IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
CIVIL APPEAL NO. 29 OF 1982.

Between:

RAM NANDAN s/o Ramrakha — APPELLANT

- and -

SHIU DATT s/o Lokai — RESPONDENT

Anil Singh and M.A.K. Khan for the Appellant
D.C. Maharaj for the Respondent

Date of Hearing: 21st March, 1984.
Delivery of Judgment:

JUDGMENT OF THE COURT

SPEIGHT, J.A.

This is an appeal from a Judgment of Madhoji J. dated 24th March, 1982, arising from a dispute between two adjoining land owners concerning access to land locked land. In his judgment the learned Judge ordered that the appellant (1st Defendant in that Court) grant a right of way over his land in favour of the land locked land of the Respondent (Plaintiff in that Court).

The facts as found by the learned Trial Judge are as follows. The lands in question were parts of a much larger block at Wainisasa containing approximately 514 acres formerly owned by Sir Henry Scott. The southern boundary of that block fronted on to Baulevu Road. Part at least of the block was in 1948 leased to one Chinappa Gounder and in that year the Respondent obtained a sub-lease from Chinappa Gounder of an area of approximately 13 acres -

we do not know the exact boundaries in the sublease but it was in the middle of the larger block, and it had no road frontage. Gounder granted informal access to Respondent by allowing him to use a narrow strip of land to pass and repass to and from Baulevu Road - a distance of about 22 chains away. This strip is the same land as is now the subject of the right of way dispute and the evidence was that Respondent used it from 1948 or 1949 down until recent years. It is said in the judgment that one Ramrakha the father of the Appellant also occupied some of this land at the time - probably also as a sub-lessee of Gounder, - but the area is not clear.

In December, 1958, Sir Henry Scott sold the whole block to Hemraj Daya, a land subdivider. Gounder's lease was due to expire on 31st December, 1959 and Hemraj Daya made plans to subdivide and sell. He doubtless had discussions with prospective buyers. One such meeting took place early in 1959 at the house of Ramrakha. Those present included the land subdivider Hemraj Daya, the Respondent, Ramrakha and Ramrakha's son the Appellant.

Hemraj Daya offered to sell Respondent an area of land in the centre of the block totalling 30 acres approximately which would include the 13 acres subleased from Gounder. Respondent agreed provided his access to Baulevu Road was included, and Hemraj Daya consented. Payment was to be by periodic instalments of £30 and the first of these payments was made on 27.5.59. It was agreed that when half of the total instalments had been paid a survey would be made of the block. Such a survey did take place eventually - and produced D.P. 3202 on which Respondent's land is Lot 15 of 30 acres 0 roods 0.2 perches - being C.T. 18049.

The Judge found that Ramrakha and the Appellant were present throughout this meeting and were aware of the foregoing arrangements. Ramrakha negotiated

at that meeting with the subdivider for the purchase of a lot fronting Baulevu Road. These road frontage sections were also subdivided, and they are part of D.P. 2516 registered with the Registrar of Titles on 13th February, 1960.

It appears that the land over which Gounder had given the Respondent a right of access may have been part of the land which Ramrakha had been occupying prior to 1960 - but in any event that land became part of Lot 7 on D.P. 2516 and Ramrakha, at the meeting with Hemraj Daya, agreed to buy Lot 7 and a transfer of that Lot, together with Lot 26, (on the other side of Baulevu Road) was registered in his name on 19th September, 1960 (C.T. 10290). The Judge specifically found that Ramrakha knew that Shiu Datt was to have a 25 link access way over the property he was buying. The title was originally issued in the name of Hemraj Daya on 28th May, 1960, and on it the plan shows a dotted strip which leads from Baulevu Road to the boundary with Lot 15 on D.P. 3202 (the land which the Respondent had, in the presence of Ramrakha and the Appellant agreed to buy from Daya) and marked "25 lks access Res.". Similarly on D.P. 3202 there is shown a dotted strip from the boundary of Lot 15 towards Baulevu Road, traversing Lot 7 on D.P. 2516 and this strip is similarly marked "Access Reserve to Baulevu Road 25 Lks wide".

Meanwhile the Respondent had been paying his instalments to Hemraj Daya, and he continued to use the access across Lot 7, but although Hemraj Daya had instructed the surveyor to provide the right of way, and although it was shown on the plans including the plan on C.T. 10290, no steps were taken when that title was issued in the name of Hemraj Daya, or when it was transferred to Ramrakha, to register a proper easement in favour of Lot 15.

