IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 164 of 2015

IN THE MATTER of Section 169 of the Land Transfer Act, Cap. 131.

BETWEEN : **ANDREW SUBBA REDDY** of Malolo, Nadi.

PLAINTIFF

AND : **ASHIK ALI** of Malolo, Nadi.

DEFENDANT

(Ms) Barbra Doton Jai with Mr. Krishneel Rajilesh Prasad for the Plaintiff
(Ms) Salote Veitokiyaki for the Defendant

Date of Hearing : - Tuesday, 19th April 2016
Date of Ruling : - Friday, 01st July 2016

RULING

(A) INTRODUCTION

(1) The matter before me stems from the Plaintiff's Originating Summons dated 24th September 2015, made pursuant to **Section 169** of the **Land Transfer Act**, for an Order for Vacant Possession against the Defendant.

(2) The Defendant is summoned to appear before the Court to show cause why he should not give up vacant possession of the Plaintiff's property comprised in **Crown Lease**

No:- 17701, being 'Nasaqara & Navo', Lot 1 and 2 on SO 32, in 'Nadi' having an area of 3.9353 ha.

(3) The application for eviction is supported by an affidavit sworn by the Plaintiff on 22nd September 2015

(4) The application for eviction is strongly resisted by the Defendant.

(5) The Defendant filed an 'Affidavit in Opposition' opposing the application for eviction followed by an 'affidavit in reply' thereto.

(6) The Plaintiff and the Defendant were heard on the 'Originating Summons'. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff and the Defendant filed a careful and comprehensive written submission for which I am most grateful.

(B) THE LAW

(1) In order to understand the issues that arise in the instant case, I bear in mind the applicable law and the judicial thinking reflected in the following judicial decisions.

(2) Sections from 169 to 172 of the **Land Transfer Act (LTA)** are applicable to summary application for eviction.

Section 169 states;

"The following persons may summon any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant:-

(a) **the last registered proprietor of the land;**
(b) .....;
(c) ...

Section 170 states;

"The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of the summons."

Section 171 states;

"On the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in Ejectment.

Section 172 states;

"If the person summoned appears he may show cause why he refuses to give possession of such land and, ***if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor,*** *mortgage or lessor or he may make any order and impose any terms he may think fit;*
Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:
Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons.

[Emphasis provided]

(3) The procedure under Section 169 was explained by Pathik J in **Deo v Mati** [2005] FJHC 136; HBC0248j.2004s (16 June 2005) as follows:-

The procedure under s.169 is governed by sections 171 and 172 of the Act which provide respectively as follows:-

"s.171. On the day appointed for the hearing of the Summons, if the person summoned does not appear, then upon proof to the satisfaction of the Judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if

any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in ejectment."

"s.172. If a person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit."

It is for the defendant to 'show cause.'

(4) The Supreme Court in considering the requirements of Section 172 stated in **Morris Hedstrom Limited v. Liaquat Ali** (Action No. 153/87 at p2) as follows and it is pertinent:

"Under Section 172 the person summoned may show cause why he refused to give possession of the land and if he proves to the satisfaction of the judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced."

(5) The requirements of Section 172 have been further elaborated by the Fiji Court of Appeal in **Azmat Ali s/o Akbar Ali** v **Mohammed Jalil s/o Mohammed Hanif** *(Action No. 44 of 1981 – judgment 2.4.82)* where it is stated:

"It is not enough to show a possible future right to possession. That is an acceptable statement as far as it goes, but the section continues that if the person summoned does show cause the judge shall dismiss the summons; but then are added the very wide words "or he may make any order and impose any terms he may think fit" These words must apply, though the person appearing has failed to satisfy the judge, and indeed are often applied when the judge decides that an open court hearing is required. We read the section as empowering the judge to make any order that justice and the circumstances require."

(C) THE FACTUAL BACKGROUND

(1) What are the facts here? It is necessary to approach the case through its pleadings/affidavits, **bearing all those legal principles uppermost in my mind.**

(2) To give the whole picture of the action, I can do no better than set out hereunder the **main averments/assertions of the Pleadings/Affidavits.**

(3) The Plaintiff in his 'Affidavit in Support' deposed *inter alia;*(as far as relevant)

Para 3 — *That I am the last registered lessee of all that piece and parcel of land comprised in Crown Lease No. 17701 being Lot 1 and 2 on SO 32 containing an area of 2.9353 perches thereon (hereinafter referred to as the "Land"). A copy of Crown Lease No. 17701 is annexed hereto and marked as "**ASR1**".*

Para 4 — *That the Defendant is occupying a portion of the Land without my consent and/or authority.*

Para 5 — *That despite numerous verbal requests the Defendant has refused to vacate the land. I had caused a Demand Notice to be served on the Defendant and demanded him to vacate the land. A copy of the said Demand Notice is annexed hereto and marked as "**ASR2**".*

Para 6 — *That by letter dated the 22nd day of May 2009 the divisional Surveyor Western granted his consent to proceed with legal action against the Defendant. A copy of the said consent is annexed hereto and marked as exhibit "**ASR3**".*

Para 7 — *That I had instituted eviction proceedings against the Defendant in Civil Action No. 177 of 2009 however this matter was struck out for non appearance on the 11th day of March 2010. Annexed hereto and marked as "**ASR4**" is a copy of the Order sealed on the 4th day of June 2010.*

Para 8 — *That an application was filed by the Defendant's employer at the Agricultural Tribunal seeking a declaration of tenancy in action no. WD 04/09 and this was appealed in appeal no 2 of 2011. The Central Agricultural Tribunal ruled that the Defendant's employer did not have any rights on the said Land and struck out the appeal. A copy of the Ruling of the Central Agricultural Tribunal is annexed hereto and marked as "**ASR5**".*

Para 9 *That despite numerous requests thereafter to vacate the land the Defendant refuses to give vacant possession to me despite the Ruling of the Central Agricultural Tribunal.*

Para 10 *That the Defendant is restraining me from entering my own property and is a nuisance and causing disturbance to me and as such I have lodged several reports at the Nadi Police Station. Annexed hereto and marked as "ASR6" is a copy of letter from the Nadi Police station.*

(4) The Defendant for his part in seeking to show cause against the Summons, filed 'an Affidavit in Opposition', which is substantially as follows; (as far as relevant)

Para 4 *THAT I am unaware of the contents of paragraphs 3 of the said affidavit and cannot comment therein.*

Para 5. *THAT I deny the contents of paragraphs 4 of the said affidavit and state that I am in lawful occupation of the property and further state that I was brought on to the property by a Sagadeo Naidu to stay on the property and cultivate the land.*

Para 6. *THAT I admit the contents of paragraphs 5 of the said affidavit.*

Para 7. *THAT I am unaware of the contents of paragraphs 6 and 7 of the said affidavit and cannot comment therein.*

Para 8. *THAT I am unaware of the contents of paragraphs 8 and 9 of the said affidavit and cannot comment therein.*

Para 9. *THAT there was no proper entry by the Director of Lands on to the said Property and the assertion by the Plaintiff Andrew Subba Reddy is fraudulent.*

Para 10. *THAT my family and I have been residing on the property for the last 9 years and I have financially contributed to the upkeep of the house and also the property.*

