IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0131 OF 2018
[High Court No. HBC 358 OF 2017]

BETWEEN : **SUSHIL PRASAD SHARMA**

Appellant

AND : **1. PAULA LAGOIA SILI & SALOME NAMATA SILI**
2. REGISTRAR OF TITLES
3. ATTORNEY GENERAL OF FIJI

Respondents

Coram : **Almeida Guneratne, JA**
: **Lecamwasam, JA**
Jameel, JA

Counsel : **Mr. V.Kumar for the Appellant**
: **Mr. S. Nand & Mr. M. Nand for the 1st Respondents**
Ms. P.Singh for the 2nd & 3rd Respondents

Date of Hearing : **12 September 2022**

Date of Judgment : **30 September 2022**

JUDGMENT

Almeida Guneratne, JA

[1] I agree with the reasoning, conclusions and Orders of Jameel JA

Lecamwasam, JA

[2] I agree with the reasons given and the conclusions arrived at, by Jameel JA.

Jameel, JA

Introduction

[3] This is an appeal from the judgment of the High Court, dated 9 November 2018, in an action commenced by way of Originating Summons filed on 28 December 2017, by the 1st Respondent against the Appellant (the 1st Defendant in the original action), the Registrar of Titles, and the Attorney General, by which the High Court ordered *inter alia* Specific Performance of a Sale and Purchase Agreement dated 8 September 2011 entered into between the Appellant and 1st Respondent giving effect to a Consent Judgment.

[4] The essence of the matter for determination by this court, is whether the Consent Judgment based on Terms of Settlement entered into on 28 October 2014, in Civil Action 253 / 2012, is enforceable. The Appellant contends that the said Consent Judgment was obtained on Terms of Settlement that were entered into under undue influence exercised on him and fraud perpetrated on him, and that he had instituted action seeking to set aside the said Consent Judgment. The Appellant contended that the challenge of the Consent Judgment involved the resolution of disputed facts, which had a bearing on the relief sought by the 1st Respondent in this case. However, in my view, the issue for determination by the High Court, was whether the 1st Respondent was entitled to enforce the Consent Judgement obtained in Civil Action 253/2012, in the light of the dismissal by this court of the Appellant's appeal in ABU 041/2012 on 14 September 2017, which was not appealed by the Appellant

[5] The determination of this matter, and the grounds of appeal framed by the Appellant, requires a consideration of the litigation that preceded this High Court action, as well as the litigation that was commenced after this action was filed.

[6] In order to appreciate and determine the issues before this court, it is necessary to understand the backdrop against which the dispute now stands. The Appellant's predominant complaint is that the High Court should not have taken up this matter without the '*connected'* actions having been concluded. These cases comprised actions filed by the 1st Respondent for Specific Performance, and an action to maintain a Caveat on the property in issue, an action by the Appellant's wife claiming her share of the property in dispute on the basis that it is matrimonial property, and an action by the Appellant against his former lawyers, as well as the lawyer of the 1st Respondent.

Factual background

(a) The Sale and Purchase Agreement ('SPA')

[7] The relationship between the parties commenced with the execution of a Sale and Purchase Agreement dated 8 September 2011 between the Appellant (the Vendor") and the 1st Respondent, (the Purchasers"). According to the terms of the SPA, the Appellant agreed to transfer to the 1st Respondent the property described in Certificate of Title No. 19761, being Lot 1 on Deposited Plan No 1796, with the buildings standing thereon. The consideration sum agreed upon was $290,000.00 which was to be paid as follows; a sum of $10,000 to be paid upon the execution of the SPA as a non-refundable deposit to Titus Real Estate, and the balance sum of $280,000.00 on the date of settlement. In the SPA, the date of settlement was set as 30 November 2011, or such other date that may be mutually agreed upon in writing between the parties. One of the conditions of the SPA was that if either party defaults or breaches any of its obligations, the other party was entitled to sue for Specific Performance of the Agreement, or Special and general damages, vacant possession and indemnity costs.

(b) The connected litigation

(i) Civil Action 411/1999

[8] The Appellant in this case was the Original Third Defendant in that case. The Original Plaintiffs in that case had been one Maya Wati, Bimla Wati, Subhas Chand Ramrakha, Amar Ramrakha, and Harish Chand Ramrakha. The Original Second Plaintiffs were Jasodha, Chandar Bhan Singh and Vijay Bhan Singh (as Executors and Trustees of the Estate of one Balram Singh), who had been made parties pursuant to a court order of 5 January 2015. The Original Plaintiffs sought an interim injunction restraining the Appellant from selling the property which was the subject matter of that action, which is also the subject matter of this appeal. The Plaintiffs in that case had also registered a Caveat in respect of the said land, which will feature later in this judgment.

(ii) Civil Action 253/2012, for specific performance of the SPA

[9] The 1st Respondent instituted this action by way of Originating Summons filed on 11 September 2012, with Statement of Claim of the 1st Respondent dated 7 September 2012. In the Affidavit in Support, the 1st Respondent averred that the Appellant was the registered proprietor of the property comprised in Certificate of Title No: 19761, being Lot 1 on DP 1796, situated in Davuilevu, Nausori, and that the said Certificate was registered with the Registrar of Titles, the 1st Respondent and Appellant had entered into a Sale and Purchase Agreement dated 8 September 2011, in terms of which the Appellant agreed to sell to them the said property. After the Agreement was executed the 1st Respondent obtained loan finance from Westpac Banking Corporation, and the Appellant executed the Transfer documents which were lodged for stamping with the Commissioner of Stamp Duties on 17 April 2012, and the 1st Respondent had paid a stamp duty of $5858.00 to get the transfer document stamped and released for settlement. When the 1st Respondent's Solicitors were liaising with the Appellant's Solicitors to have the Caveat removed, it transpired that in the meanwhile the Caveators in Civil Action 411/1999 had

obtained an Interlocutory Judgment which permitted the Appellant to sell the said property, but required him to deposit the sales proceeds in court, until the determination of the substantive matter in that case. The Appellant appealed that Interlocutory Judgment, which will be considered later in this Judgment.

