IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
Civil Appeal No. 49 of 1981

Between:

GAJADHAR s/o Bharat — Appellant

and

JAI PAL s/o Sital — 1st Respondent
NATIVE LAND TRUST BOARD — 2nd Respondent

H.K. Nagin for Appellant
S.D. Sahu Khan for 1st Respondent
A. Qetaki for 2nd Respondent

Date of Hearing: 21st July, 1982.
Delivery of Judgment: 30th July, 1982

JUDGMENT OF THE COURT

The appellant was the 2nd defendant in an action determined by the Supreme Court of Fiji at Lautoka on 14th August 1981; the 1st respondent was the plaintiff. The 2nd respondent - the Native Land Trust Board - was the 1st defendant. Eqbal Mohammed was joined as a third party. Judgment was given in favour of the 1st respondent. NLTB was ordered to pay the third party's costs for an incorrect joinder. Appellant appeals to this Court; the 1st respondent filed a cross appeal. The NLTB appeared before this Court as 2nd respondent but made it clear that it was not appealing against the judgment. The third party took no further part in the appeal.

We will follow the mode of reference in the judgment and refer to the appellant as defendant, the 1st respondent, as plaintiff and the Native Land Trust Board - 2nd respondent as NLTB. Considerable documentary evidence

was tendered by consent.

The facts are as follows. The plaintiff and the defendant held from NLTB agricultural lease No. 6430 as tenants in common in equal shares. The land covered by the lease was 54 acres 2 roods 16 perches and was situated at Ba and known as "Lonaniu"; the term was 30 years and the expiry date was 14th September 1970. The lease was originally granted to defendant; in 1942 a transfer to plaintiff and defendant as tenants in common in equal shares was registered, but due to an error in the Registry the lessee was shown as plaintiff solely. In 1968 as a result of agreement between the parties plaintiff transferred a one half share in the lease No. 6430 to defendant; they were registered as tenants in common in equal shares. The plaintiff and defendant cultivated approximately equal portions of the land; the lease was due to expire in September 1970 and they agreed to apply to NLTB to partition the land and each obtain a separate lease for his respective half. The NLTB sent a letter to the Sugar Company to whom they were both supplying cane advising that the lease of the land was being renewed for 10 years from 15th September 1970 and advising that their individual cane contracts could be renewed. The NLTB sent provisional approval notices to each of the parties, they both paid the survey fees requested; the relevant part of the approval notice sent to defendant dated 18th September 1970 reads as follows:-

"Ref: N.L.T.B. No. 4/1/192

Native Land Trust Board,
P.O. Box 116,

To: GAJADHAR f/n Bharath,
Balevuto, Ba,
C/- Land Agent, BA.

Suva, 18 Sep.1970

ORIGINAL STAMPED
$ 75c Vide No.29416 of 18.9.70

Sir,

I have to inform you that your application to lease a piece of land known as Lonaniu 1B situated in the Tikina of Magodro has been provisionally approved by the Native Land Trust Board on the following terms:-

Estimated area, subject to survey 27 acres 1 rood 08 perches

Period 10 years, from 15/9/70

Rent payable to the Native Land Trust Board in Suva half yearly in advance in the months of January and July in every year:-

$ 3rd class caneland at $10.00 p.a.p.a.; Marginal caneland at $8.00 p.a.p.a. and Grazing at 20c p.a.p.a.

Rental to be paid on account pending survey of land: $116.86 per annum.

Class of Lease A - Agricultural

Owned by the Mataqali Naduaniwai T.T. Talenaua

Estimated survey fee, subject to adjustment, $180.00

The lease will be subject to the conditions set out in the Native Land (Leases and Licences) Regulations, and where applicable the Agricultural Landlord and Tenant Ordinance, a summary of which conditions appears on the back hereof.

2. You are requested to pay the estimated survey fee, together with the rent assessed on the estimated area of the land for the first period of six months from the date of the Board's provisional approval of lease without delay to the Native Land Trust Board in Suva. "

An approval notice dated 6.4.71 expressed in the same terms was sent to plaintiff.

