from gaining possession of the disputed land from the original grantees of the permission and their direct descendants.

[52] To whom does the estoppel extend?

> The orginal grant was to those Solomon Island people who approached the Chiefs in Tamavua with their gifts. They were permitted to occupy the land in perpetuity, subject to the observance of certain custom obligations. Those people and their descendants are the persons who have occupied the land, built on it, developed it and made it their homes. These are the people whom successive legal title holders, including these plaintiffs, have known were on the land and knew were developing it and occupying it as their homes.

[53] Others arrived on the land, at later dates having applied to come in and been specifically granted permission. It cannot be said their presence stems from the original gift or grant.

[54] In these circumstances, in my judgment, the estoppel can only extend to the original grantees of the chiefly permission to occupy and their direct descendants. Writs of possession will be available in respect of all other Defendants on the land. In their case, I can see no answer to the Plaintiffs' claim.

[55] In the cases of *Inwards* and *Waltons Stores* the beneficiary of the estoppel was a single legal person. In this case there are several beneficiaries and in future years there could well be more, as yet unborn. I do not consider that that in itself, means the estoppel cannot arise. It belongs to those who can show they are the direct descendants of the original grantees. The ascertainment of who they are does not present insurmountable difficulties.

[56] It is a matter for those concerned but it might be wise for those Defendants who are direct descendants to form a trust to look after their interests. It should be carefully constructed and worded to ensure unresolvable disputes or misbehaviour do not arise. I pass no comment as to whether any prescriptive title might be obtainable.

[57] What are the boundaries of the land in question?

> I have plans of the land and have walked around it. The boundaries are reasonably clear and appear to be well known. In broad terms there is the Tamavua river along the lower edge and the registered title boundaries at the sides. The upper edge sits partly by a low cliff face and extends to the side boundaries. If there are any disputes their can be referred to the Court and speedily resolved.

[58] What is the duration of the estoppel?

> The original permission was in perpetuity subject to the performance of custom obligations. It was a grant for that group of Solomon Island people and their descendants. For the estoppel to continue then there must be
>
> (a) continuity of occupation;
> (b) by the direct descendants of the original grantees; and
> (c) the due performance of the custom obligations.

[59] In effect, three conditions. If any of these is not observed the right to remain on the land will be lost. Further, if a direct descendant has never lived on the land or has already moved to live elsewhere then he or she is not protected. Similarly if a direct descendant now living on the land moves off the land in future then he or she cannot return with the protection of the estoppel.

[60] In these circumstances, referring to the amended originating summons:

(1) I refuse to make a declaration that "the plaintiff is entitled to possession of the whole of the land described in Certificate of Title No CT 7168".

(2) I do make a declaration the Plaintiffs are estopped from removing those Defendants who are the original grantees or the direct descendants of the original grantees and who currently live on the land from that part of the land described in para [x] above according to the conditions set out in para [y].

(3) Given my findings in 1 and 2 above I need not make a declaration whether or not any purported transfer by Tamavua land owners in respect of the said land confers any interest paramount to the Plaintiff's title.

(4) I refuse to make an order for writ of possession of the said land. I acknowledge that writs of possession can issue in respect of those Defendants who are not the original grantees or their direct descendants once individually identified.

(5) No other orders are required.

[61] Given my findings in this case I do not need to consider the detailed and well researched representations on both the history of this land and the constitutional rights of the Defendants presented by the Fiji Human Rights Commission. Nor need I consider whether or not there was a "land grab" at any time or any question of "Waimiha Sawmilling Company fraud".

[62] I will hear the parties on costs.

Application dismissed.