

**IN THE SUPREME COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION**

**CIVIL PETITION NO. CBV 0005 OF 2012
(Court of Appeal No. ABU 0065 of 2011)**

BETWEEN:

**STAR AMUSEMENT LIMITED
PETITIONER**

AND:

- 1. NAVIN PRASAD**
- 2. SAMUEL NILESH PRASAD**
- 3. THE REGISTRAR OF TITLES**
- 4. THE ATTORNEY GENERAL OF FIJI**
- 5. KRISPA FOODS (FIJI) LIMITED**
- 6. ANZ BANKING GROUP LIMITED**

RESPONDENTS

CORAM: The Hon. Chief Justice Anthony Gates, President of the Supreme Court
The Hon. Mr. Justice Saleem Marsoof, Justice of the Supreme Court
The Hon. Mr. Justice Ariam Mutunayagam, Justice of the Supreme Court

HEARING: Tuesday, 13th of August 2013

COUNSEL: Mr. V.M. Mishra and Mr. S. Chandra for the Petitioner
Mr. S. Singh for the 1st and 2nd Respondents
Mr. R. Green for the 3rd and 4th Respondents
No appearance for the 5th and 6th Respondents

JUDGMENT: Wednesday, 28th August 2013

JUDGMENT OF THE COURT

1. This is an application for special leave to appeal from the judgment of the Court of Appeal dated 28th September 2012 (Calanchini, AP, Suresh Chandra, JA and Hettiarachchi, JA) affirming the interlocutory judgment of the High Court at Lautoka (Yohan Fernando, J.) dated 3rd November 2011 and its order dated 24th November

2011. The application raises important questions relating to indefeasibility of title and the Registrar's power to correct errors under the Land Transfer Act, Cap 131.

Originating Summons

2. The matter in the High Court arose from originating summons dated 17th October 2008 taken out by the 1st and 2nd Respondents, Navin Prasad and Samuel Nilesh Prasad (hereinafter sometimes referred to as "Navin and Samuel Prasad") pursuant to Section 104 of the Land Transfer Act, Cap 131, against the 3rd Respondent, Registrar of Titles, the 4th Respondent, the Attorney General of Fiji, the 5th Respondent, Krispa Foods (Fiji) Ltd., (hereinafter referred to as "Krispa Foods") the Petitioner, Star Amusements Limited, and the 6th Respondent ANZ Banking Group Limited (hereinafter referred to as "ANZ Bank"), seeking certain relief.
3. Navin and Samuel Prasad thereafter filed a Statement of Claim, which was subsequently amended on 9th October 2009, stating-
 - (a) That they were the judgment creditors under a judgment delivered on 20th December 2007 in Civil Action No.154 of 2006 in the High Court of Fiji at Lautoka against Krispa Foods in the sum of \$ 95,417 and costs in the sum of \$ 3,500;
 - (b) That Krispa Foods was the registered proprietor of the lease comprised in Native Lease No.14279;
 - (c) That the said Lease was subject to two mortgages, namely Mortgage Nos. 50169 and 555398;
 - (d) That on 18th January 2008 Navin and Samuel Prasad lodged the said judgment for registration with the Registrar of Titles and the said Judgment was registered as Dealing No.698496, and that the Registrar of Titles wrongly dated the dealing as 18th January 2007 instead of 18th January 2008;
 - (e) On 3rd March 2008, the Registrar of Titles registered a transfer of the said lease from the Krispa Foods to the Petitioner Star Amusements for a consideration of \$382,000 and registered as Dealing No.700886. A mortgage was also registered against the said lease in favour of ANZ Bank as Dealing No.700887.
 - (f) That the said transfer and the mortgage were wrongly and/or negligently registered by the Registrar of Titles without they being made subject to the judgment in favour of Navin and Samuel Prasad;
 - (g) That on 29th May 2008 the Navin and Samuel Prasad had obtained an order from the High Court of Lautoka to the following effect:

"That Judgment No.698496 registered on Native Lease No.14279 being Lot 7 Waiyavi Subdivision in the District of Vuda and in the province of Ba shall bind the said lease and remain as charge on the Lease until further order of the Court."

- (h) That on 4th June 2008 Navin and Samuel Prasad lodged the said order for registration with the Registrar of Titles, and the Registrar of Titles endorsed this against the said lease as Dealing No.704687;
- (i) That due to the wrongful and negligent act of the Registrar of Titles in allowing registration of the said transfer and the said Mortgage, Navin and Samuel Prasad have been deprived of the opportunity to exercise their rights under the said judgment and the said order;
- (j) That as a result of the aforesaid matters the Navin and Samuel Prasad have suffered loss and damage and sought the following orders:
 - (i) That the Registrar of Titles rectify the date of registration of the Judgment in Action No.154 of 2006 dated 20th December 2007 as per Dealing No. 698496 against Native Lease No.14279 to read as 18th January 2008;
 - (ii) For a declaration that the registration of the Court Order of 29th May 2008 properly extended the registration of the said Judgment;
 - (iii) For a declaration that the registration of the said Judgment (as extended by the Court Order of 29th May 2008) continues as a valid and subsisting charge against Native Lease No.14279;
 - (iv) That the Registrar of Titles be directed to cancel all instruments registered against the lease after the registration of the said Judgment;
 - (v) Alternatively for a declaration that the said Judgment (as extended by the said Order) takes priority over all subsequent dealings;
 - (vi) Further, in the alternative Judgment in the sum of \$98,917 against the Registrar of Titles and the Attorney General, as representing the Republic of Fiji;
 - (vii) For costs against Registrar of Titles, the Attorney General, Krispa Foods, Star Amusements, and ANZ Bank.