Para 11. *THAT as to the contents of paragraph 10 of the said Affidavit, the plaintiff has is the person responsible for all the disturbance and has restrained and or restricted my cultivation of the said property for the last 9 years.*

(5) The Plaintiff filed an 'Affidavit in Rebuttal' deposing *inter alia;* (as far as relevant)

Para 5. *That I deny the allegations contained in paragraph 5 of the Affidavit and further state that the said Sagadeo Naidu has no right or authority to allow the Defendant to stay on the property and cultivate the land as the Plaintiff is the registered lessee of the property and not Sagadeo Naidu and in any event there was no consent from the Director of Lands for the Defendant's occupation on the property he is in unlawful occupation of the same.*

6. *That as to paragraph 7 of the Affidavit I state that the Defendant is well aware of the contents of paragraph 7 of my Affidavit in Support as the Defendant was the same party in Civil Action No. HBC 177 of 2009 and had been represented by his Solicitors.*

7. *That I join issues with the Defendant as to paragraph 8 of the affidavit and further wish to correct what has been deposed in paragraph 8 of my Affidavit in Support sworn on the 22nd day of September 2015 in that the application filed at the Agricultural Tribunal in action No. WD 04/09 was for relief against eviction and forfeiture and not for declaration of tenancy and it was held that Crown Lease No. 9062 previously held by Sagadeo Naidu had expired on the 31st day of March 2003.*

8. *That I deny the allegations contained in paragraph 9 of the Affidavit and repeat what has been deposed in paragraphs 5 and 7 hereinabove.*

9. *That save as to admit that the Defendant and his family have been in occupation of the property as alleged in paragraph 10 of the Affidavit I deny the remaining allegations therein and further state that the Defendant has failed to provide any evidence of financial contribution towards the property.*

10. *That I deny the allegations contained in paragraph 11 of the Affidavit and further state that the Defendant has no rights and/or interest in the property and is in unlawful occupation of the same therefore ought not to carry out any cultivation.*

(D) ANALYSIS

(1) This is an application brought under Section 169 of the Land Transfer Act, [Cap 131]. Under Section 169, certain persons may summon a person in possession of land before a judge in chambers to show cause why that person should not be ordered to surrender possession of the land to the Claimant.

For the sake of completeness, Section 169 of the Land Transfer Act, is reproduced below;

> **169.** *The following persons may summon any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant:-*
>
> *(a) the last registered proprietor of the land;*
>
> *(b) a lessor with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or not any previous demand has been made for the rent;*
>
> *(c) a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired.*

I ask myself, under which limb of Section 169 is the application being made?

Reference is made to paragraph (03) of the affidavit in support of the Originating Summons.

> *Para 3* *That I am the **last registered lessee** of all that piece and parcel of land comprised in Crown Lease No. 17701 being Lot 1 and 2 on SO 32 containing an area of 2.9353 perches thereon (hereinafter referred to as the "Land"). A copy of Crown Lease No. 17701 is annexed hereto and marked as "**ASR1**".*
>
> *(Emphasis Added)*

Section 169 (a) of the Land Transfer Act, Cap 131, requires the Plaintiff to be the last **registered proprietor** of the land.

The term "**proprietor**" is defined in the Land Transfer Act as "*the registered proprietor of land, or of any estate or interest therein*".

The term "**registered**" is defined in the **Interpretation Act**, Cap 7, as "*registered used with reference to a document or the title to any immovable property means registered under the provisions of any written law for the time being applicable to the registration of such document or title*"

(2) According to the Crown Lease No:- 17701 (Annexure ASR-1), the Plaintiff is the **lessee** of the subject land. It is conceded by the Defendant that the land in question is a protected lease under the provisions of **Crown Lands Act**. The Plaintiff's title in Crown Lease No-17701 is registered with the Registrar of Title on 29th April 2009. The Crown Lease No:- 17701 shows no other interest in the land save the registered title of the Plaintiff. Thus, it seems to me perfectly plain that the Plaintiff holds a **registered lease** and could be characterised as the **last registered proprietor**.

On the question of whether a **lessee** can bring an application under Section **169 (a) of the Land Transfer Act**, if any authority is required, I need only refer to the sentiments expressed by Master Robinson in "**Michael Nair v Sangeeta Devi**", Civil Action No: 2/12, FJHC, decided on 06.02.2013. The learned Master held;

> *"The first question then is under which ambit of section 169 is the application being made? The application could not be made under the second or third limb of the section since the applicant is the lessee and not the lessor as is required under these provisions. But is the applicant a registered proprietor? A proprietor under the Land Transfer Act means the registered proprietor of any land, or of an estate or interest therein". The registration of the lease under a statutory authority, the iTLTB Act Cap 134, creates a legal interest on the land making the applicant the registered proprietor of the land for the purposes of the Land Transfer Act. He can therefore make an application under section 169 of the Land Transfer Act".*

The same rule was again applied by the learned Master in "**Nasarawaqa Co-operative Limited v Hari Chand**", Civil Action No: HBC 18 of 2013, decided on 25.04.2014. The learned Master held;

> *"It is clear that the iTLTB as the Plaintiff's lessor can take an action under section 169 to eject the Plaintiff. This is provided for under paragraphs [b] & [c]. For the lessor to be able to eject the tenant or the lessee it must have a registered lease. It is not in dispute that the Plaintiff holds a registered lease, the lease is an "Instrument of Tenancy" issued by the iTLTB under the Agricultural Landlord and Tenancy Act. It is for all intents and purposes a native lease and was registered on the 29 November 2012 and registered in book 2012 folio 11824. It is registered under the register of deeds. There is nothing in section 169 that prevents a lessor ejecting a lessee from the land as long as the lease is registered. How will the lessee then eject a trespasser if the lessor in the same lease can use section 169? The lessee under section 169 can eject a trespasser simply because the lessee is the last registered proprietor. The Plaintiff does not have to hold a title in fee simple to become a proprietor as long as he/she is the last registered proprietor. A proprietor is defined in the Land Transfer Act as "proprietor" means the registered*

proprietor of land, or of any estate or interest therein". The Plaintiff has an interest by virtue of the instrument of tenancy and therefore fits the above definition and can bring the action under section 169."

A somewhat similar situation as this was considered by His Lordship Justice K.A. Stuart in **Housing Authority v Muniappa ,**1977, FJSC. His Lordship held that the Plaintiff Housing Authority holds a registered lease therefore it could be characterised as the last registered proprietor.

In **Habib v Prasad** [2012] FJHC 22, Hon. Madam Justice AngalaWati said;

"The word registered is making reference to registration of land and not the nature of land. If the land is registered either in the Registrar of Titles Office or in the Deeds Office, it is still registered land. This land has been registered on 4th March, 2004 and is registered at the Registrar of Deeds Office, it is still registered land. The registration is sufficient to meet the definition of registered in the Interpretation Act Cap 7:-

"Registered" used with reference to a document or the title to any immoveable property means registered under the provision of any written law for the time being applicable to the registration of such document or title".

Applying those principles to the instant case and carrying those principles to their logical conclusion, I have no hesitation in holding that the Plaintiff is the last registered proprietor of the land comprised in Crown Lease No:- 17701.