[10] The 1st Respondents thereafter received a letter dated 31 May 2012 from the Appellant's new lawyers namely Messrs. Patel Sharma Lawyers, informing that they were now representing the Appellant, and that they would lodge an appeal against the said Interlocutory Judgment. The 1st Respondent averred that the disputed issue (that resulted in the said court order) was a matter for resolution between the Caveators who had filed action in the High Court and the Appellant, that the 1st Respondents were *bona fide* purchasers who were ready and willing to proceed with the settlement but it was the Appellant who was refusing to comply with the obligations under the SPA, and because the default had continued for more than fourteen days despite the 1st Respondent being ready for settlement, the 1st Respondent was entitled to Specific Performance of the SPA, special and general damages for breach of the SPA, vacant possession and indemnity costs.

Terms of Settlement filed on 28 October 2014 in Civil Action 253/2012

[11] On 28 October 2014, the Appellant and 1st Respondent had, in Civil Action No.253/2012, filed the following Terms of Settlement in Court, which terms were signed by both parties and the respective lawyers representing them. This was before this court delivered judgment in ABU 041/2012. The terms entered were as follows:

> "*TERMS OF SETTLEMENT'*
>
> *BY CONSENT the parties agree as follows:*
>
> 1. *That the settlement of the Sale and Purchase Agreement dated 8th September 2011 shall be effected within 30 days of the delivery by the Court of Appeal of its Judgment in Civil Appeal No. ABU 041of 2012 and that an Order for Specific Performance be granted accordingly.*

2. *That the Defendant do continue to actively monitor and progress his Appeal (Civil Appeal No. ABU 041 of 2012) in the Court of Appeal.*
3. *That this action be withdrawn and discontinued on the aforesaid basis.*
4. *Each party to bear their own costs.*

DATED this 28th day of October, 2014

NANDS LAW	*PATEL SHARMA LAWYERS*
Signed for and on behalf	*Signed for and on behalf*
Of the Plaintiffs	*of the Defendant.*

(iii) The Appellant's Appeal to the Court of Appeal (ABU 041/2012) against the Interlocutory Judgment in High Court Civil Action No. 441/1999 dated 28 May 2012

[12] This appeal was filed by the Appellant against the Interlocutory Judgment dated 28 May 2014 in Civil Action No. 441/1999. The impugned order of the High Court was as follows:

> *"Alternatively, in the event the property comprised in Certificate of Title number 19761, Lot 1 on Deposited Plan No. 1796 containing an area of 7 acres 2 roods and 9 perches situated in the District of Rewa is disposed of, the 3rd defendant his servants and or agents be ordered to deposit the sale proceeds without any deduction in court forthwith until final determination of the matter*

[13] This court heard the said appeal on 16 August 2017 and delivered judgment on 14 September 2017. In determining that appeal, the court took cognizance of the *status quo ante* in the pending Civil Action 253/2011 and found that although the appeal had been filed against the Interlocutory Judgment dated 28 May 2014 in Civil Action 441/1999, the effect of the entering of the Terms of Settlement on 28th October 2014 in Civil Action 253/2012, had rendered superfluous the appeal under consideration, particularly because the property had not yet been sold. Learned Counsel who appeared for the Appellant had conceded this position but had however been unable to withdraw the appeal in the absence of instructions from his client. Having considered the matter, this court dismissed that

appeal. No appeal was filed against that Judgment, and it is significant that when the judgement of this Court was delivered, the Appellant did not allege that he did not understand the Terms of Settlement or that he had been fraudulently induced to sign them.

(iv) Civil Action No. 10/2017: to extend the Caveat relating to the land in dispute

[14] Whilst the parties were awaiting the judgment of this court in ABU041/2012, the 1st Respondent's lawyers had received a Notice of Removal of Caveat over the said property. Consequently by Writ of Summons dated 17 January 2017, the 1st Respondent instituted action against the Appellant, the Registrar of Titles and the Attorney General. In the Statement of Claim the 1st Respondent reiterated the matters contained in the Statement of Claim filed by them in Civil action 253/2012, but pleaded in addition that they sought an extension of the Caveat that had been lodged, and the prevention of its removal, they were uncertain why the Appellant wanted to remove the Caveat when the Appellant knew well that an Order for Specific Performance had been granted by the Court in favour of the 1st Respondent. Therefore the 1st Respondent claimed that if the Caveat is removed, the Appellant may sell the property to someone else, thus depriving the 1st Respondent who had been waiting to purchase the property from 2012, and that the attempt to remove the Caveat was in breach of the Order made by court. The 1st Respondent therefore sought Orders that the Caveat remain registered, and a declaration that the 1st Respondents are the beneficial and or equitable proprietors of the said property.

(v) Civil Action 311/ 2017 to set aside the Consent Judgment in Civil Action 253/2012

[15] This action was commenced by the Appellant (who appears in person) by Writ of Summons filed on 21 November 2017), against the 1st Respondent's lawyers, as well as his lawyers who appeared for him in Civil Action 253/2012, in which Terms of Settlement were entered. In his Statement of Claim the Appellant has pleaded that his father and he had retained the professional services of the 1st Respondent in that case to advise them but the 1st Respondent had acted negligently in conducting the title search relating to the property, because it was later found that the land was encumbered. He pleads that the

lawyers colluded and filed the cases referred to above to defraud him, when he signed the Terms of Settlement he had been assured that if he did as advised by the lawyers, '*nothing would happen to my property, and the property would be secured and no one can force me to sell my property and I will win all my cases".* He pleads that he was influenced by his lawyer to sign the said Terms, all the lawyers appearing for all the parties misled him, the nature and effect of the Terms of Settlement were not explained to him, and he was told that although he was signing the terms, he need not comply with them. He therefore sought Orders setting aside of the Terms of Consent, damages, and a refund of legal fees paid to his lawyer.

(vi) Civil Action 28/2018- claim for Matrimonial Property

[16] By Writ of Summons filed on 31 January 2018 one Evelyn Rita Chand, instituted action against the Appellant, the 1st Respondents and Titus Narayan, the Real Estate Agent who prepared and executed the SPA. By this action she sought to set aside the said SPA on the basis of fraud, and the Terms of Settlement on the basis that they had not been entered into voluntarily, and an Order that Titus Narayan refund the deposit of $10,000.00 with interest from 8 September 2011, as well as damages and costs. In her Statement of Claim she stated that she is the wife of the Appellant, after marriage, she went to live in the matrimonial home (which is the same property that is the subject matter of this appeal), and she contributed to the improvement of the said property. However, on 8 September 2011, the Appellant had, without her knowledge or consent entered into a Sale and Purchase Agreement with the 1st Respondents for a sum of $290,000.00, the said property is now worth about a million dollars, the said SPA was prepared by Titus Narayan the Real Estate Agent, that clause 2(1) of the said SPA was void or unreasonable as it stated that a sum of $10,000.00 shall be paid upon execution as a non-refundable fee to Titus Narayan, the SPA was prepared by the said Titus Narayan who "*witnessed the signature of the 1st and 2nd signature without allowing any of the Defendants to seek independent legal advise",* that the Appellant and Titus Narayan had committed fraud against her when the SPA was executed.

(vii) Civil Action 358/2017 – to enforce the Consent Judgment

[17] This action was commenced by the 1st Respondent by way of Originating Summons under O.45 r.7 of the High Court Rules (1988), filed on 28 December 2017, to enforce the Consent Judgment entered in Civil Action 253/2012, which Judgment became operative upon this court delivering Judgment on 14 September 2017. It is the Judgment of the High Court in this action that is the subject matter of the appeal before this court for determination.

[18] The 1st Respondent in her Supporting Affidavit said that the Appellant is the registered proprietor of the land in issue, he had entered into a SPA with the 1st Respondent, (marked P2), the Appellant had breached the SPA, the 1st Respondent had instituted writ action (Civil Action 253/2012), seeking *inter-alia* Specific Performance of the SPA, subsequently, Terms of Settlement were entered between the parties on 28 October 2014 (marked P3), and the Order of Court was sealed on 4 November 2015. She pleaded that the Terms of Settlement required the Appellant to monitor and progress his appeal, and the SPA to be effected within 30 days of the delivery of the judgment of this Court, and that Civil Action 253/2012 be withdrawn and dismissed on that basis.

[19] After this Court dismissed the Appellant's appeal in ABU 041/2014, by letter dated 25 September 2017, the 1st Respondent's Solicitors Nands Law notified the Appellant of the Judgment and issued a Settlement Notice to the Appellant as well as to his lawyers Messrs. Patel Sharma Lawyers advising them that the 1st Respondent would be ready to effect settlement on 12 October 2017 at the office of the 2nd Respondent, and that in exchange for the necessary transfer documents the 1st Respondent would hand over a cheque for $270,000.00 being the balance of the purchase price.

[20] On 27 September 2017 the 1st Respondent's lawyers received a letter from the Appellant's lawyers stating that they had forwarded the said letter to the Appellant and were awaiting instructions from him in regard to effecting settlement. On 5 October 2017 the

Appellant's lawyer had informed the 1st Respondent's lawyers that they were still endeavouring to contact their client.

[21] The 1st Respondent pleaded that they were ready for settlement and had confirmation from the bank, but on 12 October 2017 the 1st Respondent was informed by their lawyers that neither the Appellant nor his lawyers had confirmed the settlement which was due to take place at the 2nd Respondent's office, and that they are advised and believe that the Appellant is deliberately trying to withhold settlement despite the Consent Judgment.

The Appellant's Affidavit in Opposition filed in Civil Action 358/2017

[22] The Appellant in his Affidavit in opposition dated 13 February 2018, had summarized the several actions pending between the 1st Respondent and him. He deposed that he had read and understood the Affidavit of the 1st Respondent in support of the Originating Summons, that in Civil Action 253/2012, the 1st Respondent had sought Specific Performance of the SPA dated 8 September 2011.

[23] The Appellant pleaded that the 1st and 3rd defendants in Civil Action 311/2017 had failed to file and serve Statement of Defence in accordance with the Rules, therefore he had filed Summons to enter judgment, and that, that case was listed for first call on 15 March 2018, and that he wanted the actions "*filed prior to this action to be heard first as their outcome will determine the outcome of this case".*

[24] The Appellant pleaded further that at the time the settlement was entered, he took the advice of his then lawyer as he was '*uneducated*,' and he later found out that an Interlocutory Judgment by consent had been entered in respect of his property, but that he did not consent to anything, however when he questioned his lawyers they lodged an appeal in this court, and that it was impossible for him to comply with the Order as there was a court order and a Caveat registered against his title by persons who do not have any interest in his land. He pleaded further that the 1st Respondent and their Counsel should be aware that he was unable to comply with an unlawful and expired Sale and Purchase

Agreement and that no consideration had passed to him, that the Court order made in Civil Action 253/2012 was valid for only a month after delivery and expired on 15 October 2017, the value of the property had increased since and he also referred to the pending writ action filed by his wife.

The 1st Respondent's Affidavit in Response in Civil Action 358/2017

[25] The 1st Respondent denied that the cases filed prior to this case must be heard first and pleaded that Civil Action 253/2012 had already been concluded, the Appellant is aware that a Consent Order was made on 28 October 2014 and he was present in court when the terms were entered, the said Order had not been set aside, and when the SPA was signed, the title in the property was in the name of only the Appellant. In regard to the Appellant's allegation that he had not received any money upon the execution of the SPA, the 1st Respondent stated that it had been deposited in the account of Titus Real Estate's account as agent of the Appellant. They reiterated as they had done in the previous, connected litigation that they had always been ready and willing to settle, and the increase in the value of the property since the SPA was signed should not be used as a ground to set aside the Consent Judgment as there was a contract in place backed by consideration for the benefit of the Appellant.

(h) The High Court Proceedings & Judgment

[26] At the commencement of the proceedings in the High Court, Counsel for the Appellant objected to the continuation of the proceedings on the basis that the case should have proceeded by way of Writ of Summons, and not Originating Summons because "*the affidavits contained serious disputes of facts and required cross examination of deponents*," and that "*cases filed prior to this case have a bearing on this case".*

[27] The learned High Court judge found that there are no factual disputes contained in the affidavits. The Application in the court below was made under O.45 r.7 of the High Court Rules 1988, and sections 26 and 186 of the Land Transfer Act, the 1st Respondent had

instituted this action to enforce compliance with the Consent Judgment according to which the settlement ought to have been effected by 14 October 2017, which required both parties to fulfil their respective obligations, failing which an order for Specific Performance would issue.

[28] The learned High Court Judge found that upon the Terms of settlement becoming an Order of Court, it had to take effect 30 days from the date of the delivery of the judgment of this court. This would have been 14 October 2017. The Learned High Court Judge found that it was the Appellant who failed to comply with the Terms of Settlement, and was preventing giving effect to the Terms.

The Grounds of Appeal

[29] Being aggrieved by the Judgment of the High Court, the Appellant appealed to this court on the following grounds.

1. ***THAT*** *the Learned High Court Trial Judge erred in law and in fact in proceeding to hear the case in form of Originating Summons when there was serious dispute of facts consisting in four other cases which required cross examination of the Deponents in Plaintiff's affidavit;*

2. ***THAT*** *the Learned High Court Trial Judge erred in law and in fact in pursuing hearing in this case when there was already on foot a Writ Action which was for the setting-aside. Consent Judgment which was in contention in this case. This Writ action was at Pre Trial Stage whereby the parties agreed for the Writ Action for the setting-aside of the Consent Judgment to be heard first;*

3. ***THAT*** *the Learned High Court Trial Judge erred in law and in fact in holding at paragraph 3 of the Judgment that the Defendant defaulted in compiling with the Sale and Purchase Agreement in fact the Plaintiff did not have overdraft facilities available to him at that time;*

4. ***THAT*** *the Learned High Court Trial Judge erred in law and in fact in trying to enforce compliance of Consent Judgment which was unlawfully obtained;*

5. ***THAT*** *the Learned High Court Trial Judge erred in law and in fact in deciding upon paragraph 4 of the 1st Defendant now the Appellants "Affidavit in Opposition" filed on the 14th day of February, 2018; which had 4 other cases listed arising from the same Sale*

and Purchase Agreement without looking into its merits thus has seriously prejudiced the Appellant;

6. ***THAT*** *the Learned High Court Trial Judge erred in law and in fact by stating in paragraph 5 of his Judgment that there was no legal right of his wife but in fact there was Caveat placed by the wife which is a temporary injunction stopping any dealing with land thereby causing substantial miscarriage of justice*;

7. ***THAT*** *the Learned High Court Trial Judge erred in law and in fact in failing to do justice in paragraph 17 of his Judgment when it was pointed out that Consent Judgment was entered after 3 years of signing of the Sale and Purchase Agreement which had expired on 30th day of November, 2011 thus giving rise to a question that Can a Consent judgment be entered on an expired Agreement;*

8. ***THAT*** *the Learned High Court Trial Judge erred in law and in fact in Paragraph 19 of his Judgment that; "At the end of the day there is no decree, order or ruling of any Senior Courts stopping the grant of specific performance of the SPA to the Plaintiff's. Nor has the First Defendant produced to this Court any declaration made by any Senior Court that SPA had expired or is invalid;" failed to consider that there was no order as the case was not even heard on merits; it was in process whilst his Lordship proceeded to hear this matter on basis of Originating Summons therefore denying the Appellant his rights to a fair trial and natural justice.*

9. ***THAT*** *the Learned High Court Trial Judge erred in law and in fact in Paragraph 20 of his Judgment, Order (2) in stating that; "…that the balance purchase price of $270,000.00 less payment…" when the Sale and Purchase Agreement states that the balance sum is of $280,000.00 (Two Hundred Eighty Thousand Dollars) thus causing a substantial miscarriage of justice;*

10. ***THAT*** *the Learned High Court Trial Judge erred in law and in fact in usurping the role of the Plaintiffs as well as the 2nd and 3rd Defendants Solicitors in trying to conduct the trial thereby becoming "Prosecutor, Judge and Jury" thus caused serious prejudice to the Appellant;*

11. ***THAT*** *the Learned High Court Trial Judge erred in law and in fact in conducting the Trial in a manner which was biased towards the Plaintiff as well as the 2nd and 3rd Defendants which became prejudicial to the appellant;*

12. ***THAT*** *the Learned High Court Trial Judge erred in law and in fact in failing to state adequately the reasons for his findings therefore encroaching the principles highlighted in the case of* ***Pettit v Dunkely [1971] 1 NSWLR 376 CA****;*

13. ***THAT*** *the Appellant reserves the right to file amended and or further grounds of Appeal upon availability of the copy record of the High Court.*

Discussion of the grounds of appeal

<u>Grounds 1, 2,3, 4 and 5</u>

[30] Grounds 1, 2, 3, 4 and 5 can be conveniently dealt with together. The Appellant contends that there are "*serious dispute of facts consisting in four other cases, which required cross examination of the Deponent's in Plaintiff's affidavit".* The cumulative effect of these grounds can be described as follows; the High Court could not have heard this case in the form of Originating Summons when there are disputed facts in four other cases which required cross-examination of the deponents, and the Appellant's action to set aside the Consent Judgment which had been unlawfully obtained, was pending.

[31] In my view, faced with those objections, the High Court was first required to look at the case that was before it and determine whether the facts before it were in dispute. The answer to this question would not depend purely on the Defendant disputing the matters set out in the Plaintiff's Affidavit, but would instead depend on, and be informed by the cumulative effect of the entirety of the evidence that was before the court.

[32] I have already recounted the series of actions that feature in this appeal; and what is relevant and indisputable is that the 1st Respondent instituted Civil Action 253/2012 to enforce the SPA, the parties settled the matter, whereby prayers for an order of Specific Performance of the SPA, and an Order for the Appellant to proceed with settlement, and hand over vacant possession was granted, the claim for damages and indemnity costs having been excluded in the Terms of Settlement; and that this was to take effect 30 days from the date of the delivery of judgment by this court in a connected appeal.

[33] There is no doubt that the contents of the Affidavit in Opposition filed by the Appellant in Civil Action 358/2017, was in sharp contrast to that in the affidavit filed by him in Civil Action 441/1999, portions of which will be reproduced below, and which reveal that when faced with that action, he relied on the very SPA that he now seeks to avoid. Further, in that case, it was the Appellant who appealed the Interlocutory Judgment of the

High Court when the court made order permitting the sale of said property, provided the sales proceeds are deposited in court.

[34] After this court delivered judgment on 14 September 2017, and the Consent Judgment became effective 30 days from the date of the judgment, the 1st Respondent was in law, entitled to the remedy of Specific Performance. The 1st Respondent, though the beneficiary of the Consent Judgment is not a party to the Appellant's claim in Civil Action 311/2017 filed against the lawyers. That dispute is between the Appellant and the lawyers. Accordingly, even if the 1st Respondent had been made a party, the matter for determination will not in law, impact on the rights of the 1st Respondent, which flow from the SPA which remains valid and enforceable through the Consent Judgment.

[35] The learned Counsel for the Appellant submitted that a consent order may be set aside on any of the grounds on which an agreement can be set aside. In this case, the Appellant alleged fraud and undue influence. To support his contention, the Appellant relied on the following passage in the judgment of Gould V.P. in **Sharma v Caldwell** [1975] Fiji Law Rp. 12; [1975] 21 FLR 85 (25 July 1975):-

> *"If plaintiff's counsel had been instructed in the matter and this was unknown to the other counsel, it would appear that even a compromise concluded under those circumstances could be set aside if grave injustice would result to the plaintiff by reason of such compromise.*
> *(See Marsden v Marsden (1972/2 All ER 1162 at 1167).*
>
> *In my view therefore the consent judgment in question was invalid by reason of the effect of Order 22 r.14 (1) of the Rules of the Supreme Court in force at the relevant time) as lacking the approval of the magistrate. As a consent judgment however it stands until set aside: Kinch v Walcott [1929] AC 483.*

[36] In my view, in **Sharma v Caldwell** (*supra)*, the Magistrate's consent was a condition precedent to the entering of the terms of settlement, because the settlement related to an infant. In the appeal that is before this court, no such condition precedent exists. In this

case, the 1st Respondent as beneficiary of the Consent Judgment only sought to enforce it. The reason the Appellant objects to this is his belated allegation that the Consent Judgement was obtained by fraud and undue influence exerted upon him by his lawyers, as well as the lawyers of the Appellant.

[37] In my view, it is significant that the Appellant does not allege that the 1st Respondent misled him or induced him against his will. The Appellant's complaint is against the lawyers. Therefore, if at all such an action is maintainable, it would be one for breach of professional duties, and it does not in any way impinge upon the legal right of the 1st Respondent to enjoy the benefit of the Consent Judgment. Therefore, the facts of **Sharma v Caldwel**l (*supr*a) can be distinguished from the facts of this case, and the Appellant's submission in this regard is rejected.

[38] The affidavit of the Appellant filed in Civil Action 441/1999 indicates that he did originally intend to honour the terms of the SPA, and he did not, at or after that time dispute the contents of the SPA. If this Court were to accept the submissions that are now made on behalf of the Appellant it would tantamount to permitting the Appellant to benefit to the prejudice of another party from a state of affairs that he had created.

[39] By virtue of the Terms of Settlement being entered in Court on 28 October 2014, the date of settlement stood extended.

[40] In **Jubilee Juice Distributors v Singh [**2014] FJSC 17; CBV0006.2014, too a SPA contained a clause identical to the clause in the SPA under consideration in this appeal, except that in that case it was 90 days from the date of execution of the SPA. In that case too. there was also an identical clause for the remedy of Specific Performance if either party breaches the agreement. The Supreme Court held as follows:

> *[26] A judgment by consent is just as effective by way of estoppel as a judgment whereby the Court exercises its mind in a contested case (vide: Re South American & Mexican Co. 1895 (1) Ch.37 at 50).*

[2] Upon a compromise being effected, the right of action upon the original claim is lost. Any action thereafter must be on the compromise and not upon the original claim.
(see: C.G Weeramantry, The Law of Contracts, Vol.II, 2nd Reprint (2013) Section 735).

[41] In my view, at the time Civil Action 358/2017 was filed, the action for specific performance (Civil Action 253/2012) had been concluded by way of a consent order and was therefore not in dispute. When this court delivered judgment on 14 September 2017, the Consent Judgment entered in CA253/2012, became operative.

[42] Between the period 4 November 2015 when the Order was sealed, and the 14 September 2017, when this court delivered judgment dismissing the Appellant's appeal, the Appellant did not take up the position that the Terms of settlement and the Consent Order had been obtained by fraud and or undue influence. The action instituted by the Appellant against the lawyers seeking an order setting aside the Consent Judgment was filed only on 21 November 2017, a period of more than two years after the Consent Judgment came into effect.

[43] When the SPA was executed, there was no indication that the Appellant did not know what he signed, and Titus Real Estate was his agent. In fact, in Civil Action 441/1999, when he was named as the 3rd Defendant in an action for injunction to prevent the sale of the disputed property, and the Plaintiffs in that case registered a Caveat in respect of this property, the Appellant moved to remove the Caveat because it was the intention of the Appellant to proceed under the SPA. In his Affidavit he deposed as follows:-

*"14. **THAT** when I was advised by Patel Sharma Lawyers that they had received a caveat, I immediately instructed them to make application for removal of caveat as it would impact on the impending sale of the subject property.*

*16. **THAT** my Solicitors Messrs. Sherani & Co. and the purchasers Solicitors have been liaising in relation to the settlement of the proposed sale expect to complete upon the removal of the Caveat.*

*17. **THAT** I am advised and verily believe that the Solicitors for the Plaintiff, Mr. Vijay Maharaj, Suresh Chandra and Ms. Amrita Maharaj are also aware of the pending sale and have discussed the matter in several phone calls with Mr. Suruj Sharma and in a meeting with Mr. Emmanuel Narayan and Mr. Ronald Singh.*

*18. **THAT** I am informed and verily believe that the Plaintiff solicitors have agree d and supported the sale process and have requested that the sale proceeds after disbursement of all legitimate expenses and portion thereof be set aside and retained in my solicitors Trust Account pending final determination of this matter.*

19.b. With regards to paragraph 3 of the Affidavit, I admit the property in question is comprised in Certificate of Title No. 19761 Lot 1 on Deposited Plan No1796.

19.d. .. I further state that the Plaintiffs including Bimla Wati were fully aware that. I was selling my property for the last 3 years.
g. With regard to paragraph 9 of the Affidavit, I state that I am the legal proprietor of my property and I have legal rights to sell same> reiterate that the Plaintiff placed a Caveat on my property and need to satisfy court of any extension thereof.

J.ii. That I have as a legal proprietor entered into sale and purchase agreement with other parties and could be sued for specific performance and damages. Furthermore and for the past 16 years I have invested substantial sums on the property.

[44] The affidavit of the Appellant filed on 21 May 2012 in Civil Action 441/1999, demonstrates clearly that he knew as far back as 2012 when he filed that affidavit that he was contractually bound to fulfil his obligations under the agreement, and he wanted the freedom the sell the property in accordance with the SPA, entered on 8 September 2011, which he had entered into voluntarily. The relevant portions of his affidavit reproduced above reflect that at that time, he intended to comply with the SPA.

[45] The Appellant contends that the learned High Court Judge erred in law in holding that the Appellant had defaulted in complying with the SPA when in fact the 1st Respondent did not have overdraft facilities available to them at the time. In my view, the learned High Court Judge found on the material before Court that 1st Respondent has pleaded that the bank had confirmed by email that it was ready but in response the Appellant's stated that

he is unaware of this. In the circumstances, the learned High Court Judge was correct in concluding that the settlement was not effected entirely due to the failure of the Appellant. In my view, in all the circumstance, the Appellant is estopped from contending that the SPA had expired on 30 November 2011.

[46] A consent judgment is a judgment entered upon the merits, it is not a default judgment. When parties to a judgment opt freely and without compulsion to enter terms of settlement, which is made a judgment of court, it is no longer open to a court to adjudicate the subject matter of the dispute. Consent can be presumed if the parties were represented by Counsel. The doctrine of estoppel would operate, to preclude the re-opening of the matters settled. This is in the interest of finality, which is a cornerstone of public policy. A consent judgment then is a contract between the parties whereby rights are created between them in substitution for an order of court. It amounts to an abandonment of the original claim and is intended to put an end to the existing litigation between the parties. A consent judgment is as effective as a judgment delivered after contest and a consideration by the court of the merits of the dispute.

[47] As Lord Herschel L.C. explained in the case of **In Re South America and Mexican Company *ex parte* Bank of England** (1885) 1 CH. 37 at 50.

> *"The truth is a judgment by consent is intended to put a stop to litigation between the parties just as much as is judgment which result from the decision of the Court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgment and were to allow question that were really involved to the action to be fought over again in a subsequent action."*

[48] A judgment or order can be set aside if it is a nullity or where a Court was misled into giving the judgment by some mistake, believing that the parties consented to its being given, whereas, in fact, they did not; **Craig vs. Kanseen,** (1943) KB 256 or (1943) 1 All ER 108 at 113, or the judgment is obtained by fraud or deceit either in the Court or of one or more of the parties; the judgment itself is a nullity; it is obvious that the Court was

misled into giving judgment under a mistaken belief that the parties consented to it; the judgment was given in the absence of jurisdiction; the proceedings adopted was such as to deprive the decision or judgment of the character of a legitimate adjudication; where there is fundamental irregularity.

[49] In this case, the Terms of Settlement were filed on 28 October 2014, parties were represented, and significantly, one of the terms was that the Appellant was obliged to monitor the progress of his appeal (ABU 041/2012) in this court, and the SPA was to be given effect to 30 days from the judgment of this court. In all these circumstances, it would be ill-conceived to contend that the court below when faced with an application in terms of O.48 r.7 for enforcement of the Consent Judgment, of the High Court Rules, could have done anything different from what it did. I am therefore satisfied that the learned High Court judge applied the correct principles of law in the case before him, and I see no reason to set aside the judgment dated 9 November 2018.

[50] The learned High Court Judge correctly rejected the Appellant's contention that the Terms of Settlement, and the Consent Order were void because the SPA had expired on 30 November 2011. The learned Judge found that because the Terms of Settlement signed between the parties bore the date 28 October 2014, and the Consent Order was dated 29 October 2014, did not render the Consent Judgment invalid. For the reasons set out above, in my view, there were no disputed facts that could have stood in the way and the learned High Court Judge was correct in rejecting the Appellant's preliminary objection. For the reasons set out above, grounds 1, 2, 3, 4 and 5 of the grounds of appeal are therefore dismissed.

Ground 6

[51] The Appellant contends that the learned High Court Judge erred in holding that the Appellant's wife had no legal right, although in fact there was Caveat placed by the wife preventing any dealing with land, and that this finding amounted to a substantial miscarriage of justice. The learned High Court Judge correctly found that the Certificate

of Title showed that the Appellant was the only registered owner of the property and the Appellant was not able to demonstrate otherwise. The principle of title by registration as provided for in the Land Transfer Act, places beyond doubt that the claim of the Appellant's wife in Civil action No 10/2017 does not invalidate or impact the SPA, or the Consent Judgment sought to be enforced. The court found that, there was no order from a superior court either staying the grant of Specific Performance of the SPA, or a declaration or finding that the SPA had expired or is invalid. Accordingly, the learned High Court Judge was satisfied on the evidence before him that the 1st Respondent was entitled to the relief sought, and made orders to give effect to the Terms of Settlement in accordance with the Consent Judgment. This ground of appeal is without merit and is therefore dismissed.

Ground 7

[52] The Appellant contends that Specific Performance cannot be granted in respect of a SPA that has expired, therefore the Terms of Settlement are invalid. The Appellant relied on the judgment of this court in **Prasad v Jivaratnam.** However, in that case, the parties themselves had failed to comply with their respective obligations under the SPA, and on that basis, this court held that there was no legal entitlement to claim Specific performance. The facts of **Prasad v Jivaratnam** (*supra*) are distinguishable from the facts of the appeal before this court. Although the date of settlement was set as 30 November 2011 in the SPA, as has been set out above, the chronology of events reveals that the parties continued to take steps to fulfil the terms of the SPA long after the 30 November 2011. In fact, in Civil Action 411/2012, the Appellant filed an Affidavit in Opposition stating that he could be sued for Specific Performance under a SPA should the Caveat not be removed. This was filed after 30 November 2011. The Appellant is estopped from denying the validity of the SPA. Further, the parties took steps after that which culminated in the filing of the Terms of Settlement on 28 October 2014. This was fortified further by the fact that the implementation of the Terms of Settlement was linked to the judgment of this court in the connected appeal filed by the Appellant. The SPA stood extended by the conduct of the parties, which was formalized when the Terms of

Settlement became an order of court. For these reasons, I reject the submissions of the Appellant, and ground 7 of the grounds of appeal is dismissed.

[53] For the reasons set out above, ground 7 of the grounds of appeal is dismissed.

Ground 8

[54] Under this ground of appeal the Appellant contends that the learned High Court Judge erred in fact and in law by concluding that there was no decree or order from a superior court stopping an order of Specific Performance in terms of the SPA, nor is there a finding by a superior court that the SPA has expired or is invalid. The Appellant contends that the learned High Court Judge erred in concluding as such, ignoring the fact that the reason that there were no court orders was because the cases that the Appellant contended would be determinative, had not been heard on their respective merits, and were pending. The Appellant contends that therefore, the learned High Court Judge proceeding to hear this case, resulted in denying the Appellant the right to a fair trial and natural justice. In my view, the learned High Court Judge did not err in fact or in law when he held that there was no judgment from a superior court either setting aside the SPA or ordering that the remedy of Specific Performance under the SPA could not be granted. This is an undeniable fact.

[55] The Appellant submits further that that the learned Judge erred in not bearing in mind that there were four other cases arising from the SPA, and that they had to be concluded before the judgment in this case could be given, and that by not awaiting the judgements in those cases, it was an abuse of process. This submission is misconceived. As I have set out above, although there were multiple cases that had been instituted by the parties, the relief sought by the Plaintiff (1st Respondent) in this case was enforcement of a Consent Judgment, and the Appellant is estopped from depriving the 1st Respondent of the benefit of same. I therefore reject the Appellant's submission on this point. Therefore, ground 8 of the grounds of appeal is dismissed.

Ground 9

[56] The Appellant contends that the Learned High Court Trial Judge erred in law and in fact in Paragraph 20 of his judgment, and when he ordered the 1st Respondent to pay the Appellant *"the balance purchase price of $270,000.00 less payment…",* when the Sale and Purchase Agreement states that the balance sum is of $280,000.00 (Two Hundred Eighty Thousand Dollars), thus causing a substantial miscarriage of justice. For the reasons set out above, I find no merit in this ground and therefore dismiss ground 9 of the grounds of appeal.

Grounds 10 and 11

[57] The Appellant draws the attention of this court to specific portions (pages 392 – 401), of the proceedings of the High Court, and alleges that the Learned High Court Judge erred in law and in fact by usurping the role of the parties and conducted the Trial in an impartial manner, showing bias towards the Plaintiff, and the 2nd and 3rd Defendants and caused prejudice to the Appellant. However, I find that pages 392 to 401 of the proceedings reflect the questions raised by the court and the response of the 1st Respondent's Counsel. There is nothing objectionable in the dialogue, nor does it reflect a predisposition on the part of the Judge, to a particular stance or position. In my view, the basis of the Appellant's complaint that the learned Judge was biased, was the rejection by him of the submissions made by the Appellant's Counsel in regard to the preliminary objection raised. An allegation of bias against a Judge is a serious matter and is not to be made lightly. In this case, there was no evidence whatsoever of either personal animosity or friendship between the learned Judge and any of the parties or Counsel, nor was there any allegation that the learned Judge was hearing any of the other several cases between the parties. The maxim *nemo judex in re causa sua*, in my view is inapplicable in a case in which a makes a ruling in respect of submissions made before him. The opinion of a Judge on an application made before him, cannot, without any other material evidence directly linking him with the result of the decision, be used as a basis for claiming bias on the part of the Judge. In this case it was never alleged that the learned Judge had an interest, either

pecuniary or non-pecuniary in the outcome of the case. Moreover, the allegation or concern of bias on the part of the learned High Court Judge was not raised before him.

[58] The rule against bias seeks to ensure public confidence in the administration of justice, and ensure to a person before a tribunal, court, or decision-maker, that his case will be heard and dealt with devoid of pre-conceived notions or prejudices, based on a factor related either to the party, or based on an affiliation or connection the judge may have in regard to the matter under review.