Responses to Originating Summons

- 4. In response to the said summons, the Registrar of Titles, Star Amusements and ANZ Bank filed their Defence.
- 5. On 3rd March 2010 the Registrar of Titles filed a summons in the same action instituted by Navin and Samuel Prasad seeking the following orders:
 - (a) That the judgment number 698496 on Native Lease No.14279 being Lot 7 Waiyavi Sub-Division in the District of Vuda and in the Province of Ba shall bind the said lease and remain as a charge on the said lease until furthers Orders of the Court;

- (b) Rectification of the incorrect date of registration of judgment No.698496 from 18th January 2007 to the correct date of 18th January 2008;
- (c) Declaration that transfer made on 3rd March 2008 on Native Lease No.14279 being Lot 7 Waiyavi Sub-Division in the District of Vuda is null and void or subject to judgment No.698496;
- (d) Rectification of the said dealing in respect to the transfer to Star Amusements and ANZ Bank from Krispa Food is subject to the registered judgment, and the court order which extended the judgment will subsist until further orders of the Court;
- (e) Further orders of the Court as it deemed fit and proper to regularize the transactions pertaining to Native Lease No.14279.

Interlocutory Judgment

- 6. The learned High Court Judge after considering the affidavits filed by the parties and the submissions filed by them, pronounced his Interlocutory Judgment on 3rd November 2011 and made the following orders on 24th November 2011:
 - (a) That the judgment number 698496, on Native Lease No.14279 being Lot 7 Waiyavi Sub-Division in the District of Vuda and in the province of Ba, shall bind the said lease as a charge to the extent of the monetary sum of the judgment only, and shall stand as having effect from 18th January 2008 till further orders of Court;
 - (b) Rectification of the incorrect date of registration of judgment No.698496 as a charge as aforesaid from 18th January 2007 to the correct date of 18 January 2008 to be effected by the Registrar of Titles forthwith;
 - (c) The transfer to Star Amusements and the Mortgage to ANZ Bank of Native Lease No.14279 being Lot 7 Waiyavi Sub-Division in the District of Vuda and in the province of Ba, to survive and subsist, subject to the charge created as aforesaid in favour of the Plaintiffs, by the judgment number 698496 for the judgment sum therein;
 - (d) The Registrar of Titles to pay Navin and Samuel Prasad, Star Amusements, and ANZ Bank costs of this application to be taxed on the standard basis or in a sum of \$1000/- to each party whichever is higher.

The Appeal to the Court of Appeal

- 7. An appeal having been taken by Star Amusements to the Court of Appeal against the said interlocutory judgment, the Court of Appeal by its judgment dated 28th

September 2012 dismissed the appeal and affirmed the interlocutory judgment of the High Court dated 3rd November 2011 and its order dated 24th November 2011.

8. In paragraph 13 of its judgment, the Court of Appeal noted that in the ordinary course of events if not for the error in the date of registering the judgment in the Register, the claim of the original plaintiffs Navin and Samuel Prasad would have served as a Caveat lodged in respect of the said land which was registered in the name of the 3rd Defendant Krispa Foods, and the judgment would certainly have been a charge on the said estate of Krispa Foods as six months would not have lapsed from the date of the judgment of 18th January 2008 when the transfer by Krispa Foods to the 4th Defendant and present Petitioner, Star Amusements took place and was registered on the 3rd of March 2008. The said transfer in such an event would have been subject to the claim of Navin and Samuel Prasad.
9. Having said that, the Court of Appeal went on to examine the implications of the very serious and vital mistake made by the Registrar of Titles in effecting the registrations in favour of Star Amusements and ANZ Bank in the context of what it regarded as an inadequate search of the Registry. Suresh Chandra JA., with whom Calanchini AP., and Hettiarachchi JA., concurred, distinguished on the facts, the decision of the Court of Appeal in *Attorney General v Vijay Kumar and Everett Riley* 1985 FLR Vol. 31, 23, on which learned Counsel for Star Amusements had placed heavy reliance, and observed as follows:-

“27. The protection afforded to a *bona fide* purchaser for value by section 42(3) of the Land Transfer Act in my view cannot be taken cover of by a purchaser on whose behalf a proper search has not been effected as set out above, and therefore the 4th Defendant's submission on the basis of S.42(3) would fail.”

10. It is noteworthy in this context that in dismissing the appeal filed in that court by Star Amusements, the Court of Appeal reacted rather strongly to the suggestion made by the learned Counsel for the Registrar of Titles that the mistake made by the Registry was an “honest mistake”, observing as follows in paragraph 29 of its judgment:-

“29.Though the judgment of the High Court has sorted out the inequities of the parties, the manner in which the Registrar of Titles has acted in registering the interests of the Plaintiffs in this case is deplorable and not what is expected of an officer on whom much confidence and trust is placed upon in carrying out his/her duties under the Land Transfer Act. More care has to be exercised in making entries in the Registry as they have to be relied on by parties interested in dealings related to such entries. If the Registrar has delegated such functions of making entries to other Officers, proper supervision must be exercised regarding such duties to ensure that such entries are made accurately and correctly. In the present case, an examination of the entries in the Register, does not show that any care had been taken in making such entries.”