The learned judge observed:-

"Clearly the Native Land Trust Board, the plaintiff and 2nd defendant clearly and indubitably knew that there was to be an equal partitioning. "

Waisaki Savou, the senior draughtsman with NLTB, gave evidence that he saw a joint application by the parties for the partitioning of the land and on 6th April 1971 he issued survey instructions to Eqbal Mohammed, a surveyor; the joint application was not produced in evidence; it had apparently gone astray; Savou said in evidence:-

"The intention was to give 27 acres approximately to each party using the creek as part of the dividing line. "

Correspondence passed between the surveyor and NLTB over the survey; the surveyor recommended a boundary which conformed with the natural contour but it gave defendant approximately 1 acre 3 roods more than plaintiff. This was not referred back to the plaintiff. By some extraordinary error which was not explained the variation in survey became 5 acres 1 rood, which would result in the defendant obtaining 32 acres 1 rood and the plaintiff 22 acres approximately if the survey was approved. After further discussion between the surveyor, Savou and the Secretary of NLTB the plan showing 32 acres 1 rood as the area to be leased obtained by way of new lease to defendant was signed by NLTB officials. A lease in favour of defendant showing the area as 32 acres 1 rood was prepared and the plan annexed; the lease was duly signed by defendant as lessee and a certificate completed by the attesting witness that the lease had been read over and explained to the defendant in Hindustani and that he appeared fully to understand the meaning and effect thereof. The certificate appearing on the lease is as follows:

"The Signature
Sgd. Gajadhar
was made in my presence and I verily believe that such signature is of the proper handwriting of the person described in the above lease as Gajadhar father's name Baharat of Balevuto, Ba, Cultivator
the lessee ..... Sgd. Gajadhar .....

and I certify that I read over and explained the contents hereof to the lessee in the Hindustani language and he appeared fully to understand the meaning and effect thereof. ..... Sgd. M. Koroi .....
Land Agent, Ba "

The lease was registered on 28th November 1975 under No. 14871 and thereafter in 1976 defendant commenced to cultivate 5 acres of land previously farmed by plaintiff. Vigorous protests were voiced by plaintiff and his lawyers to defendant and NLTB for the correction of defendant's lease; NLTB endeavoured to persuade defendant to yield up the additional land of 5 acres 1 rood included in the lease; defendant declined and maintained that as he was the registered proprietor he had the protection of the indefeasibility sections of the Land Transfer Act (Cap.131).

The learned judge held that section 39(1)(b) of the Land Transfer Act applied and that an error had been made by NLTB in the boundaries of the land leased to defendant in that 5 acres 1 rood of plaintiff's land was included. On the issue of fraud the learned trial judge found that the defendant was not fraudulent. The learned judge said:

> "I do not accept that the second defendant was fraudulent. Having received the registered title from his landlord, the Native Land Trust Board, the 2nd defendant, although aware that he had received 5 acres of the plaintiff's land decided that his title was unshakeable under the L.T.A. 1971. "

A claim for damages by the plaintiff was rejected by the learned judge on the grounds that insufficient proof had been brought in support thereof. Judgment was given in favour of the plaintiff and the learned trial judge ordered:-

> " I declare that the plaintiff is entitled to one half of the orginally leased area that is to say to an area of 27 acres 1 rood 8 perches.
>
> I declare that the existing boundary shown in Native Lease 14871 purporting to partition the original lease No. 6430 is erroneous and ineffective.
>
> The second defendant is directed to surrender Native Lease 14871 to the Registrar for cancellation.

.....
.....

He was aware of the mistake. Although he was not guilty of causing the error he sought to take an unfair advantage of it. No doubt he thought that on receiving the registered lease No. 14871 he was entitled to take advantage of the error in acreage. "

The defendant appeals to this Court and lengthy grounds of appeal were filed which we summarise as follows:-

1. That the learned judge was wrong in holding that the plaintiff and respondent had entered into an agreement for the partition of the land in the original lease No. 6430.

2. That the learned judge was in error in having defendant's lease recalled and rectified under section 39(1)(b) of the Land Transfer Act relating to misdescription of boundaries and that plaintiff could impeach defendant's title by virtue of section 39(1)(a) of the Land Transfer Act.

3. That the learned judge erred in not holding that defendant's lease 14871 was indefeasible by reason of the provisions of the Land Transfer Act.