Some calculations have been done by the learned trial Judge and these show, without going into detail here, that the area attributed to the registered proprietor of C.T. 10290 is 6 acres one rood and 38 perches, whereas

by measurement the area on Lots 7 and 26 is substantially greater than that and it is clear that when he was having the land surveyed and subdivided, Hemraj Daya and his surveyor intended some deduction to be made for the access way - but in what exact form is not defined.

The Respondent continued to use the access for many years without any objection from Ramrakha. However when survey of D.P. 3202 was completed and the Respondent attempted to register a transfer to himself of Lot 15 the Registrar would not accept the same for registration, as it had no legal access - and indeed it does not - although the Registrar had previously accepted D.P. 3202 showing Lot 15 in that condition.

After the Respondent had told Ramrakha of this difficulty Ramrakha took steps to prevent the continued use of the access.

Shortly after he transferred Lot 7 to his wife Shiu Kali without valuable consideration and she took injunction proceedings against Respondent to bar further use.

At about that time, so it has been found, Appellant told Respondent that when he in his turn similarly acquired the land from his mother he would recognise Respondent's rights to access, which he said had always belonged to Respondent and it was agreed he would sell the Respondent the narrow strip of land to the East of the access way to Respondent for $500, for it was of little use to him, given the access way.

However subsequently when Appellant became the transferee from his mother (26th January, 1979) he declined to carry out his promise.

Hemraj Daya has done his best to legalise his earlier agreement by having a separate plan prepared for

the 25 link access way and has purported to sell it to Respondent for $30 but again the Registrar will not recognise that transaction for of course it clashes with the legal registered proprietorship set out in C.T. 10290.

The salient findings are as follows :

1. Hemraj Daya agreed to sell Lot 15 to Respondent and to grant him access over D.P. 2516 then owned by him, and valuable consideration was given.
2. Ramrakha and the Appellant knew of this arrangement before Lot 7 was purchased from Hemraj Daya - and they also knew of Respondent's use of the access from 1954 or earlier through to 1970.
3. Shiu Kali also knew of these matters before she took title from Ramrakha.
4. Appellant acknowledged to Respondent that he regarded the access as belonging to Respondent.
5. The surveyors were instructed and the vendor intended that the Respondent as purchaser should have an easement over Lot 7 but by some error in the survey, or transfer drafting processes in 1960 or thereafter this was not legally effected.
6. Ramrakha took title to Lot 7 knowing of the arrangements between the original vendor and the Respondent and the subsequent title holders - viz his wife and his son similarly knew before they took title in their turn.

The first point taken on behalf of the Appellant is that no note or memorandum in writing was made (until 1973), signed by Daya evidencing the agreement creating this interest over Lot 7, and hence it was unenforceable.

This submission invokes the Fiji equivalent of what was section 4 of the Statute of Frauds 1677. It is to be found in section 59 of the Indemnity Guarantee and Bailment Act and, given the change to modern phrasology, is in terms equivalent to the original section. It reads:

"59. No action shall be brought -

(a) .....

(b) .....

(c) .....

(d) upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them;

(e) .....

unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

In England section 4 of the 1677 Statute has been replaced by section 40 of the Property Law Act 1925 which in subsection (1) has for all practical purposes the same wording as our section 59 but it adds "subsection (2). This section.....does not affect the law relating to part performance."

There is evidence here of part performance so one must ask, does section 59 of the Fiji Act alter the law of part performance which existed prior to its enactment (1881). We think not, and that the words in subsection (2) were added purely for clarification that existing law as to part performance remained unaffected.

The reason for this is that part performance developed in England as an answer to a defence based on the Statute as originally worded, which, given modernisation of language is repeated both in section 59 of Fiji and section 40(1) of the Law of Property Act (U.K.).

The history of part performance as evidence of the existence of a contract for sale of land is discussed in the leading House of Lords case; Steadman v. Steadman 1976 A.C. 536, particularly in the judgment of Lord Reid. It is apparent that payment of part of the purchase price as

evidence of a contract for sale of land has been admitted for as far back as cases are reported under the Statute, and at a time when the wording of section 4 was equivalent to section 59 of the Fiji Act. Hence no suggestion can arise that this wording, without the explanatory subsection (2) of section 40 of the 1925 English Statute extinguishes the doctrine of part performance. For a recent New Zealand case to the same effect as Steadman v. Steadman see Boutique Balmoral Ltd. v. Retail Holdings Ltd. 1976 N.Z.L.R. 222 and for a fuller discussion one can refer to Hinde McMorland & Sim on Land Law paragraph 10.039.