11. Since the Petitioner Star Amusements has not obtained the leave of the Court of Appeal to lodge an appeal to the Supreme Court against the said judgment of the Court of Appeal dated 28th September 2012, it has now sought from this Court special leave to appeal against the said judgment as provided in terms of section 8(1) of the

Administration of Justice Decree No. 9 of 2009 read with section 7 of the Supreme Court Act No. 14 of 1998.

Application for special leave to appeal

12. The Grounds upon which the Petitioner Star Amusements seeks special leave to appeal have been set out in paragraph 23 of its petition to this Court as follows:-
- (a) The Learned Judges of the Fiji Court of Appeal erred in law in holding that the High Court was correct in finding that the Petitioner's Registered Proprietorship of Native Lease No. 14729 was subject to the Judgment of the First and Second Respondents and failed to apply the principle that the Petitioner upon being registered as proprietor of the Lease had an indefeasible title against all the world.
 - (b) The Learned Judges of the Fiji Court of Appeal erred in law and failed to uphold the cardinal principle of the Land Transfer Act that the Register is absolute and conclusive except in case of actual fraud and in holding that the Petitioner's registered proprietorship was subject to a prudent and/or extensive search being carried out by a *bona fide* purchaser's Solicitor. Further that such a search included going behind the Lease and requires a search of the judgments and/or caveats themselves.
 - (c) The Learned Judges of the Fiji Court of Appeal erred in law in holding that the present case was distinguishable from the case of *Attorney General v. Vijay Kumar*, Fiji Law Reports Vol. 31 page 23, and in not following the same.
 - (d) The Learned Judges of the Fiji Court of Appeal erred in law in upholding the High Court judgment when there was no power in the Court to alter the Register unless there is fraud and further the power of the Third Respondent to correct clerical slips ceases and expires when a *bona fide* purchaser for value relying on the face of the Register and becomes a registered proprietor.
 - (e) The Learned Judges of the Court of Appeal erred in law in holding there was fraud and/or wilful blindness on part of the Petitioner when –
 - (i) Fraud had not been pleaded by the First and Second Respondents against the Petitioner.
 - (ii) The Petitioner's position as a *bona fide* purchaser for good consideration had not been effectively challenged in any way.

- (iii) A determination by affidavits was inappropriate for determination in the present case on issues which required oral evidence.
 - (iv) Any finding of wilful blindness could only be made on an allegation(s) of fraud with proper pleading and particulars and discovery and after hearing oral evidence on the search and particulars pleaded.
 - (v) The First and Second Respondents not having made any application for judgment interlocutory or otherwise and the only application for judgment being by the Third and Fourth Respondents who had no cause of action or claim against your Petitioner.
13. This application for special leave to appeal has been made pursuant to section 8(1) of the Administration of Justice Decree No. 9 of 2009, which has to be read with section 7(3) of the Supreme Court Act of 1998, which lays down stringent threshold criteria to be satisfied by an applicant for special leave to appeal, and provides that in relation to a civil matter, special leave to appeal should not be granted “unless the case raises-
- (a) a far reaching question of law;
 - (b) a matter of great general or public importance;
 - (c) a matter that is otherwise of substantial general interest to the administration of civil justice.”
14. The provisions of Section 7(3) of the Supreme Court Act quoted above, echo the sentiments expressed by Lord Macnaghten in *Daily Telegraph Newspaper Company Limited v McLaughlin* [1904] AC 776, which was the first case involving an application for special leave to appeal from a decision of the High Court of Australia to be decided by the Privy Council. Lord Macnaghten, at page 779 of his judgment, after observing that the same principles should apply as they did for an appeal from the Supreme Court of Canada, referred to the case of *Prince v Gagnon* [1882 – 83] 8 AC 103, in which it was stated that appeals would not be admitted,
- “save where the case is of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character.”
15. These criteria have been examined and applied by the Supreme Court of Fiji in decisions such as *Bulu v Housing Authority* [2005] FJSC 1 CBV0011.2004S (8 April 2005), *Dr. Ganesh Chand v Fiji Times Ltd.*, (31st March 2011) and *Praveen’s BP Service Station Ltd., v Fiji Gas Ltd.*, (6th April 2011), and it is clear from these decisions that special leave to appeal is not granted unless the case is one of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character.