4. That the learned judge erred in holding that plaintiff's interest under the original lease No. 6430 was still extant and that the rights conferred by Agricultural Landlord and Tenant Act 1970 had been surrendered and that no cause of action existed.

The plaintiff in his cross appeal sought to have the judgment of the learned trial judge confirmed principally on the ground that defendant acted fraudulently and was not entitled to rely on the indefeasible provisions of the Land Transfer Act so as to defeat the plaintiff's claim. The plaintiff also sought to have the findings of

the learned judge on the claim for damages reversed.

The defendant did not give any evidence.

It will be convenient if we deal now with the first ground. The evidence clearly establishes that the plaintiff and defendant jointly made application to NLTB to partition the land in lease 6430 into two equal halves. The approval notices issued by NLTB supports the evidence of the plaintiff and his witnesses. The survey fees were paid by the plaintiff and the defendant and the surveyor was instructed to survey defendant's land. The learned judge found that there was a contract between the parties under which they both agreed to "relingusih to the other his claim to an undivided half share of the whole in return for the exclusive right to one half". We find no merit in the first ground of appeal and it fails accordingly.

We shall now consider the second ground dealing with the misdescription of the boundaries of the land in Lease 14871.

Generally speaking, the whole pattern of the Land Transfer Act is to confer title by registration, so that once registered the proprietor can rest upon registration as the guarantee of his holding, both as to the legality of the grant, and the correctness of the description within the grant. All land transfer systems have detailed procedures whereby when land is brought under the Act careful scrutiny is made of -

(a) The origin of the applicant's entitlement, traced back through conveyances to the original grant and

(b) Research into the accuracy of description of areas and boundaries with particular reference to accuracy of survey.

No matter how much care is exercised it is sometimes the case that a slip is made in definition, so that a title originally issued, or a subsequent transfer of an interest is not worded so as to coincide with the party's demonstrable intention. When that situation can be shown the documents can be recalled for correction.

Section 39 read, as a whole, is as follows:-

"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 priority, 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 of 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.

2. Subject to the provisions of Part XIII, 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. "

The appropriate part for present consideration is subsection (1)(b).

The question arises whether the instrument of title erroneously includes land because of a wrong description of parcels or of boundaries.

There is no doubt, as the learned judge found, that the NLTB made a mistake - they had originally intended to grant the defendant 27 acres 1 rood 16 perches. After discussions this intention may have been varied by agreeing to a boundary alteration of 1¾ acres approximately.

Eventually an instrument issued which granted 32 acres 1 rood - the question arises was this an error?

The learned author of Baalman - Land Transfer Act of N.S.W. (2nd Edn.) in discussing the identical subsection says that a lucid explanation of wrong description is to be found in Hamilton v. Iredale (1903) 3 S.R. (N.S.W.) 535 at 550 where Walker J. says:-

> "If I apply to bring Blackacre (to which I am entitled) under the Act, and in my application, or in the certificate, Blackacre is misdescribed, so that a certificate is issued to me of the adjoining Whiteacre, or of Blackacre plus a strip of Whiteacre, there is plainly a misdescription of parcels or boundaries, which can be rectified as against me or any volunteer claiming under me. If, however, I apply to have land to which, in fact, I have no title, brought under the Act, and a certificate is issued to me of that land, it is not a case of misdescription of parcels or boundaries. Misdescription is where, intending to describe A, I describe B, or so describe A as to make it include B; but it is no misdescription if I describe correctly the land I am applying for, though the land is not mine. "

The question of mistake must we suggest be measured not by a party's former motives, but the intention with which the challenged description was inserted in the questioned instrument.

Here it is clear that he NLTB had been intending to grant 27 acres 1 rood 16 perches, then later 28 or 29 acres, but eventually it conferred with the surveyor.