(3) Pursuant to Section 170 of the Land Transfer Act;

(1) **the Summons shall contain a "description of the Land"**

AND

(2) **shall require the person summoned to appear in the court on a day not earlier than "sixteen days" after the service of Summons.**

The interval of not less than 16 days is allowed to give reasonable time for deliberations and to prevent undue haste or surprise.

I ask myself, are these requirements sufficiently complied with by the Plaintiff?

The Originating Summons filed by the Plaintiff does contain a description of the subject land. I am satisfied that the subject land is sufficiently described. For the sake of completeness, the Originating Summons is reproduced below.

SUMMONS FOR EJECTMENT

LET ALL PARTIES concerned attend before Master in Chambers at the High Court Lautoka on the 28th day of October 2015 at 8.30 o'clock in the forenoon on the filing of AN APPLICATION by the above named Plaintiff that:

1. *THAT the Defendant sow cause why he should not give up immediate vacant possession to the Plaintiff of that portion of all that piece and parcel of land comprised in* ***Crown Lease No. 17701 being Lot 1 and 2 on SO 32 containing an area of 3.9353 perches which the Defendant is occupying.***

2. *AN ORDER that the Defendant give immediate vacant possession to the Plaintiff of that portion of all that piece and parcel of land comprised in Crown Lease No. 17701 being Lot 1 and 2 on SO 32 containing an area of 3.9353 perches which the Defendant is occupying.*

3. *AN ORDER that the Defendant pay costs on a solicitor/client indemnity basis.*

The Plaintiff will read and rely on the Affidavit of Andrew Subba Reddy filed herewith in support of this Summons.

(Emphasis Added)

In light of the above, I have no doubt personally and I am clearly of the opinion that the first mandatory requirement of Section 170 of the Land Transfer Act has been complied with. The Plaintiff has surmounted the first threshold criteria.

(4) Now comes a most relevant and, as I think, crucial second mandatory requirement of Section 170 of the Land Transfer Act.

The Originating Summons was returnable on 28th October 2015. According to the Affidavit of Service filed by the Plaintiff, the Originating Summons was served on the Defendant on 24th October 2015.

Therefore, the Defendant is summoned to appear at the Court on a date earlier than "sixteen days" after the Service of Summons. Therefore, the second mandatory requirement of Section 170 of the Land Transfer Act has not been complied with.

The Counsel for the Defendant did not raise any objection in relation to the aforesaid non-compliance. She did not say a word against it.

However, when the Originating Summons was first called on 28th October 2015, the Counsel for the Defendant sought 21 days to file an 'Affidavit in Opposition' to the application for eviction. The Court granted 21 days to file an Affidavit in Opposition. Therefore, any shortfall of service of Originating Summons was adequately compensated and there was reasonable time for deliberations. Therefore, no prejudice is caused to the Defendant by the non-compliance.

In this, I am comforted by the rule of law expounded in the following judicial decision.

In **'Rukuvi v Kumar' (2011) FJHC 1492**, similar situation as this was considered and the Court held;

> *'[9] When the matter was called on the first day the Defendant sought 21 days to file and serve an affidavit in opposition and this was granted and the hearing was fixed for 30th November 2011. So, the Defendant had ample time to file an affidavit in opposition. Any shortfall on the service of summons was adequately compensated as the Defendant was granted 21 days from the date that appeared on the summons and no prejudice is caused by the non-compliance with the requirement of at least 16 days as stipulated in the Section 170 of the Land Transfer Act.'*

To sum up; having carefully considered the pleadings, evidence and oral submissions placed before this Court, it is quite possible to say that the Plaintiff has surmounted the threshold criteria in Section 169 and the first limb of Section 170 of the Land Transfer Act. **I am satisfied that the Plaintiff has established a prima facie right to possession.**

Now the onus is on the Defendant to establish a lawful right or title under which he is entitled to remain in possession.

In the context of the present case, I am comforted by the rule of law expounded in the following judicial decisions.

In the case of **Vana Aerhart Raihman v Mathew Chand**, Civil Action No: 184 of 2012, decided on 30.10.2012, the High Court held;

> *"There is no dispute between parties as to the locus standi of the Plaintiff, and once this is established the burden of proof shifted to the Defendant to prove his right to possession in terms of the Section 172 of the Land Transfer Act."*

In the case of **Morris HedstromLimited –v- Liaquat Ali** CA No: 153/87, the Supreme Court said that:-

> *"Under Section 172 the person summoned may show cause why he refused to give possession of the land and if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure.* ***That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right must be adduced."***
>
> (Emphasis is mine)

Also it is necessary to refer to Section 172 of the Land Transfer Act, which states;

> *"If the person summoned appears he may show cause why he refuses to give possession of such land and,* ***if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor,*** *mortgage or lessor or he may make any order and impose any terms he may think fit;*
> *Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:*
> *Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons".*
>
> [Emphasis provided]

(5) What is the Defendant's reason refusing to deliver vacant possession? The application for vacant possession is opposed by the Defendant on various reasons expressly set out in the affidavit in opposition. Some of them are interconnected and over-lapping. The reasons fall within a very small compass. I confess that the Defendant's reasons raise the questions of **'indefeasibility of title'** and **'equitable interest'**. Thus, I approach the matter as follows;

Ground (01) ⟶ Reference is made to paragraph (09) of the Defendant's Affidavit in Opposition:-

Para 9. *THAT there was no proper entry by the Director of Lands on to the said Property and the assertion by the Plaintiff Andrew Subba Reddy is **fraudulent.***

(Emphasis Added)

Ground (02) ⟶ Reference is made to paragraphs (05) and (10) of the Defendant's Affidavit in Opposition;

Para 5. *THAT I deny the contents of paragraphs 4 of the said affidavit and state that I am in lawful occupation of the property and further state that **I was brought on to the property by a Sagadeo Naidu to stay on the property and cultivate the land.***

(Emphasis Added)

Para 10. *THAT my family and I have been **residing on the property for the last 9 years** and I have financially contributed to the upkeep of the house and also the property.*

(Emphasis added)

(6) Based on above grounds in opposition, there are five (05) questions that concern me. As I see it, five (05) questions lie for determination by the Court. They are;

(1) Whether the Plaintiff holds an **indefeasible title**?
(This relates to the first ground adduced by the Defendant)

(2) Is the alleged verbal consent granted to the Defendant by 'Sagadeo Naidu'; i.e; the Plaintiff's predecessor in title, to occupy and cultivate the 'Crown Land', a'dealing **with the land'** within the meaning of Section 13 of the Crown Lands Act?
(This relates to the second ground adduced by the Defendant)

(3) Whether the alleged **verbal consent** is in breach of Section 13 of the Crown Lands Act?
(This relates to the second ground adduced by the Defendant)

(4) Is there any 'equitable estopple' or 'lien' arising in the Defendants favour in the land in question, on the money expended on the land and the cultivation of the land by the Defendant?
(This relates to the second ground adduced by the Defendant)

(5) Is the Defendant's occupation of the subject land for whatever length of time, a circumstance, giving rise to any form of 'proprietary estoppel' or 'equity'?
(This relates to the second ground adduced by the Defendant)

(7) Let me now move to consider the **first question** posed at paragraph (6); Reference is made to paragraph (9) of the affidavit in opposition.