16. Mr. Green who appeared for the Registrar of Titles and the Attorney General in this case strongly resisted the grant of special leave to appeal on the basis that the judgment of the High Court dated 3rd November 2011 and the subsequent order of that Court dated 24th November 2011 against which Star Amusements had lodged an appeal in the Court of Appeal was an interlocutory judgment lacking in finality, and that the matters agitated before the Court of Appeal and now raised in the application for special leave to appeal may be dealt with in the High Court in a substantive judgment.
17. In our view, this Court cannot overlook the “exceptional nature” (*The New India Assurance Company Limited v Fiji Development Bank*) of an appeal against an interlocutory judgment and order. However, when as in this case, substantive title and rights of the Petitioner have been adversely affected by “rectifications” effected on the Register of Titles by virtue of the interlocutory order made by the High Court, which also made orders seeking to keep alive encumbrances on its title and rights which it had pleaded it was unaware of at the time of acquiring and registering the same, we are inclined to agree with Mr. Mishra that in the exceptional circumstances of this case, the interlocutory nature of the judgment and order of the High Court *per se*, should not be a bar to consideration of the grant of special leave to appeal.
18. Having considered the facts and circumstances of this case and the five main grounds on which special leave to appeal has been sought, we are persuaded that this case gives rise to several serious questions of law involving matters of public interest and affecting property of considerable amount. In paragraph 24 of the petition seeking special leave to appeal lodged by Star Amusement, six questions have been set out as far reaching questions of law arising from the impugned judgment of the Court of Appeal. While we are of the view that every one of those questions may, in appropriate cases, be regarded as far reaching questions of law, but as far as this case is concerned, question (iv) and (v) need not concern us, as “wilful blindness” is at best relevant only as evidence of the existence of a fraudulent state of mind, which is an element in the proof of fraud, which does not arise in this case due to absence of any pleadings or issues on fraud. Similarly, question (vi) relating to the binding nature of the decision of the decision of the Court of Appeal in *Attorney General v Vijay Kumar and Everett Riley, supra*, is best considered in the context of questions (i) and (ii). In our considered opinion, it would in all the circumstances of this case be sufficient if special leave to appeal is granted only on the first three of them, which are in our view serious questions of law requiring clarification by this Court. These questions on which special leave to appeal is granted, are reproduced below for convenience:-
 - (i) Whether the Fiji Court of Appeal have failed to uphold the cardinal principle of the Land Transfer Act that the Register is absolute and conclusive except in case of actual fraud which has to be brought home to the registered proprietor.
 - (ii) Whether a *bona fide* purchaser for value acquires by registration a title immune from adverse claims.

- (iii) Whether the High Court has power or the jurisdiction to order alteration of the Register under Section 168 of the Land Transfer Act or other provisions in the absence of proof of actual fraud and whether the power to correct the Register expires when a *bona fide* purchaser for value relying on the face of the Register becomes a registered proprietor.
19. Before looking at these questions closely, it might be useful to highlight the basic facts in the context of which these questions arise.

Factual Matrix

20. Most of the basic facts are not disputed and appear from the relevant folium of the Register of Titles.
21. Krispa Foods, the registered proprietor of the lease comprised in Native Lease No.14279, which appears from the memorial at page 81 of the Record of the High Court to have been registered in the Registry of Titles on 22nd August 1972, subsequently transferred the said sub-lease to Star Amusements on 16th January 2008 for a consideration of \$382,000, which transaction appears from the memorial at page 82 of the said Record to have been registered on 3rd March 2008 as Dealing No.700886.
22. There is also on the same page another memorial, appearing just below the one recording the registration of the aforesaid transfer, which shows that the leased property was on 16th January 2008 subjected to a mortgage in favour of ANZ Bank as Dealing No.700887.
23. However, it would appear that unknown to Star Amusements and ANZ Bank, there was a money judgment entered in High Court of Fiji at Lautoka in case No. HBC 154 of 2006L on 20th December 2007 in a sum of \$95,417 as damages and \$3500 as costs against Krispa Foods, which judgment was in favour of Navin and Samuel Prasad, and appears to have been served on the Registrar of Titles in pursuance of section 104 of the Land Transfer Act, Cap 131, on 18th January 2008 and registered as a charge on the lease comprised in Native Lease No.14279 as Dealing No.698496. Krispa Foods did not appear in the Court of Appeal or in this Court.
24. It is this native land that was purchased by Star Amusements, which purchase was partly financed by a mortgage executed by Star Amusements to ANZ Bank on 16th January 2008. The two memorials relating to the said judgment, both of which appear in page 82 of the High Court Record ahead of the memorials relating to the transfer in favour Star Amusements and mortgage in favour of ANZ Bank, show 18th January 2007 as the date of registration. The position taken up by the Registrar of Titles is that this was a “mistake” for 18th January 2008.
25. This was a serious and vital mistake, given that according to section 105(2) of the Land Transfer Act, any judgment, decree or order for payment of money registered in the

Registry of Titles under section 104 of the Act “shall cease to bind, charge or affect any estate or interest in land in respect of which it is registered” unless a transfer upon a sale under such judgment, decree or order is presented for registration “within six months, or such extended period as the court by order made on application to it upon summons shall determine, from the day on which the copy of such judgment, order or decree was served.”

26. Since on the face of the Register the two memorials relating to the judgement in High Court of Lautoka case No. HBC 154 of 2006L showed that it was registered on 18th January 2007, any person who sees the said memorials would be misled to believe that the judgment had ceased to have effect six months from that date, as there was no indication on the Register of Titles that the same had been extended by an order of court.
27. In effect, due to the “mistake” of the Registrar of Titles, despite the due registration of the judgment in High Court of Lautoka case No. HBC 154 of 2006L as a charge on the native land subjected to the lease, the Register of Titles would have shown clear title in favour of its then proprietor Krispa Foods at the time the transfer to Star Amusements and the mortgage in favour of ANZ Bank were executed and registered.