What transpired is not given in evidence, but as a result, the Board approved of the 32 acre 1 rood boundary plan. This appears from the evidence of Savou:

> "The surveyor then called to see me. He said that my predecessor had indicated that natural boundary markings should be adhered to as far as possible.
>
> I referred the matter to the Secretary. He directed me to approve the plan which was then then to the Director of Lands for mathematical check.
>
> I did not get an approval from the tenants as to where the boundary should be because this was a good natural boundary. "

And later -

> "Mr. Eqbal deviated from the creek.
> I approved his plan.
> I am referred to EX. D.1.
> It bears the stamp of Native Land Trust Board February 1975. "

Exhibit D.1 referred to is the registered lease, and on it is the plan showing a boundary which produces an area of 32 acres 1 rood and it bears an approval stamp signed by Mr. Savou on behalf of the NLTB. Such a signature could in other circumstances be take as a mistake, but not here where according to the evidence there had been discussion and consideration as to where the boundary should go and its position and subsequent area had been approved by the Secretary of the Board.

In our view this does not amount to a "boundary erroneously included in the instrument", and accordingly section 39(1)(b) is inapplicable.

Accordingly defendant succeeds on the 2nd ground of appeal.

The third ground of appeal alleges that defendant's lease was indefeasible under the Land Transfer Act; the

1st ground of the plaintiff's cross appeal alleges that defendant was fraudulent and for that reason defendant could not rely on the indefeasibility provisions of the Land Transfer Act. These opposing grounds may be taken together.

Fraud cases largely turn upon the knowledge that the challenged party has of the existence and nature of the adverse claim.

Various pronouncements have been made as to what will amount to fraud and some of these are hard to reconcile with others unless it is remembered that the question of fraud defeating indefeasibility arises in two quite different situations.

In the Land Transfer Act (Cap. 131) these are dealt with in two sections 39 and 40.

Section 39 has already been set out in full (supra).

It will be seen that this covers the registered proprietor against whom it is claimed that there was irregularity concerning the document or the circumstances whereby he acquired his status of proprietor - the immediate purchaser situation. Just by way of illustration Section 39(1)(b) - a misdescription of boundaries can be corrected in the case of the party whose document of title has been issued with misdescription but not in the case of a subsequent purchaser for value.

Then follows section 40:-

> "40. 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 in any previous proprietor of such estate or interest

> is or was registered, or to see to the application of the purchase money or any part thereof, or shall be affected by notice, direct or constructive, of any trust or 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. "

Again even the subsequent purchaser's title may be upset in case of fraud, but with the proviso that notice of a trust or unregistered interest in existence does not of itself connote fraud upon the party obtaining registration.

These provisions appear in other statutes of land registration - as for example the Australian States, New Zealand, Malaysia and others. The distinction between the circumstances of the immediate and the deferred purchaser is fully discussed in Frazer v. Walker & Anor /1967/ 1 AC 569 and in the many articles which have been written concerning that decision.

Now cases in which there have been attempted definitions of fraud, or of the circumstances in which it will be inferred, need to be examined with some care to see into which of these two classes they fall.

The well known passage in the judgment of the Privy Council in Waimiha Sawmilling Company Ltd. v. Waione Timber Company Ltd. (1926) A.C. 101 at pp.106 and 107 concludes with these oft quoted words:-

> "The act must be dishonest and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest."

Now the facts in that case were that the appellant had claimed that certain timber cutting rights that it had in respect of land registered in the name of one Howe amounted to a lease. The appellant brought an action against Howe in the Supreme Court for a declaration,

but lost. An appeal was lodged but had not been disposed of. Howe sold to Wilson, who knew of the pending appeal, and Wilson later sold to the respondent company which also knew of the appellant's claim. Their Lordships recited both section 58 and section 197 of the New Zealand Land Transfer Act 1915 (our sections 39 nd 40) and held that notice of the claim of an unregistered interest did not amount to fraud in those circumstances. But it is clear that Wilson and the respondent company both had the protection of section 197 which has the proviso that fraud is not to be imputed to a subsequent purchaser even with notice and the discussion of the meaning of fraud must be understood as relating to those circumstances. It is to be noted that in the head note a passage reads:-

> "Held: that the circumstances.....
> did not constitute fraud within the meaning
> of section 58 of the Act."

With respect we suggest that the judgment does not justify this reference to section 58.

Similarly the discussion of fraud in Assets Company Ltd. v. Mere Roihi (1905) A.C. 176 must be read with this in mind. We do no more than refer to page 210 where the different positions of immediate registration and subsequent purchase for value are referred to.