> *Para 9.* *THAT there was no proper entry by the Director of Lands on to the said Property and the assertion by the Plaintiff Andrew Subba Reddy is **fraudulent.***
>
> (Emphasis Added)

The agricultural holding which was initially leased by 'Sagadeo Naidu' from the Director of Lands had expired in 2003. It was Crown Lease No: 9062 being 'Nasaqara & Navo', formerly Lots 5 & 16 ND 5169 at 'Nadi' on Plan SO 32 and containing an area of 1.5167 hectares and registered in the name of 'Sagadeo Naidu' as the executor and Trustee of the Estate of 'Guru Swamy Bhaktar'. The Crown Lease 9062 was issued for a term of 10 years from 01st April 1973 and when the lease expired on 31st March 1983, a 20 year statutory extension under Agricultural Landlord and Tenancy Act (ALTA) was granted from 01st April 1983 and expired on 31st March 2003. That upon its legal expiry date, the land under Crown Lease No. 9062 reverted back to the Statutory Landlord (viz, the Director of Lands).

The Defendant was let into possession of the agricultural holding by 'Sagadeo Naidu' as a caretaker. The Defendant has been in cultivation and occupation and he was allowed to remain in occupation and cultivation by 'Sagadeo Naidu' even after the legal expiry date of Crown Lease No: 9062.

It is important to remember that, significantly as I believe, upon the legal expiry date of Crown Lease No: 9062, the agricultural holding reverted back to the Director of

Lands and the Defendant or 'Sagadeo Naidu' has no right under an expired lease. The Director of Lands has a discretion to grant a lease to anyone who applied for it.

The piece of agricultural land containing an area of 1.5167 hectares initially leased to 'Sagadeo Naidu' (viz, Crown Lease No:- 9062) has been amalgamated with another piece of Crown land containing 2.4168 hectares under a new Crown Lease 17701.

The agricultural holding which is the subject of the action is currently leased by the Plaintiff from the Director of Lands on 01st of January 2009 for a term of 30 years. (See; annexure **ASR-1**, Crown Lease No. 17701). The Plaintiff obtained registration on 29th April 2009. The Crown Lease No- 17701 shows no other interest in the land save the registered title of the Plaintiff. Therefore, the Plaintiff holds a registered lease and he is the last registered proprietor of the Crown Lease No- 17701.

As noted above, the Plaintiff obtained registration on 29th April 2009 and his title is not subject to an 'equitable claim' or 'encumbrance', because at the time of registration there was no any legal agreement affecting the Crown Land or an Agreement which is enforceable either at law or in equity. There is no valid contract or an Agreement binding the Plaintiff.

The Defendant alleges fraud against the Plaintiff. But it is a bare allegation of fraud. No single material fact is condescended upon in a manner which would enable this Court to understand what it was that was alleged to be fraudulent. In the 'Torrens System' registered interests can be set aside if they have been procured by fraud, where fraud refers to active fraud, personal dishonesty or moral turpitude. Therefore, a bare allegation of fraud against the Plaintiff does not amount by itself to a complicated question of fact, making the summary procedure of Section 169 inappropriate.

As noted above, in the instant case, the Defendant merely alleged fraud against the Plaintiff. It is denied by the Plaintiff. There is nothing whatsoever before me to suggest the existence of any evidence, documentary or oral, that might possibly suggest fraud against the Plaintiff. Therefore, the allegation of fraud fails.

Therefore, I am clearly of the opinion that the Plaintiff's title cannot be impeached. Section 39 of the Land Transfer Act provides that a registered proprietor, except in case of Fraud, holds the land free from all encumbrances except those registered against title.

Returning back to the case before me, there is no evidence whatsoever to establish that the Plaintiff had acquired his registered title to the land through fraud. That being so, I would hold that the title of the Plaintiff to the Crown Land is not subject to any interest, equitable or otherwise, of the Defendant. As a result, I am left with the

conclusion that the Plaintiff holds an indefeasible title. **Thus, I answer the first question posed at paragraph (6) affirmatively. Therefore, the first ground fails.**

In this regard, I am comforted by the following legislative provisions and the rule of law expounded in the following judicial decisions.

Sections 38 and 39 (1) of the Land Transfer Act, can be regarded as the basis of the concept of "indefeasibility of title" of a registered proprietor. Under Torrens System of land law the registration is everything and only exception is **fraud.**

I should quote Section 38 and 39 (1) of the **Land Transfer Act**, which provides;

Section 38 provides;

Registered instrument to be conclusive evidence of title

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

Section 39 (1) provides;

"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 if the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except...

I am conscious of the fact that section 40 of the Land Transfer Act seeks to dispel Notice of a Trust or unregistered interest in existence in the following manner;

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 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." (Underlining is mine).

With regard to the concept of "**indefeasibility of title of a registered proprietor**", the following passage from the case of ***"EngMee Young and Others (1980) Ac 331*** is apt and I adapt it here;

> *"The Torrens system of land registration and conveyamncing as applied in Malaya by the National Land Code has as one of its principle objects to give certainty to land and registrable interests in land. Since the instant case is concerned with Title to the land itself their Lordships will confine their remarks to this, though similar principles apply to other registrable interests. By s.340 the title of any person to land of which he is registered as proprietor is indefeasible except in cases of fraud, forgery or illegality and even in such cases a bond fide purchase for value can safely deal with the registered proprietor and will acquire from him on indefensible registered title."*

In "**Prasad v Mohammed" (2005) FJHC 124; HBC 0272J.1999L (03.06.2005) His Lordship Gates,** succinctly stated the principles in relation to **fraud** and **indefeasibility of title** as follows;

> *[13] In Fiji under the Torrens system of land registration, the register is everything: Subramani & Ano v DharamSheela & 3 Others [1982] 28 Fiji LR 82. Except in the case of fraud the title to land is that as registered with the Register of Titles under the Land Transfer Act [see sections 39, 40, 41, and 42]: Fels v Knowles [1906] 26 NZLR 604; Assets Co Ltd v Mere Roihi [1905] AC 176, PC. In Frazer v Walker [1967] AC 569 at p.580 Lord Wilberforce delivering the judgment of the Board said:*
>
> *"It is to be noticed that each of these sections except the case of fraud, section 62 employing the words "except in case of fraud." And section 63 using the words "as against the person*

registered as proprietor of that land through fraud." The uncertain ambit of these expressions has been limited by judicial decision to actual fraud by the registered proprietor of his agent: Assets Co Ltd v Mere Roihi.

It is these sections which, together with those next referred to, confer upon the registered proprietor what has come to be called "indefeasibility of title. ***"The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration."***

[14] Actual fraud or moral turpitude must therefore be sown on the part of the plaintiff as registered proprietor or of his agents Wicks v. Bennet [1921] 30 CLR 80; Butler v Fairclough [1917] HCA 9; [1917] 23 CLR 78 at p.97

(Emphasis Added)

In the case of **SHAH –v- FIFTA** (2004) FJHC 299, HBC 03292J, 2003S (23rd June 2004) the Court took into consideration Sections 38, 39 and 40 of the Land Transfer Act Cap 131. Under Section 38 of the Lands Transfer Act Cap 131 it states that;

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

Pathik J in this case; **SHAH –v- FIFITA***(supra)* emphasised on section 40 of the Land Transfer Act Cap 131 as follows:

"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 rules 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".