Indefeasibility of Title

28. Question (i) on which special leave to appeal was granted in this case is whether the Court of Appeal has failed to uphold the cardinal principle of the Land Transfer Act that the Register is *absolute and conclusive* except in case of actual fraud which has to be brought home to the registered proprietor.
29. In support of his position that the Court of Appeal has erred in its understanding of the concept of indefeasibility of title and misapplied the law to the facts of this case, Mr. Mishra has invited the attention of Court to certain provisions of the Land Transfer Act, particularly those falling within Part V (Effect of Registration) and Part XVI (Judgments and Execution) of the Act, and relied on the decisions in *Subramani & Maria v Dharam Sheela and three others*, FCA Civil Appeal No. 56 of 1981 and *Attorney General v Vijay Kumar and Everett Riley* 1985 FLR Vol. 31, 23, which are both decisions of the Court of Appeal. He has also referred to certain judicial decisions from other jurisdictions.
30. Mr. Singh, who appeared for Navin and Samuel Prasad, and Mr. Green, who appeared for the Registrar of Titles and the Attorney General, did not deny that the principle that the Register of Titles is absolute and conclusive (indefeasible) is the cardinal principle of the Land Transfer Act. They submitted that the Court of Appeal did not err in fact and law in upholding the decision of the High Court that the judgment entered in High Court of Fiji at Lautoka in case No. HBC 154 of 2006L dated 20th December 2007 binds the lease comprised in Native Lease No.14279 of which Star Amusements was now the registered proprietor, and in doing so they invited the attention of Court to the discrepancies in the two memorials relating to the registration of the judgment in question on 18th January 2008, and to sections 20 and 104 of the Land Transfer Act.

31. Mr. Singh and Mr. Green also invited the attention of Court to the decision in *Bursill v Berger Bros. Trading Co. Pty Ltd* [1971] 124 CLR 73 and a passage in *McMorland & Sim, Land Law in New Zealand*, (2003) at 2 page 275 regarding the intensity of a prudent search. Although in their written submissions and oral submissions before Court, reference was made to a large volume of case law on the question of fraud, since fraud was not included in the pleadings in the case and did not arise in issue, it is not necessary, in our view, to advert to those decisions in this judgment.
32. The Court of Appeal has in paragraph 11 of its impugned judgment examined the salient provisions relating to the registration of instruments and judgments in the context of the facts of the appeal before it, but in our view did not consider the concept of “absolute and conclusive title” or “indefeasibility of title”. The Court of Appeal emphasised that even if Star Amusements may have been a *bona fide* purchaser for value, a proper search in the Registry would have revealed the correct date of the Judgment that had been registered on 18th January 2008. In this connection, it observed as follows in paragraph 23 of its judgment:-

“23.The Petitioner (Star Amusements) submitted that in view of Section 42(3) of the Act, that the Registrar of Titles in the absence of fraud, has no power to correct clerical slips when a new transaction occurs whereby a *bona fide* purchaser for value relying on the face of the register purchases and becomes registered on the Title. But the question here as observed by the learned High Court Judge in his judgment is whether the Petitioner could rely merely on the entry in the Register (which was an erroneous entry) and consider that there is no charge on the land that he was interested in purchasing, *especially when even in the wrong entry, there were two dates visible, namely 18th January 2007, and 18th January 2008 and the fact that it was in relation to a Judgment.* These two entries certainly had inconsistencies which were very conspicuous. A further search as would in such circumstances have been made by a diligent Solicitor of the copy of the judgment, and the "Presentation Book" (which would have had a short description of the instrument that was presented registration), would have revealed the real position regarding the judgment which had been delivered in December 2007 and therefore necessarily presented after that date which was in January 2008. Such an examination would have shown the significance of the entry at the bottom left hand corner of the memorial which was to the effect "judgment" and "18/1/2008". This would suggest that more care should be exercised in doing a search at the Registry in relation to land transactions, and merely relying on a single entry in a memorial in the Registry would not be sufficient.” (*emphasis added*)

33. The italicised words in the above quoted passage turned out to be crucial for the decision of the Court of Appeal. It is manifest that the Court of Appeal was under the impression that “even in the wrong entry, there were two dates visible, namely 18th January 2007, and 18th January 2008 and the fact that it was in relation to a Judgment”. Page 82 of the Record of the Court of Appeal reveals that the folium was divided into two vertical columns on its left and right sides, in which there was provision for a totality of five memorials on each column, making a total of ten memorials on the entire folium. Of these altogether nine were completed, and only the last one on the right vertical column was unfilled, no memorial having been made on it at the relevant time.