More appropriate to the present circumstances are cases concerning knowledge by the party who first becomes registered knowing of adverse rights; in particular Loke Yew v.Port Swettenham Rubber Co. Ltd. (1913) A.C. 491 and Efstratiou & Ors. v. Glantschnig (1972) NZLR 594.

In considering these "immediate proprietor" cases it is also important to note at what time knowledge came to the challenged party, whether before or after registration - for to be a party to a registerable document with knowledge of conflicting interest in one thing, but merely to learn at a later stage after

registration of an adverse claim and then to decline to recognise it, is another.

The much cited case of Sutton v. O'Kane [1973] NZLR 304 was in the later class and different views were taken by two of the learned appeal judges. The view taken by the learned trial judge in the present case is in accord with the majority view in Sutton v. O'Kane when he held that knowledge of the respondents claim, if acquired after his lease was registered did not constitute fraud on the part of the appellant.

We return however to a brief discussion of the two cases mentioned a little earlier.

Loke Yew's case is a good example of the operation of the equivalent of our section 39 - of clear deception by the registered proprietor in obtaining registration by becoming party to a document which conveyed to him land, of which part to his knowledge belonged to another.

Efstratiou v. Glantschnig (supra) contains a careful annlysis of earlier observations concerning fraud in circumstances very close to the present. The Glantschnigs were husband and wife. The wife had paid sums of money toward the purchase of a house property which was registered in the husband's name - so that she had an equitable interest under the principles relating to trusts between husband and wife. They separated and the husband immediately placed the property in the hands of a land agent, and it was sold to a third party within a very short time at a substantial under value - the agreement for sale, the stamping of the document, the settlement of the transaction and registration into the name of the third party all followed in a matter of 2 to 3 days. The trial judge and the Court of Appeal all concluded that the husband was attempting to defeat the wife's interest in the property. It had also been held

as a matter of fact that the third party, although virtually a stranger must in all the circumstances have been aware that the wife was being deprived of her part interest in the property.

In delivering the judgment of the Court of Appeal Turner J. discussed the two Privy Council decisions above mentioned, and he then went on to examine the observations of Sir John Salmond, one of the majority in the Court of Appeal in the Waimiha case - 1923 NZLR 1137 at 1173 which majority decision had been upehld by the Privy Council.

The passage there appearing, and which is adopted in Efstratiou v. Glantschnig (supra) at p. 602 as appropriate in section 62 (formerly section 58) (NZ) (Section 39 Fiji) cases is:-

> "The true test of fraud is not whether the purchaser actually knew of a certainty of the existence of the adverse right, but whether he knew enough to make it his duty as an honest man to hold his hand, and either to make further inquiries before purchasing, or to abstain from the purchase, or to purchase subject to the claimant's rights rather than in defiance of them. If knowing as much as this he proceeds without further enquiry or delay to purchase an unencumbered title with intent to disregard the claimant's rights, if they exist, he is guilty of that wilful blindness or voluntary ignorance which according to the authorities is equivalent to actual knowledge and therefore amounts to fraud. "

We turn to the pleadings in this case so far as fraud was raised. Although not pleaded as specifically as might have been we are of the opinion that the combined effect of the statement of claim and the statement of defence were sufficient to put the issue squarely before the court in accordance with Order 18/8 and 18/12. The relevant paragraphs in the statement of claim are: (3), (4), (6), (8), (9), (10), (11), (12), (13) and (14). In the statement of defence the defendant acknowledged the preliminary matter pleaded concerning the joint

ownership of the land prior to 1970 and also matters relating to the application to the NLTB for leases. He then pleaded, however, that he had no specific knowledge of the respective areas to which each man was entitled. Indeed it was pleaded that he believed that his proper share was substantially larger than the share of the plaintiff. So that he took the lease from the NLTB when it was issued to him in good faith and in accordance with a belief that that was his entitlement. This contention was rejected by the learned trial judge. We will outline certain steps in a moment but the trial judge very firmly said that when he received his registered title the defendant was aware that he had received 5 acres of the plaintiff's land. This of course is a reference to the state of mind after registration a matter which we have already discussed in considering the case law. The judge had also said a little earlier that

> "presumably the second defendant was not aware of the proposed boundary until he received his copy of the registered lease",

and a little later,

> "He was probably as much surprised as the plaintiff when he learned of the new boundary."