Fraud for the purpose of the Land Transfer Act has been defined by the Privy Council in **Assets Company Ltd v Mere Roihi** [1905] AC 176 at p.210 where it was said:

> *".... by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Lands Act, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty or fraud if he honestly believes it to be a genuine document which can be properly acted upon."*

Fraud: Sufficiency of evidence;

In **Sigatoka Builders Ltd v Pushpa Ram & Ano**. (Unreported) Lautoka High Court Civil Action No. HBC 182.01L, 22 April 2002 the Court held in relation to "Fraud: sufficiency of evidence";

> *"Though evidence of fraud and collusion is often difficult to obtain, the evidence here fails a good way short of a standard requiring the court's further investigation. In* ***Darshan Singh v Puran Singh*** *[1987] 33 Fiji LR 63 at p.67 it was said:*
>
> *"****There must, in our view, be some evidence in support of the allegation indicating the need for fuller investigation which would make Section 169 procedure unsatisfactory****. In the present case the appellant merely asserted that he had paid the money for the purchase of the property. This was denied by*

both Prasin Kuar and the respondent. ***There was nothing whatsoever before the learned judge to suggest the existence of any evidence, documentary or oral, that might possibly assist the appellant in treating the case as falling within the scope of Section 169 of the Land Transfer Act and making an order for possession in favour of the respondent."***

In that case it was also held that a bare allegation of fraud did not amount by itself to a complicated question of fact, making the summary procedure of Section 169 in appropriate see too ***Ram Devi v Satya Nand Sharma & Anor****.[1985] 31 Fiji LR 130 at p.135A. A threshold of evidence must be reached by the Defendant before the Plaintiff can be denied his summary remedy. In* ***Wallingford v Mutual Society*** *[1880] 5 AC 685 at p. 697 Lord Selbourne LC said:*

"With regards to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon; in a manner which would enable any Court to understand what it was that was alleged to be fraudulent."

(Emphasis Added)

It is clear from the above mentioned judicial decisions that a bare allegation of fraud does not amount by itself to a complicated question of fact, making the summary procedure of Section 169 inappropriate.

In the "Torrens System" registered interests can be set aside if they have been procured by fraud, where fraud refers to active fraud, personal dishonesty or moral turpitude. As I said earlier, there is nothing whatsoever before me to suggest the existence of any evidence, documentary or oral, that might possibly suggest fraud against the Plaintiff. Therefore, the allegation of fraud fails.

(8) I propose to consider the second and third question posed at paragraph (6) jointly.

Reference is made to paragraph (05) of the Affidavit in Opposition filed by the Defendant.

Para 5. *THAT I deny the contents of paragraphs 4 of the said affidavit and state that I am in lawful occupation of the property and further state that* ***I was brought on to the property by a Sagadeo Naidu to stay on the property and cultivate the land.***

(Emphasis Added)

It is not in dispute that he land in question in this case is Crown Land within the meaning of Crown Lands Act. As such its control is vested with the Director of Lands. Therefore, it is necessary to examine Section 13 of the Crown Lands Act.

I should quote Section 13 which provides;

> *13.-(1) Whenever in any lease under this Act there has been inserted the following clause:-*
>
> *"This lease is a protected lease under the provisions of the Crown Lands Act"*
>
> *(hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.*
>
> *Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing affected without such consent shall be null and void."*

Reading, as best as I can between the lines of the Crown Lands Act, it seems to me, that Section 13 (1) prohibits any dealing in land which is comprised in Crown Lease without the consent of the Director of Lands.

Moreover, unlawful occupation of Crown Land is an offence under Section 32 and 40 of the Crown Lands Act.

On a strict reading of Section 13 (1) of the Crown Lands Act, suggest to my mind, that the Act has a discernible protective or public policy purpose, namely the prevention in the public interest, of the uncontrolled alienation of crown land.

I do not think I need to read anymore!

In **Reddy v Kumar** [2012] **FJCA 38, ABU 0011.11 (8 June 2012)** Fiji Court of Appeal held that any dealing in respect of a Government land effected without the consent of the Director of Lands shall be considered *ab-intio* void and has no effect or force in the eyes of the law. **It is further stated in the said Judgment that the consent of the Director of Lands under the Crown Lands Act stands as a mandatory requirement before any transaction or similar dealing is affected in respect of a leasehold Government land.**

In paragraph (9) and (10) of the Judgment, his Lordship Chirasiri J. Stated as follows:

> *"9. The above section of the Crown Lands Act clearly stipulates that it is unlawful to alienate or deal with a land comprising a lease unless the written consent of the Director of Lands first had obtained. It is further stated that any sale or transfer or other alienation or any dealing affected in respect of such land without the consent of the Director of Lands shall be null and void. Accordingly, a statutory bar is being imposed for the transactions or dealings affecting Government land or part thereof which is subjected to a protected lease unless and until the consent for such a transaction is obtained from the Director of Lands beforehand.* ***Therefore, if any dealing in respect of a Government land is affected without the consent referred to above, such a transaction shall be considered ab-intio void and has no effect or force in the eyes of the law."***
>
> *"10. When looking at the said Section 13, it seems that the consent of the Director referred to therein should be given by him only upon considering the totality of the provisions contained in the Crown Lands Act. That power of the Director cannot be exercised by a person functioning in another capacity than of the Director of Lands.* ***[Section 13 (4)*** *of the Act]. However, it must be noted that it does not mean that the right to review decisions of the Director or the Minister, if there had been an appeal under* ***Section 13*** *(3)to the Minister, is taken away from the jurisdiction of Courts but of course subject to the provisions of the law prevailing in Fiji.* ***Hence, the requirement to have the consent of the Director under the Crown Lands Act stands as a mandatory requirement before any transaction or similar dealing is affected in respect of a leasehold Government land."***
>
> (Emphasis added)

In **Raliwalala v Kaicola (2015) FJHC 66,** a similar situation arose involving Native Land whereby the Defendants were trying to justify its position of occupation by virtue of an agreement with the previous owner. The court in that instance stated:

> *"The main issue to be determined in this application is that whether such an arrangement entered between the previous tenant and the Defendant constitutes a consent or licence to occupy the land. Indeed it is an arrangement entered between the tenant and a third party to settle loan arrears with the bank. In order to legitimize such*

> *a transfer of property by the tenant, he is required to obtain the consent of the Native Land Trust Board which has not been obtained. In the meantime, the previous tenant deposed in his annexed affidavit that he was forcefully evicted from the land and the Defendant was demanding the money back, which he paid to the bank. Under such circumstances, it appears that the dispute between the previous tenant and the Defendant does not relate to the occupation of the land. The Defendant may have a claim "in personam", but not for the possession of the land. Accordingly, it is my opinion that the Defendants have not obtained consent or a licence to occupy or remain in occupation of this land.*

Returning to the present case, on the question as to whether the Defendant's occupation and cultivation of the land after the legal expiry date of Crown Lease 9062 by virtue of alleged verbal consent granted by 'Sagadeo Naidu' can be a "dealing" within the meaning of Section 13 (1) of the Crown Lands Act, if any authority is required, I need only refer to the rule of law enunciated by the Privy Council in **Chalmers v Pardoe (1963) 3 A.E.R. 552.**

In that case, Mr. Pardoe was the holder of a lease of Native Land. **The Native land is subject to Section 12 (1) of the Native Land Trust Act which is in the exact same terms as Section 13 of the Crown Lands Act**. Section 12 (1) provides;

> *"Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing affected without such consent shall be null and void ...."*

The leading case upon the interpretation of Section 12 of the Native Land Trust Act is **Chalmers v Pardoe** *(supra).* Mr. Pardoe was the holder of a lease of Native Land. By a "friendly arrangement" with Mr Pardoe, Mr Chalmers built a house on a part of the land and entered into possession. The consent of the Native Land Trust Board was never obtained. **The rule of law enunciated by the Privy Council was that the transaction amounted to an agreement for a lease or sublease but even regarding it as a licence to occupy coupled with possession and that a "dealing" with the land took place.**

As to whether the "friendly arrangement" amounted to a "dealing" with native land within the meaning of s.12 of the Ordinance, Sir Terence Donovan, in delivering the speech of the Privy Council in **Chalmers v Pardoe** *(supra),* explained it as follows:

> ***"Repeating this term, but without necessarily adopting it, the Court of Appeal held, as their lordships have already indicated, that the least effect which could be given to the "friendly arrangement" was***

that of a licence to occupy coupled with possession. Their lordships think the matter might have been put higher. "I gave him the land for nothing" said Mr Pardoe. Again, "He could get anything – a sublease or a surrender, which was perfectly correct..." And so on. In their lordships view an agreement for a lease or sublease in Mr Chalmers' favour could reasonably be inferred from Pardoe's evidence.

Even treating the matter simply as one where a licence to occupy coupled with possession was given, all for the purpose, as Mr Chalmers and Mr Pardoe well knew, of erecting a dwelling-house and necessary buildings, it seems to their lordships that, when this purpose was carried into effect, a "dealing" with the land took place. On this point their lordships are in accord with the Court of Appeal: and since the prior consent of the Board was not obtained, it follows that under the terms of s.12 of the ordinance, cap 104, this dealing with the land was unlawful. It is true that in Harman Singh and Backshish Singh v Bawa Singh [1958-59] FLR 31, the Court of Appeal said that it would be an absurdity to say that a mere agreement to deal with land would contravene s.12, for there must necessarily be some prior arrangement in all such cases. Otherwise there would be nothing for which to seek the Board's consent. In the present case, however, there was not merely agreement, but, on one side, full performance: and the Board found itself with six more buildings on the land without having the opportunity of considering beforehand whether this was desirable. It would seem to their lordships that this is one of the things that s.12 was designed to prevent. True it is that, confronted with the new buildings, the Board as lessor extracted additional rent from Mr Pardoe: but whatever effect this might have on the remedies the Board would otherwise have against Mr Pardoe under the lease, it cannot make lawful that which the ordinance declares to be unlawful."

In the context of the present case, I am mindful of the rule of law enunciated in the following decisions;

Henry J.P. in **Phalad v Sukh Raj** (1978) 24 FLR 170 said;

> *"The cases already cited show that the Courts have held that the mere making of a contract is not necessarily prohibited by section 12. It is the effect of the contract which must be examined to see whether there has been a breach of section 12. The question then is whether, upon the true construction of the said agreement the subsequent acts of appellant, done in pursuance of the agreement, "alienate or deal with the land, whether by sale transfer or sublease or in any other manner whatsoever" without the prior consent of the Board had or obtained. The use of the term "in any other manner whatsoever" gives a wide meaning to the prohibited acts. For myself I have no doubt but that the true construction of the said agreement and the said agreement and the substantial implementation of*

such an agreement for sale and purchase, under which possession is completely parted with to the purchaser and immediate mutual rights and liabilities are created in respect of such exclusive possession, is a breach of section 12 if done before the consent is obtained."

The words "alienate" and "deal with" as elaborated in section 12, are absolute and do not permit conditional acts in contravention. If before consent, acts are done pending the granting of consent, which come within the prohibited transactions, then the section has been breached and later consent cannot make lawful that which was earlier unlawful and null and void. This does not cut across the cases already cited which deal with the formation of the contract as contrasted with an immediately operative agreement and substantive acts in performance thereof."

Gould V.P in **Jai Kissun Singh v Sumintra**, 16 FLR p 165 said;

". . . .it is not necessary that the agreement between the parties should have progressed to a stage at which formal documents of lease or assignment has been executed before the transaction became a dealing requiring prior consent. That, having regard to the objects of the section, is only common sense. Otherwise, a purchaser under agreement could remain indefinitely in possession and control, exercising the rights of full ownership and even protecting himself by caveat. If an agreement is signed and held inoperative and inchoate while the consent is being applied for I fully agree that it is not rendered illegal and void by section 12. Where then, is the line to be drawn? I think on a strict reading of section 12 in the light of its object, an agreement for sale of native land would become void under the section as soon as it was implemented in any way touching the land, without the consent having been at least applied for ... ..."

(Emphasis Added)

In **Chalmers v Pardoe** (*supra*) said moreover,

"But even treating the matter simply as one where a licence to occupy, coupled with possession was given, all for the purpose, as Chalmers and Pardoe well knew, of erecting a dwelling house and accessory buildings it seems to their Lordships that when this purpose was carried into effect a "dealing" with the land took place."

Returning to the present case, on the strength of the authority in the above cases, it is clear beyond question that the alleged "verbal consent" granted to the Defendant by 'Sagadeo Naidu'; i.e; Plaintiff's predecessor in title, to occupy and cultivate the subject land after the legal expiry date of Crown Lease 9062 amounted to a "dealing with the land" within the meaning of Section 13 of the Crown Lands Act. Because;

- The Defendant was allowed to remain in occupation and cultivation of the agricultural holding after the legal expiry date of Crown Lease No. 9062, by virtue of verbal arrangement made between "Sagadeo Naidu" and the Defendant.

- The verbal arrangement was executed to the full by the Defendant remaining in occupation of the land and cultivating it. Thus, the alleged verbal arrangement/ consent amounted to a license to occupy coupled with possession and that a 'dealing with the land' took place.

Thus, I answer the second question posed at paragraph (6) in the affirmative. Therefore, the second ground fails.

Let me now move to consider the third (03) question posed at paragraph six (06). The affidavits contain no statement that the Director of Lands had ever consented to 'Sagadeo Naidu' either, expressly or by implication for alienation or any dealing effected in respect of agricultural holding.

Thus, the alleged verbal consent granted to the Defendant by 'Sagadeo Naidu' to remain in occupation and cultivation of the Crown Land (after the legal expiry date of Crown Lease 9062) is illegal since the provisions of Section 13 of the Crown Lands Act has been breached. As a result, the inescapable conclusion is that the alleged transaction whereby Sagadeo Naidu alienated or dealt with the property by way of alleged verbal consent granted to the Defendant to remain in occupation and cultivation of the Crown Land (after the legal expiry date of Crown Lease 9062) was unlawful and null and void ***ab initio***.

In the context of the present case, I must confess that I am much comforted by the rule of law expounded in the following judicial decisions.

In **MISTRY AMAR SINGH v KULUBYA** 1963 3 AER p.499, a Privy Council case, it was held that a registered owner of the land was entitled to recover possession because his right to possession did not depend on the illegal agreements in that case but rested in his registered ownership and as the person in possession could not rely on the agreements because of their illegality he could not justify his remaining in possession. That case "concerned an illegal lease of 'Mailo' land by an African to a non-African which was prohibited by a Uganda Statute except with the written consent of the Governor. No consent was obtained to the lease. After the defendant had been in possession for several years the plaintiff gave notice to quit and ultimately sued him for recovery of the lands. He succeeded.

Also in **RAM KALI** f/n Sita Ram and SATEN f/n Maharaj (Action No. 93/77) **KERMODE J**. expressed a similar view:-

> *"It is not necessary to determine whether there was an alleged sale as the defendant contends or a tenancy as the plaintiff alleges. Either transaction was illegal without the consent of the Director of Lands. ... While the plaintiff did disclose the illegal tenancy her claim for possession is based on the independent and untainted grounds of her registered ownership and she does not have to have recourse to the illegal tenancy to establish her case."*

In **Khan v Prasad** [1996] FJHC 85; HBC 0480J, 96s (23 December 1996), Hon. Mr Justice Pathik expressed the view that where the Director of Lands consent was not obtained on the defendant's occupation of a crown protected lease, the defendant cannot justify the remaining in possession.

Therefore, the defendant's stance would, of course, fly on the face of the rule of law enunciated in the aforementioned judicial decisions.

Given the above, I am constrained to answer the third question earlier posed at paragraph (06) in the affirmative. Therefore, the second ground fails.

Suffice it to say that the Defendant's stance will not stand as, Section 59 (d) of the 'Indemnity, Guarantee and bailment Act' (Cap 232) states that no action shall be brought upon **any contract or sale of lands or any interest** in them unless the agreement upon which such action is brought or a memorandum thereof is in writing. Quite plainly this provision is designed to prevent fraud.

No such writing is in evidence in the present case. There is no shred of evidence tending to establish such writing. Accordingly, the alleged verbal consent granted to the Defendant by 'Sagadeo Naidu' to remain in occupation and cultivation of the Crown land (after the legal expiry date of Crown Lease 9062) is invalid and unenforceable.

For the sake of completeness, Section 59 (d) of the act is reproduced below.

> ***59.*** ***<u>No action shall be brought-</u>***
>
> *(a)* .....
> *(b)* .....
> *(c)* .....

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

(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 there or some other person thereunto by him lawfully authorised.

(Emphasis added)

(9) Now I proceed to address the fourth (04) question posed at paragraph (06).

Reference is made to paragraph (10) of the Defendant's Affidavit in opposition.

Para 10. *THAT my family and I have been residing on the property for the last 9 years and* ***I have financially contributed to the upkeep of the house and also the property.***

(Emphasis Added)

This question requires some examination of the law regarding "**Promissory or equitable estoppel**."

The relevant principle is expounded in;

- **"Spry" in his "Principles of Equitable Remedies" 04th Edition, (1990), p. 179.**
- **"Snell" in his "Principles of Equity" 27th Edition, p. 565**
- **"Spencer Bower & Turner" in "Estoppel by Representation" 3rd Edition, (1977) Chapter 12.**

Spry in his "Principles of Equitable Remedies" 4th Edition 1990 page 179 sets out the basic principles of equitable proprietary estoppel as follows:

- *The Plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendants or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship.*
- *The Plaintiff has induced the defendant to adopt that assumption or expectation.*
- *The Plaintiff acts or abstains from acting in reliance on the assumption or expectation.*
- *The defendant knew or intended him to do so.*
- *The Plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled.*
- *The defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.*

Lord Kingsdown in the case of **Ramsden v Dyson** (1865) L.R. 1 H.L. 129 said at p. 140;

> *"If a man under a verbal agreement with a landlord for a certain interest in land or what amounts to the same thing under the expectation created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation with the knowledge of the landlord and without any objections by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation."*

Also at p. 140 Lord Cransworth L.C. said:

> *"If a stranger begins to build on any land supposing it to be his own and I perceiving his mistake, abstain setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land in which he had expended money on the supposition that the land was his own."*

Promissory or equitable estoppel is described in Halsburys Laws of England, Fourth Edition, Volume 16, at paragraph 1514:

> *"When one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on*

accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced"

Snell's Equity (13th Ed), at para 39 – 12 states that:

"Proprietary estoppel is one of the qualifications to the general rule that a person who spends money or improving the property of another has no claim to reimbursement or to any proprietary interest in the property".

Proprietary estoppel, unlike promissory estoppel, is permanent in its effect. It is capable even of conferring a right of action. For it to apply there must exist essential elements or conditions. The Court, in Denny v. Jensen [1977] NZLR 635 identified four conditions namely, as p.638.

"There must be expenditure, a mistaken belief, conscious silence on the part of the owner of the land and no bar to the equity".

Megarry J in In re Vendervell's Trust (No. 2) [1974] CH 269 describes the essential elements this way, at p. 301,

"... the person to be estopped (I shall call him O, to represent the owner of the property in question), must know not merely that the person doing the acts (which I shall call) was incurring the expenditure in the mistaken belief that A already owned or would obtain a sufficient interest in the property to justify the expenditure, but also that he, O, was entitled to object to the expenditure. Knowing this, O nevertheless stood by without enlightening A. The equity is based on unconscionable behaviour by O; it must be shown by strong and cogent evidence that he knew of A's mistake, and nevertheless dishonestly remained willfully passive in order to profit by the mistake".

In **Denny v. Jensen** **[1977]** 1 NZLR 635 at 639, Justice White very aptly summarised the doctrine as follows:-

> *"In Snell's Principles of Equity (27 Ed) 565 it is stated that proprietary estoppel is" ... capable of operating positively so far as to confer a right of action". It is "one of the qualifications" to the general rule that a person who spends money on improving the property of another has no claim to reimbursement or to any proprietary interest in that property. In* ***Plimmer v Willington City Corporation*** *(1884) 9 App Cas 699; NZPCC 250 it was stated by the Privy Council that "... the equity arising from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated" (ibid, 713, 29). After referring to the cases, including* ***Ramsden v Dyson*** *(1866) LR 1 HL 129, the opinion of the Privy Council continued, " In fact, the court must look at the circumstances in each case to decide in what way the equity can be satisfied" (9 App Cas 699), 714; NZPCC 250, 260). In* ***Chalmers v Pardoe*** *[1963] 1 WLR 677; [1963] 3 All ER 552 (PC) a person expending money was held entitled to a charge on the same principle. The principle was again applied by the Court of Appeal in* ***Inwards v Baker*** *[1965]2 QB 29; [1965] 1 All ER 446. There a son had built on land owned by his father who died leaving his estate to others. Lord Denning MR, with whom Danckwerts and Salon LJJ agreed, said that all that was necessary:*
>
> *"... is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do". (ibid, 37, 449).*
>
> (Emphasis Added)

Hon. Mr Justice Deepthi Amaratunga observed in **Vishwa Nand v Rajendra Kumar** (Civil Action HBC 271 of 2012) that;

> *"The general rule, however is that "liabilities are not to be forced upon people behind their backs" and four conditions must be satisfied before proprietary estoppel applies.* ***There must be expenditure, a mistaken belief, conscious silence on the part of the owner of the land and no bar to the equity."***
>
> (Emphasis Added)

Hon. Madam Justice Anjala Wati in **Wilfred Thomas Peter v HiraLal and Farasiko** (Labasa HBC 40 of 2009) held that;

> *"I must analyse whether the four conditions have been met for the defence of proprietary estoppel to apply. The conditions are:*
>
> *i. An expenditure*
> *ii. A mistaken belief*
> *iii. Conscious silence on the part of the owner of the land*
> *iv. No bar to the equity*

Returning back to the case before me, as noted earlier, the alleged verbal consent granted to the Defendant by 'Sagadeo Naidu' to remain in occupation and cultivation of the Crown land (after the legal expiry date of Crown Lease 9062) is implicitly prohibited by Section 13 of the Crown Lands Act since it lacked the consent of the Director of Lands.

The doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has enacted to be invalid. [**Chand v Prakash**, 2011, FJHC 640, HB169. 2010]

His Lordship Gates considered somewhat a similar situation in "**Indar Prasad and BidyaWati v Pusup Chand**" (2001) 1 FLR 164 and said;

> ***"Section 13 of the State Lands Act would appear to be a complete bar to any equitable estoppel arising in the Defendant's favour."***

"**Estoppel against a statute**" is discussed as follows in Halsburys Laws of England, 4th Edition, Volume 16, at paragraph 1515,

> *"The doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted is to be invalid, or to give the court a jurisdiction which is denied to it by statute, or to oust the court's statutory jurisdiction under an enactment which precludes the parties contracting out of its provisions. Where a statute, enacted for the benefit of a section of the public, imposes a duty of a positive kind, the person charged with the performance of the duty cannot be estopped be prevented from exercising his statutory powers. A petitioner in a divorce suit cannot obtain relief simply because*

the respondent is estopped from denying the charges, as the court has a statutory duty to inquire into the truth of a petition.

In **Chalmers v Paradoe** (1963) 1W.L.R. 687 the court held;

> *"The friendly arrangement entered into between the respondent and the appellant amounted to granting the appellant permission to treat a certain portion of the land comprised in the lease as if the appellant were in fact the lessee. Under this arrangement the respondent gave the appellant possession of part of the land. He granted to the appellant permission to enjoy exclusive occupation of that portion of the land, and to erect such buildings thereon as he wished. Such an arrangement could we think be considered an alienation, as was argued in* ***Kuppan v Unni****. Whether or not it was an alienation it can, we think, hardly be contended that it did not amount to a dealing in land with the meaning of section 12. It is true that the 'friendly arrangement' did no amount to a formal sublease of a portion of the land or to a formal transfer of the lessee's interest in part of the land comprised in the lease. The least possible legal effect which in our opinion could be given to this arrangement would be to describe it as a license to occupy coupled with possession, granted by the lessee to the appellant. In our opinion, the granting of such a license and possession constitutes dealing with the land so as to come within the provisions of section 12, Ca. 104. The consent of the Native Land Trust Board was admittedly not obtained prior to this dealing, which thus becomes unlawful and acquires all the attributes of illegality. An equitable charge cannot be brought into being by an unlawful transaction and the appellant's claim to such a charge must therefore fail."*

In **Re CM Group (Pvt) Ltd's Caveat** [1986] 1 Qd R 381, it was held that property did not pass in equity until the required municipal council approval was obtained. In **Brown v Heffer** (1967) 110 CLR 344, an interest in equity did not pass because the required consent of the Minister had not been obtained.

On the strength of the authority in the above cases, I think it is quite possible to say that the mandatory requirement of Section 13 of the Crown Lands Act and the legal consequences that flow from non-compliance defeat the Defendant's claim for an equitable charge or lien over the land in view of the money expended on the property, the cultivation and all other improvements on the land. The defence stance in relation

to equitable charge would, of course, fly on the face of the rule of law enunciated in the above judicial decisions. **Therefore, I am constrained to answer the fourth question earlier posed at paragraph (06) negatively. Therefore, the second ground fails.**

(10) Now let me proceed to address the **fifth** and the last question posed at paragraph (6).

Reference is made to paragraph (10) of the affidavit in opposition.

> *Para 10.* *THAT my family and **I have been residing on the property for the last 9 years** and I have financially contributed to the upkeep of the house and also the property.*
>
> *(Emphasis Added)*

The Defendant contends that there is equity or proprietary estoppel arising out of his long term occupation of the subject land

On the question of whether the Defendant's occupation of the subject land for whatever length of time, a circumstance giving rising to any form of proprietary estoppel or equity, if any authority is required, I need only refer to the sentiments of Fatiaki J in **Wati v Raji** (1996) FJHC 105; The Hon. Judge held;

> *"Turning finally to the question of **'proprietary estoppel', Suffice it to say that the mere occupation of a piece of land on a yearly tenancy for whatever length of time, is not a circumstance capable of giving rise to any form of 'estoppel', proprietary or otherwise, nor in my view is any 'equity' created thereby which the court would protect.***
>
> (Emphasis added)

The wording of the above passage is precise and clear to me. Applying those principles to the present case and carrying those principles to their logical conclusion, I have no hesitation in holding that the Defendant's occupation of the agricultural holding for whatever length of time is not a circumstance capable of giving rise to any form of 'proprietary estoppel' or 'equity'.

In the result, I am constrained to answer the fifth and the final question posed at paragraph (06) negatively. Therefore, the second ground fails.

(11) To sum up, for the reasons which I have endeavored to explain, it is clear beyond question that the Defendant has failed to show cause to remain in possession as required under Section 172 of the Land Transfer Act.

At this point, I cannot resist in reiterating the judicial thinking reflected in the following judicial decisions;

In the case of **Morris Hedstrom Limited v Liaquat Ali,** CA No, 153/87, the Supreme Court held,

> *"Under Section 172 the person summonsed may show cause why he refused to give possession of the land if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure.* ***That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for a right must be adduced."***
>
> (Emphasis is mine)

In **Shankar v Ram,** (2012) FJHC 823; HBC 54.2010, the Court held;

> *"What the Defendant needs to satisfy is not a fully – fledged right recognized in law, to remain possession but some tangible evidence establishing a right or some evidence supporting an arguable case for such a right to remain in possession. So, even in a case where the Defendant is unable to establish a complete right to possession, if he can satisfy an arguable case for a right still he would be successful in this action for eviction, to remain in possession."*

Being guided by those words, I think it is right in this case to say that the Defendant has failed to adduce some tangible evidence establishing a right or supporting an arguable case for such a right.

I disallow the grounds adduced by the Defendant refusing to deliver vacant possession.

Essentially that is all I have to say!!!

(E) CONCLUSION

Having had the benefit of oral submissions for which I am most grateful and after having perused the affidavits, written submissions and the pleadings, doing the best that I can on the material that is available to me, I have no doubt personally and I am clearly of the opinion that the Defendant has failed to show cause to remain in possession as required under Section 172 of the Land Transfer Act.

In these circumstances, I am driven to the conclusion that the Plaintiff is entitled to an order as prayed in Summons for immediate vacant possession.

(F) FINAL ORDERS

(1) I order that Defendant to deliver immediate vacant possession of the land described in the Originating Summons, dated 24th September 2015.

(2) The Defendant is ordered to pay costs of $1000.00 (summarily assessed) to the Plaintiff which is to be paid within 7 days hereof.

HIGH COURT OF FIJI LAUTOKA

01/07/2016

.....

Jude Nanayakkara
Master

At Lautoka
01st July 2016