34. The last memorial at the bottom of the left vertical column and the first memorial at the top of the right vertical column related to the Judgment in question, and in both these memorials, the handwriting with which they have been filled is identical. In both, the date of registration is clearly written as 18th January 2007. They also contained the same Dealing No. 698496. The difference between the two memorials is that the one on the bottom of the left vertical column is not signed by the Registrar of Titles or his official, but the one on the top of the right column contains the signature of an official of the Registrar of Titles, but there is no seal. Another difference is that the memorial on the bottom of the left column bears an endorsement made with a rubber seal which contains the words "ENDORSEMENT IN ERROR", which endorsement too is authenticated by the initials of an official of the Registry.
35. The Court of Appeal attached great significance to the handwritten words on the very bottom of the cancelled memorial on the bottom of the left vertical column of the folium relating to Dealing No. 698496, which contains an entry with the words "Judgment 18/1/08" with the initial of an official of the Registry. The handwriting and initials of this entry are not the same as that of the official who wrote out this memorial or the other memorial on the top of the right column both relating to Dealing No. 698496. These memorials are followed by two memorials dated 3rd March 2008 on the right vertical column bearing Dealing Nos. 700886 and 700887 respectively relating to the transfer of the lease to Star Amusements and ANZ Bank, which are in a different handwriting from that of the previous memorials relating to Dealing No. 698496. Both these memorials are signed by an official of the Registry.
36. Following these two memorials is the last memorial on the right vertical column, which is entitled "COURT ORDER" bearing Dealing No. 704687 and dated 4th June 2008. This is made out in a handwriting different from all previous memorials, but has been signed by the same Registry official who signed the memorials relating to Dealings Nos. 700886 and 700887. Curiously, on the bottom of this memorial there is an entry made out with a different handwriting which says "Order 4/6/08 – For Chaudhry & Ass." The handwriting with which this entry was made out is identical with the handwriting on the entry at the bottom of the cancelled memorial relating to Dealing No. 698496 on the bottom of the left column containing the words "Judgment 18/1/08" and the initials of the official of the Registry who made both these entries is identical. In our considered view, this unravels the mystery of two dates referred to in paragraph 23 of the judgment of the Court of Appeal, which had mystified that court. It is clear that the Court of Appeal erred in its conclusion that there were inconsistencies in the relevant folium of the Registry of Titles which were very conspicuous, which should have put a diligent Solicitor on notice that there were matters that should be further investigated.
37. All this may be beside the point, if one takes into consideration the fact that the Land Transfer Act, Cap. 131, is based on the "Torrens System" which is a system of land title where a Register of land holdings maintained by the State guarantees an indefeasible title to those included in the Register. The system had its origins in New South Wales

in the late 19th Century, and has since influenced the development of the law in many jurisdictions including Fiji.

38. The phrase “indefeasibility of title” is not found in the legislation of New South Wales or the other Australian States or in the statute law of other nations that borrowed the system including Fiji, but is derived from the word “defeasible” found in the legislation. Section 38 of the Land Transfer Act, Cap. 131 provides that-

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

39. It is noteworthy that Star Amusements has, perhaps advisedly, not used the terminology of indefeasible, and instead used the phrase “*absolute and conclusive*” in formulating its grounds for seeking special leave to appeal and in also framing its first far reaching question of law, as the words “absolute” and “conclusive” are used throughout in the Land Transfer Act, though not together to form the phrase “absolute and conclusive”. The word absolute occurs in sections 39(1), 42(2), 93(3) and 100 and the word “conclusive” appears in sections 18, 25 and the title to section 38, though as already noted, the language of the substantive provision in section 38 avoids “conclusive” and enacts in essence that “no instrument of title registered under the provisions of this Act shall be impeached or defeasible....” in the given circumstances.

40. Section 39(1) carries the concept further and enacts that “the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall, *except in case of fraud*, hold the same *subject to such encumbrances as may be notified on the folium 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; and

(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; and

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

41. While the above quoted section 39(1) of the Act may be regarded as the heart of the concept of indefeasibility of title of a registered proprietor, section 40 seeks to dispel any doubts that may have existed in regard to the survival of various legal or equitable principles relating to “trust or unregistered interest” in land in the following manner:-

“Except in the case of fraud, *no person* contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest in land subject to the provisions of this Act *shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor of such estate or interest is or was registered, or to see to the application of the purchase money or any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.*” (emphasis added)

42. The decision in *Subramani & Maria v Dharam Sheela and three others, supra*, is important not only because of the peculiar facts of that case, but also because Marsack JA., in the course of his judgment in that case, referred to with favour the landmark decision of the majority of the Court of Appeal in New Zealand in *Fels v. Knowles* (1906) 26 NZLR 604 in which it was observed at page 620 that-

“The cardinal principle of the statute is that *the register is everything*, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, *upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against the world* ... Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorised, as in the case of easements or incorporeal rights, to the right registered.” (emphasis added)

43. The above quoted passage from *Fels v Knowles, supra*, in which the principle of immediate indefeasibility of title was first enunciated, has been quoted with approval by the Supreme Court of Canada in *Union Bank of Canada v. Phillips and Boulter Waugh Ltd.*, [1919] S.C.R. 385 at 387, the majority of the New Zealand Court of Appeal in *Boyd v. Mayor of Wellington* [1924] NZLR and by the the Privy Council in *Waimiha Sawmilling Co. Ltd v. Waione Timber Co. Ltd* [1926] AC 101 at 106, and has since gained universal acceptance. What “immediate indefeasibility” signifies is that the purchaser obtains an indefeasible title once the transfer is registered regardless of the fact that the document was invalid.
44. Of course, there have been other and earlier cases such as *Gibbs v Messer* [1891] AC 248, where the court preferred to follow the principle of deferred indefeasibility, which means that the purchaser's title is defeasible and can be 'set aside' if the real proprietor makes a claim. However, if the purchaser transfers his title to a new purchaser (*bona fide* and for valuable consideration) before any such claim is made, that new purchaser's title does become indefeasible.
45. Any doubt that may have existed in this regard were dispelled in a most decisive manner in *Frazer v. Walker* [1967] 1 AC 569 in which the Privy Council upheld the title of a *bona fide* purchaser for value despite the existence of fraud on the part of his predecessor in title, as he himself was unaware of any fraud. In the course of this decision, the Privy Council held that *Boyd v. Mayor of Wellington, supra*, was rightly

decided by the majority of the Court of Appeal, and Lord Wilberforce at page 584 of his opinion, observed that:-

“... the ratio of the decision [in *Boyd's case*] applies as regards titles derived from registration of void instruments generally. In respect of all such instruments it established that registration is effective to vest and to divest title and to protect the registered proprietor against adverse claims.”

46. It is also noteworthy that the Privy Council distinguished *Gibbs v. Messer, supra*, on the ground that “the Board was then concerned with the position of a *bona fide* 'purchaser' for value from a fictitious person and the decision is founded on a distinction drawn between such a case and that of a *bona fide* purchaser from a real registered proprietor.”
47. This brings us to the more recent decision of the Court of Appeal in *Attorney General v Vijay Kumar and Everett Riley, supra*, which the Court of Appeal had sought to distinguish on the facts on the basis that while the case at hand concerned a mistake made by the Registry in incorrectly recording the date of registration of a Judgment, the *Riley* decision involved an error made in the Registry in not properly recording the fact that the registered transfer was only of a “half share”. This overlooked the simple point that both were errors made by the Registry, which had the effect of giving clear title to a proprietor when in the *Riley* case he had conveyed only a half share and in the present case, it was subject to charge resulting from a money Judgment. The Court of Appeal in the *Riley* case upheld the cardinal principle of the Land Transfer Act relating to indefeasibility of title in no uncertain terms, while the Court of Appeal in its impugned judgment in this case had denied the protection of this principle to Star Amusements, which was a registered proprietor entitled to the same protection. As Speight, V. P. (with whom Mishra JA and Roper JA concurred) observed in paragraph 2 of the *Riley* judgment,

“The purpose of the Torrens system was to establish certainty of title based on registration, which can be taken as notice to all of the identity of and extent of interest of the person who is certified to be the owner (*Gibbs v. Messer* (1891) A.C. 248). *It recognized that innocent persons might suffer through error or other causes; this must take second place to the merit of certainty, leaving innocent parties to be compensated. The registered proprietor's interest is indefeasible.*” (emphasis added)

48. We are therefore firmly of the view that the Court of Appeal clearly failed to uphold the cardinal principle of the Land Transfer Act that the Register is *absolute and conclusive* except in case of actual fraud, which has to be brought home to the registered proprietor. Question (i) above has to be answered in favour of the Petitioner.

The Protection of the Bona Fide Purchaser for Value

49. The next question that arises for determination is (ii) whether a *bona fide purchaser* for value acquires by registration a title immune from adverse claims. In regard to this question, it is relevant to note that the Court of Appeal in paragraph 27 of its

judgment which is quoted fully in paragraph 9 above, sought to deprive Star Amusements of the protection afforded to a *bona fide* purchaser for value by section 42(3) of the Land Transfer Act on the basis that it cannot be taken cover of by a purchaser on whose behalf a proper search has not been effected. Section 42(3) of the Land Transfer Act provides that-

“Nothing in this Act contained shall be so interpreted as to leave subject to an action of ejectment or for recovery of damages or for deprivation of the estate or interest in respect of which he is registered as proprietor any *bona fide purchaser for valuable* consideration of any land subject to the provisions of this Act, or any estate or interest therein, on the ground that the proprietor through or under whom he claims was registered as proprietor through fraud or error or has derived from or through a person registered as proprietor through fraud or error; and this whether such fraud or error consists in wrong description of the boundaries or of the parcels of any land or otherwise howsoever.” (*Emphasis added*)

50. In this connection, Mr. Mishra has submitted that any person inspecting the Register of Titles would have been misled by the “mistake” made by the Registrar of Titles, for the reason that in terms of section 105 (2) of the Act, any judgment, decree or order served on the Registrar under section 104 “shall cease to bind, charge or affect any estate or interest in land” in respect of which it is registered unless a transfer upon a sale under such judgment, decree or order has been presented to the Registrar for registration “within *six months*, or such extended period...”, from the day on which the copy of such judgment, order or decree was served. He further submitted that Star Amusements was in actual fact misled by the error in the Register, and in those circumstances it is entitled to protection as *bona fide* transferor for value.
51. On the other hand, it is the contention of Mr. Green, who appeared for the Registrar of Titles and the Attorney General, that a prudent search of the Registry of Lands would have revealed that the judgment in case No. HBC 154 of 2006L was pronounced only on 20th December 2007, and could not have been registered on 18th January 2007, and the date of the judgment could have been ascertained from the Registry of Lands, particularly from the relevant lodgement entry. He further submitted that the inconsistencies apparent in the memorials should have put any prudent searcher of the Registry on inquiry. He submitted that this was tantamount to “wilful blindness” on the part of Star Amusements.
52. It is of interest to note that the affidavit of the then Registrar of Titles, Usenia Losalini dated 18th February 2010 (pages 150 to 153 of the Court of Appeal Record) is altogether inconsistent with the position taken up by Mr. Green. In paragraph 7 of the said affidavit, Losalini has sworn that Dealings No. 700886 (transfer in favour of Star Amusements) and Dealing No. 700887 (mortgage in favour of ANZ Bank) were registered “on the basis that the six months [prescribed in section 105(2) of the Act] has lapsed”. In paragraph 8 of the same affidavit, Losalini has said, in a Torrens spirit, that “there was no need to go beyond the title to ascertain the validity of the judgment unless we have been informed earlier that the registration date is incorrect.”

53. Reference has already been made to the decisions of the Court of Appeal in *Subramani & Maria v Dharam Sheela and three others, supra*, and *Attorney General v Vijay Kumar and Everet Riley, supra*, 23, by which the Court of Appeal was clearly bound, which upheld the rights of a *bona fide* purchaser for value, and the decisions of the Privy Council in *Waimiha Sawmilling Co. Ltd v. Waione Timber Co. Ltd, supra*, and *Frazer v Walker, supra*, were to the same effect. The Court of Appeal in the impugned judgment has disregarded the binding nature of all these judgments and the principles enunciated in them, and erred in holding that Star Amusements was disentitled to protection as a *bona fide* purchaser for value because a more prudent search of the Registry has not been carried out on its behalf.
54. For these reasons, we have no hesitation in holding that the Court of Appeal did err in depriving Star Amusements of the protection it was entitled to as a *bona fide* purchaser for value.

The Power to Correct the Register

55. The third and final question for consideration in this appeal is whether the High Court has power or the jurisdiction to order alteration of the Register under Section 168 of the Land Transfer Act or other provisions in the absence of proof of actual fraud and whether the power to correct the Register expires when a *bona fide* purchaser for value relying on the face of the Register and becomes a registered proprietor. The question arises in the context that the Court of Appeal did consider in paragraphs 17 and 18 of its judgment, the ambit of sections 165 and 168 of the Land Transfer Act dealing respectively with the power of the Registrar and the Court to correct certain errors in the Registry.
56. Fortunately, this question has been considered in depth in the decision of the Privy Council in *Frazer v Walker, supra*, and by the Court of Appeal in *Attorney General v Vijay Kumar and Everett Riley, supra*.
57. It may be stated at the outset that the power of the Registrar under section 166 to make corrections or to move Court to make the same, is confined to particular circumstances spelt out in the said section, such as where “any grant, certificate of title or other instrument of title has been issued in error or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error on any such instrument, or that any such instrument, entry or endorsement has been fraudulently or wrongfully obtained, or that any such instrument is fraudulently or wrongfully retained” and none other. The ambit of Section 168 is much wider.
58. In exercising the powers of correction conferred by sections 131, 166 and 168, the Registrar of Titles and the Court should be mindful of the other provisions of the Land Transactions Act which have provided for indefeasibility of title, and the fact that in those provisions, such as sections 39(1), 40, 41, 42(1)(c) and 42(3), an intention to protect the title of the registered proprietor except where there is fraud, is manifest. In *Frazer v Walker, supra*, Lord Wilberforce made it clear that section 183 of the New

Zealand legislation which corresponds with our section 42(3) limited the Registrar's powers of correction to the period before which a *bona fide* purchaser or mortgagee acquires title. In *Attorney General v Vijay Kumar and Everett Riley, supra*, Speight VP., noted that although the specific remark of Lord Wilberforce "referred to the restrictions on the Registrar's power to correct, it follows from what has been said earlier that if the purchaser is *bona fide* he is free from fraud and no action whether by the Registrar or by an earlier proprietor taking proceedings could avail."

59. For these reasons, we hold that the Court of Appeal in the impugned judgment erred in affirming the decision and order of the High Court directing the Registrar of Titles to rectify the date of registration of judgment No.698496 from 18th January 2007 to 18 January 2008, long after Star Amusements, as registered proprietor, and ANZ Bank, as bona fide mortgagee for value, acquired their respective title and rights.

Conclusions

60. In the result, all the far reaching questions of law on which special leave to appeal was granted by this Court are answered in favour of the Petitioner Star Amusements, and the judgment of the Court of Appeal dated 28th September 2012, as well as the judgment of the High Court dated 3rd November 2011 and its order dated 24th November 2011 are vacated. The original summons filed by the 1st and 2nd Respondents Navin and Samuel Prasad is dismissed, except in regard to the claim made by them against the 3rd and 4th Respondent Registrar of Titles and the Attorney General for compensation, which will now proceed to conclusion in the High Court.
61. The 3rd Respondent Registrar of Titles shall pay by way of costs of this appeal, a sum of \$ 4000 to the Petitioner, Star Amusements Limited.

Hon. Chief Justice Anthony Gates
President of the Supreme Court

Hon. Mr. Justice Saleem Marsoof
Justice of the Supreme Court

Hon. Mr. Justice Ariam Mutunayagam
Justice of the Supreme Court

Solicitors:

MC Lawyers for the Petitioner

Chaudhry & Associates for 1st and 2nd Respondents

Office of the Attorney General for the 3rd and 4th Respondents

No appearance for the 5th and 6th Respondents