The use of the word "presumably" and the word "surprised" was doubtless because the defendant had not given evidence so his knowledge or belief were not deposed to. It seems that the learned trial judge's attention was never directed to forming a specific conclusion concerning defendant's state of mind before the lease was registered. He may well have been diverted from this enquiry by the submission which Mr. Nagin made on this point. When questioned by this Court on whether or not defendant had been fraudulent in accepting the lease for this acreage, Mr. Nagin relied solely on a submission that the defnedant had no knowledge of the acreage he was going to get, so that it was not fraudulent on his part to sign the lease. This

submission was consistent with the statement of defence, and the conduct of the defence at trial - namely that defendant claimed he was entitled to more land than defendant. We feel it is a pity that attention was diverted from what we think was the true issue in this way. Having concluded that there was no fraud the learned judge went on to deal with the matter under section 39(1)(b) which for reasons we have already expressed we think to be not applicable. As the defendant did not give evidence and the matter is one almost entirely of documentary record this Court feels that it is in a position to make a factual conclusion arising from the following circumstances:-

(1) The original lease was to the defendant solely.

(2) An undivided half share was to be transferred to the plaintiff in 1942.

(3) By a mistake of registration the whole property was transferred to the plaintiff.

(4) This error was rectified when plaintiff made an honourable re-transfer to the defendant of an undivided half share in 1967 and 1968; this was properly registered on the lease. These steps must have emphasised in the defendant's mind that they were indeed half owners.

(5) In 1970 when the lease expired the evidence of the plaintiff, accepted by the trial judge, was that the parties agreed to partition equally and to apply to NLTB for separate leases of half of the property.

(6) They joined in making a written application which was accepted by the NLTB and this comprises a written contract between them for a half share each. A witness from NLTB had seen this document just before trial but for some reason it was not produced.

(7) The NLTB issued provisional approval notices to each party notifying its intention to grant them leases of 27 acres 1 rood 8 perches each - subject to survey - and calling on each to pay estimated survey fee of $180. Both defendant and plaintiff paid the fees.

(8) In due course the survey on being instructed by NLTB went on to the property. He discussed the proper position of the survey line with the defendant. No point can be taken that the defendant misled the surveyor but it is obvious that he must have known that this work was being done in furtherance of the provisional approval of intention to grant him 27 acres.

(9) For reasons already discussed the NLTB officials made a mistake drawing up a lease for the defendant which in area specified 32 acres 1 rood and also showed that area on the plan.

(10) The defendant was then invited to accept this lease which he did. Against the background it is inconceivable that he would have accepted the lease without knowing that he was being given 32 acres 1 rood. Indeed the very conduct of the defence indicates that he was aware of that fact. Even more importantly he signed the lease and it was certified that the contents had been read to him and he had understood. No sensible conclusion can be given other than that he knowingly made himself party to a document of title subsequently registered on his behalf which purported to grant him 5 acres more than he knew was his entitlement and this is as plain a fraud as in any of the reported cases referred to. In particular, we refer again to the most appropriate authority - Efstratiou v Glantschnig (supra) and the observations recited in that case.

As stated the attention of the learned judge was not directed to this important aspect. The statement of claim contained we believe sufficient particulars of the fraudulent dealing alleged against defendant and of the consequences which the plaintiff considered flowed therefrom. In Lawrance v. Norreys (1890) 15 App. Cases 210 Lord Watson at p. 221 said:-

> "There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments. "

The appeal before us is somewhat unusual. There was no dispute as to the basic facts; it is a question of the correct inferences to be drawn from those facts. Admittedly the defendant did not give evidence,but it is clear that the defendant had his new lease which gave him 32 acres 1 rood read over and explained to him before it was signed and registered; the defendant's dishonesty within the true test of fraud as explained by Sir John Salmon in the Waimiha case is established in this case principally on the documents coupled with the pleadings and evidence. The defendant, at the very least when he heard the lease read over and thereupon signed it must have realised he was getting 32 acres 1 rood, he should have held his hand and made further inquiries as to whether 5 acres of plaintiff's land was included in his lease.