[59] The 1st Respondent relies on the judgment in **Bubbles & Wine Ltd. v Reshat Lusha** [2018] EWCA Civ. 468. The issue in that case was whether the Judge was biased because of a conversation he had had in private with one party's Counsel alone. In respect of the law on apparent bias, Leggat J said:

> "*17.The legal test for apparent bias is very well established. Mr Faure reminded us of the famous statements of Lord Hewart CJ in **R v Sussex Justices** ex parte McCarthy [1924] 1 KB 256 at 259 that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" and that "[n]othing is to be done which creates even a suspicion that there has been an improper interference with the course of justice." These principles remain as salutary and important as ever, but the way in which they are to be applied has been made more precise by the modern authorities. These establish that the test for apparent bias involves a two stage process. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was biased: see **Porter v Magill** [2001] UKHL 67; [2002] 2 AC 357, paras 102-103. Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case: see Flaherty v National Greyhound Racing Club Ltd [2005] EWCA Civ 1117, para 28; **Secretary of State for the Home Department v AF** (No2) [2008] EWCA Civ 117; [2008] 1 WLR 2528, para 53.*
>
> *"18Further points distilled from the case law by Sir Terence Etherton in Resolution **Chemicals Ltd v H Lundbeck A/S** [2013] EWCA Civ 1515; [2014] 1 WLR 1943, at para 35, are the following*:

(*1) The fair-minded and informed observer is not unduly sensitive or suspicious, but neither is he or she complacent:* ***Lawal v Northern Spirit Ltd*** *[2003] UKHL 35; [2003] ICR 856, para 14 (Lord Steyn).*

(2) The facts and context are critical, with each case turning on "an intense focus on the essential facts of the case": ***Helow v Secretary of State for the Home Department*** *[2008] UKHL 62; [2008] 1 WLR 2416, para 2 (Lord Hope).*

(3) If the test of apparent bias is satisfied, the judge is automatically disqualified from hearing the case and considerations of inconvenience, cost and delay are irrelevant: ***Man O' War Station Ltd v Auckland City Council (formerly Waiheke County Council)*** *[2002] UKPC 28, para 11 (Lord Steyn).*

"19. In ***Helow v Secretary of State for the Home Department Lord Hope*** *observed that the fair-minded and informed observer is not to be confused with the person raising the complaint of apparent bias and that the test ensures that there is this measure of detachment: [2008] UKHL 62; [2008] 1 WLR 2416, para 2; and see also* ***Almazeedi v Penner*** *[2018] UKPC 3, para 20. In the Resolution Chemicals case Sir Terence Etherton also pointed out that, if the legal test is not satisfied, then the objection to the judge must fail, even if that leaves the applicant dissatisfied and bearing a sense that justice will not or may not be done: [2013] EWCA Civ 1515; [2014] 1 WLR 1943, para 40."*

[60] In **Bubbles & Wine Ltd. v Lusha** (*supra)*, despite the trial Judge having communicated his thoughts on the weaknesses of the case before him, the Court of Appeal found on an application of the established legal test of apparent bias, the fair-minded and informed observer, having considered all the relevant facts would conclude that the conduct of the judge in this case did not indicate any real possibility that he was biased, and therefore dismissed the appeal.

[61] Applying the principles formulated in **Bubbles & Wine v Lusha** (*supra*), in my view, the conduct of the learned trial judge did not generate the impression that he was impartial towards one party's Counsel. There was nothing in the proceedings to suggest that the learned High Court Judge had made up his mind on the matter. There was nothing to indicate that he gave one party assistance which he denied to the other. In determining this ground of appeal, this court is mindful that the determination on an allegation of bias is one of specific factual context. It is vital to bear in mind that in this particular case, the

history of the litigation between the parties, particularly the fact the court was confronted with a judgment of a superior court (this court), in an appeal filed by the Appellant himself, left no doubt that the Terms of settlement and Consent Judgment already entered and sealed on 4 November 2017, left nothing more to be done by the parties, except to comply with the Judgment. These grounds of appeal have no merit and therefore grounds 10 and 11 of the grounds of appeal are dismissed.

Ground 12

[62] Under this ground of appeal the Appellant contends that the Learned High Court Judge erred in law and in fact in failing to state adequately the reasons for his findings. The duty to give reasons for decisions is part of the content of Natural Justice. Reasons need not be elaborate, but must be such that the aggrieved party understands why a decision went against him. The formulation of a Judge's reasoning in the circumstances was clear and sufficient to enable the Appellant for formulate his grounds of appeal. There is no merit in this ground. This grounds of appeal is therefore dismissed.

[63] The decision of this court delivered on 14 September 2017 was not appealed. Its agreed result was that the Terms of Settlement entered in Civil Action 253/2012 was to take effect. For the reasons set out above, I am satisfied that the learned High Court Judge applied the correct principles of law to the matters that required determination. I see no merit in any of the grounds of appeal urged by the Appellant, and therefore dismiss the appeal.

Orders of the Court:

1. *The Appeal is dismissed, and the judgment of the High Court dated 9 November 2018 is affirmed.*
2. *The Appellant shall attend at the office of the Registrar of Titles in Suva, on or before 30 November 2022 and produce the Duplicate of Certificate of Title no. 19761 Lot 1, DP 1796 and the Certificate of payment of Capital Gains Tax on this disposal.*

3. *The First Respondent shall attend the office of the Registrar of Titles in Suva, at the same time pay to the Appellant the balance purchase price of $270,000, less payment of all Utilities bills outstanding as at 30 November, 2022.*
4. *If the Appellant fails to comply with Order (2) above, the Registrar of Titles is directed to take steps under the provisions of section 168 of the Land Transfer Act 1971 to dispense with the delivery of the duplicate title, and to accept for registration the stamped Transfer in favour of the First Respondent.*
5. *The Registrar of the High Court of Fiji, Suva is hereby appointed to execute any other documents that may be required to give effect to the orders made above.*
6. *If the Appellant fails to comply with (2) above, the balance purchase price shall be paid into the Trust Account of the High Court, and released to the Appellant only upon him providing to the Registrar of the High Court, the Certificate of payment of Capital Gains Tax.*
7. *The Appellant shall quit and deliver vacant possession of the property held under Certificate of Title No. 19767 to the Plaintiffs within twenty-eight (28) days of the date of the lodgment of the Transfer at the Registry of Titles.*
8. *The Appellant shall pay the First Respondent within 28 days of this judgment, the sum of $5,000.00 as costs in this Court, and the sum of $1,250.00 as costs in the court below.*

.....
Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Justice Susantha Lecamwasam
JUSTICE OF APPEAL

.....
Hon. Justice Farzana Jameel
JUSTICE OF APPEAL