On the facts of this case the matter raised by counsel for Appellant is simply answered by pointing to acts of part performance by the Respondent and the acknowledgment in the conduct of Daya. Immediately after the oral agreements were reached between Daya, the Respondent, and Ramrakha, Respondent commenced paying instalments as agreed and continued to do so thereafter until such time as he had made sufficient payments as to entitle him to call for a conveyance. Those payments could only be applicable as towards purchase price for at that time Shiu Datt was sublessee of Chinappa Gounder. When a sale note was later drawn up in November 1961 it showed part payment as starting in May 1959 and it had a sketch indicating the access way. Contemporaneously in May 1959 Daya instructed his surveyor to prepare D.P. 2516 showing the access reserve leading from the boundary of Lot 15 at the appropriate point and crossing Lot 7.

The second ground dealt with a matter which was detected by the learned trial Judge and discussed by him in his judgment. For the purpose of this subdivision Daya had all the land fronting Baulevu Road surveyed into lots. He took title in his own name (C.T. 10290 - 28 May, 1960) to Lots 7 and 26 - and doubtless to other lots as well. He them immediately transferred this title to Ramrakha. Lot 26 is on the far (southern) side of Baulevu Road and does not concern us. Lot 7 as drawn on the certificate of title and

on its parent plan 2516 has a "25 lk access res." drawn on it connecting Lot 15 (now Shiu Datt's 30 acres) to Baulevu Road. It is agreed by all that the title did not reserve an easement in respect of this access way in the only way it can be reserved and registered under the Land Transfer Act, but it shows that Daya had intended, and his surveyor must have been instructed to create such an interest.

The learned trial Judge also discovered confirmation of this by examining the areas. The plan on C.T. 10290 shows Lots 7 and 26 to have 6 acres 1 rood 38 perches and the body of the title recites that as being the proprietor's holding. Madhoji J. however, with the assistance of a survey witness, calculated that the delineation shown on the title and on plan 2576 contains in excess of 7 acres. Question thus arose as to what land is in the title - for the difference obviously represents the area of the so called access reserve.

The Respondent had in the Court below tried to support an argument that this strip was not in the title and should be the property of Daya's personal representative in trust for him, and he holds a plan prepared in 1974 wherein Daya attempted to exclude the access area from Lot 7 so that he could transfer it to him in accordance with his original agreement.

The Registrar of Titles refused to register, and we think, rightly.

We accept the submissions of Mr. Singh that the crucial deciding factor is the delineated survey - regardless of the area cited - and a registered proprietor's title under the Act runs from peg to peg. He cited many authorities - reference need only be made to Russell v. Mueller 25 N.Z.L.R. 256 and Dempster v. Richardson 1930 44 C.L.R. 576.

Indeed the supposed conflict arising from the understated area as quoted is not really misleading because

although the certificate recites the lesser area, the D.P. 2516 in doing so makes it clear that area is "ex access res."

Although this does not affect the legal position it is strong evidence confirming the findings that when the original arrangements were made at Ramrakha's house in 1959, with Appellant and Respondent and Ramrakha present, the scheme was for the grant of an access over Lot 7 in favour of Lot 15 in the same area as Shiu Datt had used for years.

Ground 3 involved an argument concerning equitable interests and rights in personam notwithstanding the indefeasibility provisions of the Act. The appropriate sections are 38,39 and 40 of the Land Transfer Act and they correspond closely with the sections in the 1952 New Zealand Act - 62-64, 75 and 182-183.

Complaint is made that in dismissing the matter the learned Judge relied on New Zealand cases without discussing the Fiji Act. With all respect to Mr. Singh we do not accept that there are any differences in the substance of the comparable sections of such a kind as to render the New Zealand cases inapplicable. The well known case of Frazer v. Walker 1967 1 A.C. 569 held that apart from fraud, or from errors of misdescription which can be rectified, the registered proprietor holds his title immune from attack by all the world, but claims in personam will still subsist.

Sections 182 and 183 in New Zealand correspond with section 40 in Fiji which provides:

> " Except in case of fraud.....no person dealing with the proprietor....shall be affected by notice,direct or constructive of any trust or unregistered interest..... and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

Now we can be saved the time of discussing in personam rights, and equitable easements because Mr. Maharaj for the Respondent recognises that these are of little use to him in the present circumstances; they certainly will not assist him to obtain registration of Lot 15, and he relies solely upon his claim that this is a case of fraud.

We can therefore move straight onto Mr. Singh's fourth ground which is the crux of the case.

Regardless of what differences may exist between the Fiji and New Zealand statutes, and they are minor, the concept of fraud is common to both, and as both counsel recognised there are many reported New Zealand decisions on this question, including cases which have been finally determined in the Privy Council.

The latest and most comprehensive discussion of a situation similar to the present one, but not on all fours, is Sutton v. O'Kane 1973 2 N.Z.L.R. 304 a decision of the New Zealand Court of Appeal in which fraud was discussed at length by two of that country's most erudite judges of recent years - Turner P. and Richmond J. On the facts they came to different conclusions, and with Wild C.J. agreeing with Richmond J. but on a different approach, it became a majority decision. Both the leading judgments contain lengthy reviews of earlier cases of fraud in respect of a person who procures himself to be registered proprietor in cases where he then knows, or later becomes aware, of an unregistered interest.

Richmond J. and Turner P. were in agreement that a person who knows of another's interest and procures registration which cheats the other of that interest is guilty of fraud and his title can be impeached:

> "It is well settled that knowledge of a breach of trust or of the wrongful disregard and destruction of some adverse unregistered interest does itself amount to fraud. In Locher v. Howlett it is said by Richmond J: 'It may be considered as the settled construction of this enactment that a purchaser is not affected by knowledge of the mere existence of a trust or unregistered interest, but that he is affected by knowledge that the trust is being broken, or that the owner of the unregistered interest is being improperly deprived of it by the transfer under which the purchaser himself is taking'."

per Salmond J. in Waimiha Sawmilling Co. Ltd. v. Waione Timber Ltd. 1923 NZLR 1137 at 1173 - N.Z. Court of Appeal, affirmed in the Privy Council 1926 A.C. 101.

The difference of opinion related to the position of supervening fraud - the proprietor who intended to recognise the interest at the time he registered but subsequently disregards that interest. Turner P. held that was also fraud; Richmond J. thought otherwise. In New Zealand therefore the question is still open, for Wild C.J. did not find himself called upon to decide this question.

In so far as it might be relevant for the purposes of this case we prefer the view of Turner P. backed as it was by a long line of authority.

A few quotations from authorities relied on by him are of relevance :

> " 'If the defendant acquired the title, said Prendergast C.J. in Merrie v. McKay (1897) 16 NZLR 124,'intending to carry out the agreement with the plaintiff, there was no fraud then; the fraud is in now repudiating the agreement, and in endeavouring to make use of the position he has obtained to deprive the plaintiff of his rights, under the agreement. If the defendant acquired his registered title with a view to depriving the plaintiff of those rights, then the fraud was in acquiring the registered the title. Whichever view is accepted, he must be held to hold the land subject to the plaintiff's rights under the agreement, and must perform the contract entered into by the plaintiff's vendor'. "

Merrie v. McKay was cited with approval by Salmond J. in Wellington City Corporation v. Public Trustee 1921 NZLR 423 at 433. There Salmond J. said :

> " It is true that mere knowledge that a trust or other unregistered interest is in existence is not of itself to be imputed as fraud. A purchaser may buy land with full knowledge that it is affected by a trust, and the sale may be a breach of trust on the part of the seller, but the purchaser has the protection of s.197 unless he knew or suspected that the transaction was abreach of trust. Fraud in such a case consists in being party to a transfer which is known or suspected to be a violation of the equitable rights of other persons. Where, however, the transfer is not itself a

> violation of any such rights, but the title acquired is known by the purchaser to be subject to some equitable encumbrance, the fraud consists in the claim to hold the land for an unencumbered estate in wilful disregard of the rights to which it is known to be subject. Thus in Thomson v. Finlay it was held that a purchaser of land under the Land Transfer Act who takes with actual notice of a contract by the seller to grant a lease to a third person is bound by that contract. Williams J, says 'If there is a valid contract affecting an estate, and the interest is sold expressly subject to that contract, it would be a distinct moral fraud in the purchaser to repudiate the contract, and the Act does not protect moral fraud'. Specific performance of the contract to lease was decreed against the purchaser accordingly."

Merrie v. McKay went to the Court of Appeal and as Turner P. points out nothing was said in that Court to derrogate from this statement, and he refers to observations of Hosking J. in Waimiha case (supra) to the same effect.

> "'There is the suggestion that Wilson took his transfer subject to the rights of the plaintiff and had then turned round and refused to give effect to those rights'

Hosking J then alludes to Thomson v. Finlay (1866) N.Z.L.R. 5 SC 203 and says :

> 'In.....such cases the intention of the disposition on both sides was that the purchaser should take subject to the specified outstanding rights of a third party, and it was held to be fraud on the part of the transferee for him, when he became registered, to turn round and refuse to give effect to those rights on the contention that he had an absolute title under the Act'. "

Other judgments of distinguished New Zealand Judges were also cited by Turner P. in support of these propositions, namely that there was not a cut off point for considering fraud solely as at the time of registration.

However, although we prefer the views expressed by Turner P. we do not have to go that far in order to uphold the finding of fraud in this case.

First even on a factual basis similar to Sutton v. O'Kane we have the situation that Ramrakha obtained registration on 19 September, 1960, and his title must thereafter have been subject to an equitable claim by the owner pro tem of Lot 15. See Wellington City Council v. Public Trustee 1921 N.Z.L.R. 1086 - relied on by Turner P. in Sutton v. O'Kane for such a proposition.

Thereafter his wife Shiu Kali became the registered proprietor without giving valuable consideration, at a time when she had already taken injunction proceedings to attempt to stop Shiu Datt from continuing to use the access way as he had been doing without previous objection since 1948. So she was not in the position of a person whose fraud was supervening - she was fraudulent when she took title. The appellant similarly - for he told the respondent at the time of his mother's injunction proceedings that Shiu Datt was not to worry. He (the Appellant) said he recognised the respondent's interest and when he succeeded his mother in title he would rectify the situation; in fact he did succeed her on 26 January 1979 but has continued to refuse to recognise the interest - so we are presented with a fraud at the date of procuring registration.

A second and even clearer ground can be made out by recognising that the facts of this case are stronger in favour of the unregistered party than in Sutton v. O'Kane.

In Sutton v. O'Kane the supposed but non-existing easement had been used by O'Kane for many years over the property of Dalton - Sutton's predecessor in title. When Sutton bought from Dalton he believed there was such an easement but subsequently found out it was not so and

thereafter resisted O'Kane's attempts to establish a legal right.

In the present case there was no existing question of easement/no easement to which Ramrakha came.

He was part of the negotiation, with the present Appellant also present, when Daya agreed to sell Lot 15 to the Respondent with right of way access over Lot 7, and to sell Lot 7 to Ramrakha subject to a right of way in favour of Lot 15.

Shiu Datt the Respondent acted on that. He started to pay instalments early in 1959.

When Ramrakha took title in 1960 the title clearly showed that the easement, which he himself had agreed would be created, had been omitted. Fraud existed in Ramrakha at that time and fraud has been committed again by the wife and the son in their turn.

In the face of either of these conclusions, it is clear that the Appellant's claim of indefeasibility cannot stand.

That makes it unnecessary for us to consider the other interesting submission advanced by Mr. Maharaj. He suggested that there was room for a finding that when the Appellant told the Respondent that he would regularise the position when he took title, he induced the respondent to refrain from caveating the title which the Respondent says he was considering doing, and that could give rise to proprietary estoppel on the High Trees principle. This is an interesting proposition but it was not raised before the trial Judge and accordingly there is no finding as to whether or not the Respondent did act to his detriment - in the mid 1970's.

The order made by Madhoji J. was that the Appellant specifically perform Ramrakha's agreement to grant the right of way and do all things necessary to that end, and that the Registrar of Titles should thereupon perfect the same by registration and also register the transfer of Lot 15.

At the trial, counsel appeared for the Attorney-General, sued in respect of the Registrar of Titles, and the judgment included certain orders directed at him to enable registration to be perfected. The Crown Law Office was served with notice of this appeal, but on the day of hearing the Court Registrar was advised that the Crown did not wish to be heard. We think that, in the circumstances, an appearance should have been made if only to seek to be excused.

However, the Crown of course is bound by the original judgment and by this. The Respondent cross appealed, seeking a variation of the judgment to the effect that the Appellant be ordered to sign the plan prepared in 1974 which was associated with the attempt by Daya to transfer the fee simple of the access strip to the Respondent. From the above findings, it is clear that the conclusion reached in the Court below and in this Court is that the agreement of 1959 was for an easement only, not an outright transfer and hence the cross appeal is dismissed.

The appeal by Ram Nandan is dismissed with costs against him and with the consequences propounded by Madhoji J.

.....
JUDGE OF APPEAL

.....
JUDGE OF APPEAL

.....
JUDGE OF APPEAL