In the circumstances outlined we believe we are justified in differing from the trial judge's decision on the finding of fact that defendant was not fraudulent, and consider, for the reasons we have given, that they are more open to be reassessed by this Court than is often the case. We are of the opinion that on the facts, in this appeal, clear grounds exist for us substituting our own conclusions for that of the learned trial judge as to whether fraud within the meaning accorded to that word in the decided cases had been proved on the part of

the defendant. In Akerhielm v. De Mare [1959] A.C.789 Lord Jenkins said:-

> "Their Lordships would add that they accept, and would apply in the present case, the principle that where a defendant has been acquitted of fraud in a court of first instance the decision in his favour should not be displaced on appeal except on the clearest grounds. "

With respect we suggest that this one of those rare cases where there can be no other conclusion once attention is directed to the point we have raised.

We conclude therefore and draw the inference from the evidence and the whole of the surrounding circumstances that the defendant knew enough when he signed his lease and having had it read to him, to make it his duty as an honest man to refrain from proceeding further and inquire whether 5 acres of his neighbour's land had been included in his lease. The trial judge stated that the defendant having received the registered lease from NLTB was then aware that he had received 5 acres of his neighbour's land, but he then decided to take advantage of the situation; it was at this stage he moved in and started cultivating the disputed land. The learned judge said:-

> "The 2nd defendant had, along with the plaintiff, applied for an equal partition of the land and he could not be expected to anticipate that their landlord, the Native Land Trust Board, who had agreed to halving the land, as shown in the existing provisional approvals for leases, would accept a survey deviating substantially from an equal partition. "

We conclude that the proper inference for the learned judge to have drawn on the facts of this case was that the defendant had acted fraudulently, and accordingly the indefeasible provisions of the Land Transfer Act do not avail him.

In our opinion this is the end of the matter and the appeal by the defendant fails and there is no need for us to consider the other grounds of his appeal. The plaintiff in his cross appeal seeks to have the judgment of the learned judge reversed on the question of damages. The plaintiff claimed special damages of $2,500 per annum for 5 years. The learned judge held that the evidence in support of the claim for special damages was unsatisfactory. The learned judge said:

> "The plaintiff in evidence did not reveal how many tons of cane per acre he had been deriving from the 5-acres which wrongly found its way to the second defendant, nor did he give any indication of prices or production costs..... Unfortunately none of the plaintiff's witnesses has translated the lost cane into cash. There are no figures from which I can assess it. "

At the hearing of this appeal counsel for defendant urged that this Court should attempt to fix a sum by way of damages. We agree that the evidence placed before the trial judge was inconclusive and unsatisfactory; we are being asked to have a "shot in the dark" and fix damages. In our opinion the approach of the trial judge on this question of special damages was correct and we agree with his reasoning. This ground of the cross appeal fails.

The position is that the respondent/plaintiff has succeeded on the 1st ground of the cross appeal and the appeal by the appellant/defendant fails on the major issue. We would therefore dismiss the appeal by appellant/defendant and allow the cross appeal by respondent/plaintiff; set aside the judgment in the Supreme Court with the exception of paragraphs (5) and (6) thereof and remit the case to the Supreme Court for the making of declarations that the respondent/plaintiff is entitled to namely,

(a) a declaration that the respondent is entitled to a lease of one half of the land known as "Lonaniu" at Ba containing 27 acres 1 rood 16 perches;

(b) for an order that the appellant/defendant surrender native lease 14871 to the Registrar of Titles for cancellation and that the NLTB cause a survey to be made forthwith of the land comprised in Native Lease 6430 and known as "Lonaniu" and partition it along a boundary which shall as far as possible -

(i) enable a lease to be given in favour of the respondent/plaintiff for an area of 27 acres 1 rood 16 perches;and

(ii) enable a lease to be given in favour of the appellant/defendant for an area of 27 acres 1 rood 16 perches.

The orders to costs in the Supreme Court referred to in paragraphs (5) and (6) of the judgment appealed from and dated 14th August 1981 are not affected.

We order that the appellant/defendant in this appeal pay the respondents/plaintiff costs of the appeal and cross appeal in this Court to be taxed if not agreed. No order as to costs is made in respect of the appearance by NLTB.

Accordingly the appeal is dismissed (in part) and the cross appeal is allowed (in part) and there will be the consequential orders mentioned above.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL