

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 103 of 2014

BETWEEN : **RAJ DATT** of Navakai, Nadi Fiji, retired.

PLAINTIFF

AND : **SUNIL DATT** of Navakai, Nadi, Fiji Supervisor in his personal capacity and as one of the Administrator of the Estate of Rudra Datt father's name Badal of Navakai, Nadi, Fiji, Cultivator and as one of the Executor and Trustee in the Estate of Sheela father's name Angu Prasad of Navakai, Nadi Domestic Duties.

1ST DEFENDANT

AND : **RAM DATT** of Navakai, Nadi, Fiji Carpenter in his personal capacity and as one of the Administrator of the Estate of Rudra Datt father's name Badal of Navakai, Nadi, Fiji, Cultivator and as one of the Executor and Trustee in the Estate of Sheela father's name Angu Prasad of Navakai, Nadi Domestic Duties

2ND DEFENDANT

AND : **ANIL DATT** of Navakai, Nadi, Fiji Driver in his personal capacity and as one of the Administrator of the Estate of Rudra Datt father's name Badal of Navakai, Nadi, Fiji, Cultivator and as one of the Executor and Trustee in the Estate of Sheela father's name Angu Prasad of Navakai, Nadi Domestic Duties.

3RD DEFENDANT

AND : **MANJULA WATI** of Navakai, Nadi, Fiji Domestic Duties in her personal capacity and as one of the Administrator of the Estate of Rudra Datt father's name Badal of Navakai, Nadi, Fiji Cultivator and as one of the Executor and Trustee in the Estate of Sheela father's name Angu Prasad of Navakai, Nadi Domestic Duties.

4TH DEFENDANT

AND : **DIRECTOR OF LANDS**

5TH DEFENDANT

Counsel : **Mr. Eroni Maopa for the Plaintiff**
(Ms) Adi Litia Vereivalu Vateitei for the First Defendant
No appearance for the Second, Third and Fourth Defendants
Mr. Josefa Mainavolau for the Fifth Defendant

Date of Trial : **Monday 09th, Tuesday 10th and Wednesday 11th July 2018**
Date of Judgment : **Friday, 14th December 2018**

JUDGMENT

(A) INTRODUCTION

(i) The plaintiff by way of 'Writ of Summons' instituted these proceedings on the 26th day of June 2014 seeking the following Orders;

(a) *A Declaration that the transfer of Leases issued to the defendants be declared Null and Void.*

(b) *THAT the defendants by themselves, their servants, agents, nominees, whosoever and whatsoever be restrained from entering the said property.*

(c) *DAMAGES for harassment, intimidation and pain and suffering against the defendants as a result of the fraud transfers.*

(d) *AN Order that the defendants and/or their servants and/or agents do pay interest to the plaintiff pursuant to Miscellaneous Provisions (Births and deaths) Law Reform.*

(e) *AN Order that the defendants do pay General Damages Punitive and Aggravated Damages to the plaintiff.*

(f) *AN Order that 1st to 4th defendants pay the costs of the 3 houses, 2 cars, personal belongings and other items in the sum of \$50,000.00 with interest.*

- (g) *AN Order that 1st to 5th Defendants do pay costs for loss of all income with interest of 12.5% per annum for loss of life of my wife, costs for pain and suffering, costs for staying in tent for one month (on road) and all costs from 2004 till to date for going to Magistrate's Court, High Court, Fiji Court of Appeal and now back to High Court, costs for all the fees for court filing documents, searches, all expenses that incurred while travelling from Nadi to Lautoka and Suva to attend Court in the sum of \$100,000.00*
- (h) *AN Order that 5th defendant, the Lands Department together with 1st to 4th defendants as equally the parties to pay to the plaintiff the sum of \$650,000.00 with interest.*
- (i) *AN Order for the Lands Department to execute proper Residential Title of Quarter area from the 2.24 hectares with proper road consent to water and electricity.*
- (j) *Such further and/or other relief that may seem just and proper to this Honorable Court.*

- (ii) Two causes of action are raised against 01st to 04th defendants. The First cause of action is "**fraud**". The second cause of action is "**false representation**". An allegation of acting in bad faith and fraudulently issuing new titles to 01st to 03rd defendants was leveled against the 5th defendant.
- (iii) **The plaintiffs' claim stems from a purported "Deed of Family Settlement" (hereinafter referred to as the "Deed") which was executed by the 01st to 04th defendants' deceased father and his brothers including the plaintiff on the 16th day of October 1990.**
- (iv) The First defendant vigorously defends the claim by the plaintiff. The First defendant alleges that the deed lacked the consent of the "Director of Lands" and is therefore in contravention of Section 13 (1) of State Lands Act, No-15 of 1945. The position of the First defendant is that the plaintiff cannot claim any right under the deed.
- (v) The Second, Third and Fourth defendants did not enter an appearance to the Writ of Summons. They took no part in these proceedings right from the beginning, consequently, the plaintiff entered Judgment in default of defence against them.

(B) The Minutes of the “Pre-Trial Conference” record, contain the following;

AGREED FACTS

1. *That the plaintiff's father the late Mr Badal had the following children namely:*
 - i. *Shiu Dulari*
 - ii. *Shiu Kumari*
 - iii. *Suruj Kumari*
 - iv. *Chandar Kumari*
 - v. *Rattan Kumari*
 - vi. *Deo Kumari*
 - vii. *Rudra Datt*
 - viii. *Prem Datt*
 - ix. *Raj Datt*
 - x. *Muni Datt*
 - xi. *Rishi Datt*
 - xii. *Rajend Datt*
2. *That the 1st, 2nd, 3rd and 4th defendant's father, Rudra Datt is the brother of the plaintiff.*
3. *That Rudra Datt was the registered lessee of the Crown Lease ref no.4/10/1500 situated at Wailoaloo, Nadi and crown lease No. 10093 [L/D REF 4/10/1926] situated at Navakai, Nadi.*
4. *That Rudra Datt vacated and sold the Crown Lease ref no 4/10/1500 situated at Wailoaloo, Nadi to Club (Fiji) Limited in the sum of \$90,000.00.*
5. *That Sheela Wati wife of Rudra Datt became the administratrix of the Estate of Rudra Datt.*
6. *That the First defendant is the registered lessee of all that piece and parcel of land comprised in Crown Lease No. 14796.*
7. *That the First defendant issued a Notice to Vacate and instituted High Court Action No. 189 of 2004 against the plaintiff and his families.*
8. *That the Court ordered Writ of Possession in favour of the 1st defendant on the 10th day of November 2005 in High Court Action No. 189 of 2004.*

9. *That the First defendant sought permission from the 5th defendant to evict the plaintiff and his families.*
10. *That the 5th defendant's servants and agents did give consent for subdivision and eviction.*
11. *That the 5th defendant's servants and agents did give consent on the new lease.*

ISSUES TO BE DETERMINED

1. *Whether the purported Deed of Settlement dated 16th October, 1990 was consented or required the consent of the 5th Defendant?*
2. *Whether the purported Deed of Settlement is enforceable in law or whether it is void ab initio?*
3. *Whether the eviction of the Plaintiff from Crown Lease no. 14796 was unlawful and if so, is the Plaintiff entitled to damages?*
4. *Whether the Administratrix of the Estate of Rudra Datt, the late Ms. Sheela Wati, made false representations to the Director of Lands to acquire the subdivision of Crown Lease No. 10093 [L/D Ref 4/10/1926] as particularized in paragraph 16 of the Statement of Claim?*
5. *Whether the Administratrix of the Estate of Rudra Datt, the late Ms. Sheela Wati and the Fifth defendant acted fraudulently in obtaining Crown Lease No. 14796 [L/D Ref 4/10/4158] in the First defendant's name as particularized in paragraph 17 of the Statement of Claim?*
6. *Whether the plaintiff is entitled to a share of one quarter area residential site on Crown Lease No. 10093 [L/D Ref 4/10/1926] situated at Navakai, Nadi pursuant to the Deed of Family Settlement dated 16th October, 1990?*
7. *Whether there should be a declaration that the transfer of the lease issued to the First defendant is null and void?*
8. *Whether the plaintiff is entitled to damages for harassment, intimidation and pain and suffering against the First and Fifth defendant if the Court finds that the transfers were done so fraudulently?*
9. *Whether the plaintiff is entitled to interest on the award of damages, if any?*

10. *Whether the plaintiff is entitled to general damages, punitive and aggravated damages against the First and Fifth defendants?*
11. *Whether the First defendant has suffered loss and damages as particularized in paragraph 44 of the First defendant's Statement of Counterclaim.*
12. *Whether the First defendant is entitled to compensatory damages and general damages and if so, at what quantum?*
13. *Whether the plaintiff ought to pay costs to the First and Fifth defendant on a solicitor/client indemnity basis?*

(C) THE WITNESSES

(i) The Plaintiffs' case

- ❖ Raj Datt (the plaintiff)
- ❖ Detective Sergeant 1898 Arvin Singh
- ❖ Ravin Datt

(ii) The First defendant did not call witnesses.

(iii) The Fifth defendants' case

(Ms) Laisenia Kidinaceva
Lands Officer, Department of Lands

(D) THE PLAINTIFFS' CASE AND THE EVIDENCE

- (i) The plaintiff is the uncle of First, Second, Third and Fourth defendants. The plaintiffs' elder brother, Rudra Datt (Deceased) was the First, Second, Third and Fourth defendants' father.
- (ii) Apart from 'Rudra Datt', the plaintiff had four (04) other brothers, Rishi Datt, Muni Datt, Rajend Datt and Prem Datt. Their fathers' name was Badal. The six (06) brothers had for many years all lived on State leased land at 'Wailoaloa'. Rudra Datt as the eldest brother was the registered lessee of that State lease.

- (iii) In about 1990 Rudra Datt sold the State leased land to Club Fiji Ltd for \$90,000.00. At about the same time Rudra Datt purchased Crown Lease No:- 10093 [Lot 7, Plan SO 498] (plaintiffs' exhibit – 01) with an area of 2.2442 hectares for \$21,000.00. Rudra Datt became the registered proprietor of the lease on 17th December 1990.
- (iv) Four brothers (Rudra Datt, the Plaintiff Raj Datt, Rishi Datt and Prem Datt) executed a document described as a 'Deed of Family Settlement' (Deed) (plaintiffs' exhibit – 2) on 16th October 1990.
- (v) Pursuant to the Deed of Family Settlement (Deed), Rudra Datt gave to each of his three brothers (Raj Datt, Rishi Datt and Prem Datt) a sum of \$2000.00 and one quarter area of residential site on Crown Lease No:- 10093. [Clause (5) of the Deed].
- (vi) Rudra Datt, upon transfer of Crown Lease 10093 to him, was required to execute a proper title to each of the brothers (including the plaintiff). [Clause (3) of the Deed].
- (vii) Each of the brothers was entitled to create substantial developments on Crown Lease 10093 for their occupation. [Clause (4) of the Deed].
- (viii) As I understand Clause (5) of the Deed, upon receipt of \$2000.00 and a residential site of one quarter on Crown Lease 10093, each brother would release Rudra Datt of any claim he had in respect of the Crown Lease land at 'Wailoaloa' against Rudra Datt.
- (ix) The evidence in this case shows that after the execution of the deed, the four brothers with their families moved on to the land that was State Lease No:- 10093 [Lot 7, Plan No. SO.498] and erected dwelling – houses on the property.
- (x) In 1991, Rudra Datt passed away and on 03rd May 1991 his widow 'Sheela Wati' became registered lessee on transmission by death as the administratrix of the estate of Rudra Datt.
- (xi) On the passing of 'Sheela Wati', 01st to 03rd defendants (sons of Rudra Datt) became registered lessees as administrators on transmission by death on 30th October 2001.
- (xii) The partial surrender of State Lease No:- 10093 was registered on 18th July 2002. It was as a result of subdivision (approved by Divisional Surveyor Western) the

First, Second and Third defendants acquired Crown Lease, 14796 (plaintiffs' exhibit 13(c)) and Crown Lease 17392 (plaintiffs' exhibit 13(a)) and Crown Lease 17070 (plaintiffs' exhibit 13 (b)) respectively.

- (xiii) Almost two years later, the proceedings were commenced by the First defendant in the High Court as summary proceedings under Section 169 of the Land Transfer Act, Cap 131, by way of Summons dated 29th June 2004. The First defendant sought an order that the plaintiff to show cause why he should not give up immediate vacant possession to the First defendant of part of all that land contained in Crown Lease No:- 14796.
- (xiv) The application was supported by an affidavit sworn on 21st June 2004 by the First defendant. In that affidavit the First defendant deposed that he was the registered proprietor of the land described in Crown Lease No:-14796 measuring 6917m² at Navakai, Nadi. The copy lease that was annexed to the affidavit showed that the Crown Lease was registered in the First defendants' name on 18th July 2002. The First defendant was the registered proprietor of Crown Lease 14796 (From head lease 10093) and the plaintiff was occupying part of that lease.
- (xv) On the basis of the copy lease annexed to the First defendants' affidavit, the First defendant had established that he was the registered proprietor of the land in question thereby establishing a basis for summoning the plaintiff to show cause why he should not give up possession of the land to the First defendant.

In a brief extempore decision delivered on 28th June 2005 the learned High Court Judge ordered that the plaintiff give vacant possession of the land to the First defendant with a stay of execution until 28th October 2005.

- (xvi) The plaintiff says that he only became aware of the order when the bailiff attended to dismantle the plaintiffs' house and was on that day shown a copy of the order. However, it would appear that the house he has lived on since 1990 was dismantled a short time after the First defendant had obtained the Writ of possession issued by the Court on 10th November 2005.

(E) THE FIRST DEFENDANTS' DEFENCE

- (i) By his defence, delivered, the First defendant contended;

- ❖ *The late Rudra Datt was the registered lessee of Crown Lease Ref No. 4/10/1500 and the plaintiff did not have any rights and/or interests in the said Crown Lease.*
- ❖ *There were no living arrangements made by the late Badal for the plaintiff and his brothers as the late Rudra Datt was the registered lessee of Crown Lease Ref No. 4/10/1500 and late Rudra Datt did not make any living arrangements for the plaintiff.*
- ❖ *The purported Deed of Settlement dated the 16th day of October 1990 is null and void ab initio pursuant to section 13 (1) of Crown Lands Act.*
- ❖ *There was no consent first had and obtained from the Director of Lands for the purported Deed of Settlement dated the 16th day of October 1990 and therefore the purported Deed is null and void and unenforceable.*
- ❖ *The plaintiff wrongfully and unlawfully occupied the late Rudra Datt's property and had constructed a dwelling house on the late Rudra Datt's property without obtaining the prior consent from the Director of Lands and other relevant authorities.*
- ❖ *Rudra Datt was the registered lessee and after his death the Estate of Rudra Datt was the registered lessee of all that piece and parcel of land comprised in Crown Lease No. 10093 containing an area of 2.2442 ha (hereinafter referred to as the "Master Lease").*
- ❖ *The sub-division of the Master Lease was duly consented to by the 5th Defendant upon application by the late Sheela Wati the then Executrix of the Estate of Rudra Datt.*
- ❖ *The Master Lease was surrendered and fresh leases were issued to the First, Second and Third Defendants therein.*
- ❖ *The First Defendant is now the registered lessee of all that piece and parcel of land comprised in Crown Lease No. 14796 known as "Solawaru & Enamanu and Nubu or Vakai" in Nadi district having an area of 6917 square meters being Lot 3 on SO 4425 (hereinafter referred to as "The Property") in his personal capacity.*
- ❖ *The Plaintiff does not have any rights, interests and/or entitlement in Crown Lease No. 14796 and prior to that did not have any rights, interests and/or entitlement in the Master Lease.*

- ❖ *The Plaintiff's occupation of a portion of Crown Lease No. 14796 was illegal and unlawful and therefore the plaintiff was a trespasser on the First Defendant's Property.*
- ❖ *The First defendant upon obtaining the consent of the 5th defendant and upon obtaining an Order from the High Court in civil action no. 189 of 2004 evicted the plaintiff from the First defendant's property sometime on or about November 2005.*
- ❖ *In any event the purported Deed of Settlement is null and void and unenforceable.*
- ❖ *Pursuant to the High Court Order and Writ of Possession issued against the plaintiff the Lautoka High Court Sheriff's evicted the plaintiff and the plaintiff's family from the First defendant's land.*
- ❖ *The High Court Sheriffs carried out the eviction process with the First defendant pursuant to the Order for Vacant Possession obtained by the First defendant against the plaintiff.*
- ❖ *The eviction process was carried out lawfully and with due diligence.*

(ii) In addition, the First defendant counterclaimed for damages in respect of;

- ❖ *While the First defendant was in the process of subdividing the Property the plaintiff appealed the decision of the High Court in Civil Appeal Action No. 33 of 2013.*
- ❖ *The First defendant had potential buyers for the lots and as a result of the plaintiff's appeal the First defendant could not proceed with the sale of the lots.*
- ❖ *As a result of the plaintiffs aforesaid actions the First defendant has suffered loss and damages.*

PARTICULARS OF LOSS AND DAMAGES

- i. *Unable to use and utilize the portion of the Property illegally occupied by the plaintiff.*
- ii. *Unable to proceed to subdivide the Property.*

iii. *Unable to sell the lots to potential buyers.*

- ❖ *The plaintiff has caused great inconvenience and hardship to the First Defendant as a consequence of which the First defendant has suffered loss and damages.*

(F) THE FIFTH DEFENDANTS' DEFENCE

- (i) By its defence, the Fifth defendant denied the allegation of acting in bad faith and the allegation of fraudulently issuing of new titles to the 01st to 03rd defendants.
- (ii) By its defence, the Fifth defendant contended that the 'Deed of Family Settlement' was entered into by parties without the knowledge and consent of the 'Director of Lands.'

(G) CONSIDERATION AND DETERMINATION

- (i) Counsel for the plaintiff and the defendants tendered written submissions in support of their respective cases. I am grateful to Counsel for those lucid and relevant submissions and the authorities therein collected which have made my task less difficult than it otherwise might have been. I may add that the submissions are careful and competent. If I do not refer to any particular submission that has been made, it is not that I have not noted that submission or that submission is not relevant; it is simply that; in the time available, I am not able to cover in this decision every point that has been made before the Court.

Whether the Deed of Settlement is enforceable in law?

- (ii) The subject matter of the 'Deed of Family Settlement' (plaintiffs' exhibit – 2) is a Crown leasehold property. The four brothers executed the 'Deed of Family Settlement' (hereinafter referred to as the deed settlement) on 16th October 1990. Pursuant to the 'deed settlement', Rudra Datt gave to each of his three brothers a sum of \$2000.00 (a non-refundable loan) and one quarter area of residential site on Crown Lease No: - 10093 (plaintiffs' exhibit -01).

Clause (5) of the 'deed settlement' is in these terms; (the contractual obligation).

5. THAT the said RISHI DUTT, PREM DUTT and RAJ DUTT upon receipt of \$200.00 (two thousand dollars) and a residential site of ¼ (quarter) on Crown Lease No. 10093 (LD Ref: 4/10/1926) hereby dismiss all their other claims in respect of Crown Lease LD Ref: 4/10/1500 against the said RUDRA DUTT.

- (iii) It is common ground that Section 13(1) of the State Lands Act places restrictions on the lessee of the lease to deal with the land comprised in Crown Leasehold. Any transaction which comes within the ambit of Section 13(1), is declared unlawful unless the written consent of the 'Director of Lands' as lessor or head lessor is first had and obtained.

The relevant portion of Section 13(1) of the State Lands Act, No-15 of 1945 is in the following terms;

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.

- (iv) Of course, I do not deny for a moment that Section 13(1) does not prohibit the mere making of a contract or a deed settlement.

All I am saying is that Section 13 (1) prohibits the alienation or dealing with the land, whether by sale, transfer or sub-lease or any other manner whatsoever without prior written consent of the "Director of Lands".

In the illuminating Judgment of Hon. Justice Calanchini, (the President, Court of Appeal) in 'Ram Chandar Reddy v Subadra Devi and Director of Lands', Civil Appeal No:- ABU 26 of 2013, date of Ruling 26.02.2016 contained the very significant passages following;

[25] *The question for the Court is whether there is any or, for that matter in this case, sufficient merit to that challenge. Section 13 requires the*

consent of the Director to be first obtained in respect of any alienation or dealing by way of sale, transfer or sub-lease of a state lease. In the absence of such prior consent then that alienation or dealing is null and void. It is also apparent from the wording of Section 13 that the party responsible for obtaining that consent is the lease of the State lease since under Section 13(3) any lessee aggrieved by the refusal of the Director to give the required consent may appeal to the Minister.

[26] *However the point that needs to be emphasized is that the consent is not required for the entering into of a contract for the alienation or the dealing. The contract does not constitute the act of alienation or dealing. The consent is required prior to the alienation or the dealing being effected. In other words prior to the sale, transfer or sub lease being effected. The position is different under section 6 of the Land Sales Act Cap 137 where the responsible Minister's consent is required prior to a non-resident purchaser entering into a contract to purchase land.*

[27] *The consent of the Director that is required under Section 13 of the State Lands Act may be regarded as a condition precedent to performance. The consent of the Minister that is regarded under Section 6 of the Land Sales Act may be regarded as a condition precedent to formation of the contract. The consent required under Section 13 of the State Lands Act was obtained the day after the contract was made and prior to any act of performance of the contract. The condition precedent to performance had been satisfied. The parties then began to give effect to the contract by implementing its terms. The purchaser complied with his obligation by paying part of the purchase price and the vendor permitted the purchase to enter into possession in accordance with the contract.*

- (v) **Therefore, it should be firmly stated that the consent is not required for the entering into of a contract or deed settlement for the alienation or the dealing.**

The entering into a deed settlement does not constitute the act of 'alienation or dealing'. The consent is required before giving effect to the 'deed settlement' by implementing its terms.

- (vi) Almost (04) months after the date of execution of the deed 'settlement', on 21.02.1991, the plaintiffs' solicitors wrote to Lands Department seeking consent for deed settlement as follows; (plaintiffs' exhibit -6)

DATE 21/2/91

*The Assistant Director of Lands,
Lands Department,
P O Box 335,
LAUTOKA*

Dear Sir,

*re: Crown Lease 10093
LD Ref: 4/10/1926
Rudra Datt son of Badal*

We advise that we as solicitors for the above-named and advise that:-

- (1) Our above named client had previously owned Crown Land covered under LD ref: 4/10/1500.*
- (2) The said land covered under LD Ref: 4/10/1500 was occupied by Rudra Dutt and his brothers RISHI DATT, PREM DATT, RAJ DATT and RAJEND DATT as one family.*
- (3) That after crown land 4/10/1500 was sold by our client, all occupants therein moved to live on Crown Lease 10093 under Deed of Settlement dated 16th day of October, 1990 reached between the parties.*
- (4) That we as solicitors acting for Rudra Datt hereby enclose a copy of the said agreement for your grant of consent to the agreement as under this circumstances the persons named above are still occupying above lease.*

Thanking you.

*Yours faithfully,
PILLAL NAIDU & ASSOCIATES*

On 22nd December, 1992 the Divisional Surveyor Western replied to the letter of 21st February, 1991 as follows;

4/10/1926

22 Dec 92

Messrs Pillai – Naidu & Associates
Barristers & Solicitors
P O Box 1184
NADI

Dear Sirs

re: Deed of Family Arrangement
CL 10093 – Rudra Dutt

I refer to your letter dated 21 February 91 and wish to advise that consent to deed of family settlement cannot be granted at this stage.

Your client should submit to this office his proposal to subdivide the said land for our perusal. The application should be accompanied with \$74.80 being investigation costs.

Furthermore, upon receipt of the application, an investigation will be carried out and submission will be put to Director of Lands for his approval.

Further communication will be addressed to you upon receipt of a reply from Director of Lands.

Yours faithfully

(V K Raman)
for Divisional Surveyor Western

(Emphasis added)

- (vii) The letter is most important. The relevant portion of it runs thus; "I refer to your letter dated 21 February 91 and wish to advise that consent to deed of family settlement cannot be granted at this stage."

In the face of the correspondence I have referred to, I feel myself quite able to hold that the 'Director of Lands' has not consented to the deed settlement. It is also worth noting that the preamble on the top of page (2) of the deed states that;

"AND WHEREAS an approval from Director of Lands has been obtained (consent granted on 24/9/90) AND WHEREAS the Donor has agreed with each of the Donees in the terms and conditions states hereinafter.

A copy of the letter of consent dated 24/09/90 is marked as plaintiffs' exhibit – 05.
The consent letter reads as follows;

Date: 24/9/90

LD. Ref: 4/10/1926
Your ref: DSN/an

Messers Pillai Naidu & Associates
Barristers and Solicitors
P O Box 1184
NADI

Dear Sir

re: Transfer

I refer to your letter dated 28/8/90 and have to advise that consent has been granted to the dealing below. The necessary consent will be endorsed on production of the document fully executed by the parties.

Please submit the Agreement/Mortgage/Transfer documents in duplicate/triplicate, a copy is required for my record.

Revenue Receipt No. is enclosed herein.

Yours faithfully

(D RAO)
for Director of Lands

<u>CL/Farm/Lot No.</u>	<u>Dealing</u>	<u>Parties</u>
CL 10093	Transfer \$21,000.00	Ramjan F/N Kasim Ali to Rudra Datt

The consent granted on 24/9/90 is a letter from Department of Lands to Messer's Pillai Naidu & Associates on behalf of the lessee stating that consent has been granted to the dealing of Agreement/Mortgage/Transfer. To avoid any further doubt, the bottom of the document refers to the actual dealing which is the transfer of CL 10093 from Ramjan f/n Kasim Ali for the consideration sum of \$21,000.00. **Therefore, it is clear that the consent letter dated 24/09/90 refers to transfer CL 10093 only.**

(viii) Now, I turn to the parol evidence. I quote the following portion of evidence given by (Mr.) Laisenia Kidinaceva, Lands Officer, Department of Lands, given in his evidence in chief (page 75 of the transcript).

Q: *And in May 1991, Patel Sharma Solicitors sought consent from the Director of Lands to lodge a Caveat of the subject Lot in consideration of the Deed of Families Settlement made on the 16th of October, 1990 between Rudhra Datt, Rishi Datt, Prem Datt and Raj Datt?*

A: *Yes my Lord.*

Q: *And was this consent refused?*

A: *Yes my Lord, it was refused.*

Q: *And as per the Minute it was refused on the ground that the Director of Lands consent was not obtained for the Deed of Family Settlement?*

A: *Yes my Lord.*

Q: *And do you confirm that in July 1992, a letter dated the 21st of February, 1991 from Pillay Naidu & Associates was received seeking consent to the Deed of Family Settlement and that they were advised to consent to the Deed of Family Settlement cannot be granted at this stage, correct?*

A: *Yes my Lord.*

[Emphasis Added]

I couple with that evidence, the evidence given by (Mr.) Laisenia Kidinaceva at the cross-examination (page 80 and 81 of the transcript).

Q: *Good morning Sir. I act for the First Defendant Mr Sunil Datt who is one of the registered proprietors in the Lots that has been transferred through the Probate. Sir, do you maintain that there was a consent that was sought prior to the Deed of Settlement? There's a consent number that's been referred to in the Deed of Settlement, if you can just clarify?*

Crt: Show the document please.

Q: What that consent number refers?

Crt: Deed of Settlement. Second page.

Q: Second page.

A: Yes my Lord.

Crt: Consent granted on 24th September, 1990

A: Yes my Lord. It was consent.

Q: What's that consent referring to?

A: It is a consent to transfer of the property to Rudhra Datt.

Q: Okay, thank you Sir. So, it was consent for Transfer.

A: For Transfer.

Q: Okay, and from the questions that you have answered, when your Lawyer had been asking you, there's no mention of consent being given for the Deed of Settlement. That's correct? No consent was given for the Deed of Settlement?

A: Yes my Lord.

[Emphasis Added]

- (ix) The undisputed evidence is that pursuant to the 'Deed of Family Settlement', Rudra Datt gave to each brother (including the plaintiff) one quarter area of residential site on Crown Lease No:- 10093 permanently with the rental payments to be apportioned. Each of the brothers was entitled to create substantial developments on Crown Lease 10093 for their occupation. It would appear that the four brothers together with their families moved on to the land that was Crown Lease No: - 10093 and they have erected many houses on the agricultural lease and created substantial developments on Crown Lease 10093 for their occupation. (Plaintiffs' exhibit – 15, File brief Report 4/10/1926). **Therefore, I come to the clear conclusion that the parties to the deed have given effect to deed by implementing its terms.**
- (x) The lease is expressed as being a 'protected lease' and is therefore subject to Section 13 of the State Lands Act. **As for the improvements to the land in the form of residence and its' extension of facilities, I accept the testimony of the plaintiff that he had never sought nor been granted consent to such alteration.** An alienation or dealing is being effected without obtaining the consent of the Director of Lands. Section 13 requires the consent of the Director of Lands to be

first obtained in respect of any alienation or dealing by way of sale, transfer or sub-lease of a State lease. In the absence of such prior consent, the Deed of Family settlement which constituted the alienation or dealing with the Crown Lease land is illegal and null and void. The Court cannot render assistance in enforcing an illegal deed.

(xi) **Whether there is a constructive trust created under the deed?**

- (a) At the cost of some repetition, I state that in 1990, the 01st to 04th defendants' father (being the plaintiffs' brother) Rudra Datt purchased land known as Crown Lease No. 10093. Before the 01st to 04th defendants' father had purchased Crown Lease No. 10093, he was a lessee of Crown Lease land at Wailoaloa in Nadi. That land was occupied by the 01st to 04th defendants' father (Rudra Datt) and his five brothers, including the plaintiff. By 16 October 1990, Rudra Datt had sold the Crown land at Wailoaloa (since he as the eldest brother was the registered lessee of that land) to Club (Fiji) Ltd for \$90,000.00. The purchaser required immediate vacant possession of that land. As at 16 October 1990, the 01st to 04th defendants' father Rudra Datt was in the process of purchasing Crown Lease No. 10093. The purchase price for the Crown Lease 10093 was \$21,000.00.
- (b) Pursuant to Clause (5) of the 'deed settlement', upon receipt of \$2000.00 and a residential site of one quarter on Crown Lease 10093, each brother agreed to release Rudra Datt of any claim he had in respect of the Crown Lease land at Wailoaloa against Rudra Datt. It would appear that the plaintiff relied on the Deed of Settlement as the basis of his claim to remain in possession of the land he occupied.
- (c) Mr. Maopa, in arguing for the plaintiff, put his contention, as I understand him thus; "the plaintiff and his two brothers acquired an equitable interest pursuant to what became a **constructive trust** with Rudra Datt, upon him being registered as proprietor of Crown Lease 10093, as trustee. Once Rudra Datt became the registered proprietor of Crown Lease 10093 he held it as trust for his brothers and himself. Rudra Datt remained trustee until he had executed a proper title to each of his brothers in accordance with clause (5) of the Deed or until his death in early 1991. Upon his death, the estate held on trust by him vested in his personal representative pursuant to Section 10 of the Succession Probate and Administration Act Cap 60. Rudra Datt died intestate." Section 10 states:

"All property held by one person in trust shall vest as aforesaid subject to the trusts and equities affecting the same."

There is not a word about this from Counsel for the First defendant. However, I am unable to accept Mr. Maopas' this view of the facts.

(d) What is meant by the phrase “**constructive trust**”?

A “**constructive trust**” is a trust imposed by law. A constructive trust arises by operation of law. A **constructive trust is an equitable remedy and they are discretionary in nature.** (See; Re Polly Peck International PLC (in administration) v MacIntosh (1998) 3 All E.R. 512 and 825).

In a broad sense, the constructive trust is both an institution and a remedy of the law of equity. See; Muschinski v Dadds [1985] HCA 78; (1985) 160 C.L.R. 583.

Constructive trusts are not always subject to the requirement of certainty of subject matter. In “Giumelli v Giumelli [1999] HCA 10; (1999) 196 C.L.R. 101 at 112 Gleeson C.J., McHugh, Gummot and Callinan JJ, found that some constructive trusts create or recognize no proprietary interest but rather impose a personal liability to account for losses sustained by constructive beneficiaries. In that situation there is no identifiable Trust property.

During the 1970's the United Kingdom's Court of Appeal, led by Lord Denning MR, adapted a free-ranging remedial basis for constructive trusts and came to the view that a constructive trust is “imposed by law whenever justice and conscience require it”; Hussey v Palmer (1972) 3 All E.R. 744.

Therefore, the law as I understand is this;

- ❖ As a species of trust, constructive trusts inherently create equitable proprietary interests in favour of identifiable beneficiaries.
- ❖ Constructive trust is a liberal process, founded upon large principles of equity.

(e) As I said in para (x), the lease is expressed as being a ‘protected lease’ and is therefore subject to Section 13 of the State Lands Act. An alienation or dealing is being effected without obtaining the consent of the Director of Lands. Section 13 requires the consent of the Director of Lands to be First obtained in respect of any alienation or dealing by way of sale, transfer or sub-lease of a State lease. In the absence of such prior consent the deed of family settlement which created the

alienation or dealing with the Crown leasehold is null and void, and illegal. The deed is incapable of enforcement. The Court cannot render assistance in enforcing an illegal deed.

- (f) I hold that **no constructive trust** can be created in relation to a Crown lease without the prior written consent of the Director of Lands.

It is quite possible to say that the mandatory requirement of Section 13 (1) of the State Lands Act and the legal consequences that flow from non-compliance defeats the plaintiffs' claim for an equitable charge or constructive trust over the land. The situation in the case before me does not give rise to a constructive trust since the plaintiff does not have an equitable interest in the land due to breach of Section 13 of the State Lands Act.

I am clearly of the opinion that a court of equity will not impose on the defendants a constructive trust in favour of the plaintiff, since the plaintiffs' entry and occupation of the land is illegal and is in breach of Section 13 (1) of the State Lands Act. The plaintiff has no equity against the defendants. The defendants are not bound by the notice of any illegal deed affecting the State Land or a deed which is not enforceable either at law or in equity granting a legal right. There is no valid deed binding the defendants. Therefore, no constructive trust could be imposed on the defendants in favour of the plaintiff.

A constructive trust is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience. See; **Snell's Principles of Equity, 28th Edition, Page 192.**

I have formed the opinion (in para (x) above) that the deed of family settlement is null and void and illegal. The jurisdiction in equity is exercised upon the principle that equity follows the law. In equity, just as at law, no suit lies in general in respect of an illegal transaction. The deed of family settlement which created the transaction of alienation or dealing with the crown leasehold is illegal and void. Since equity follows the law, the deed did not create a constructive trust. Therefore, the plaintiff did not acquire an equitable interest in the land under the deed. In the result, the plaintiff did not acquire an equitable interest under a constructive trust.

In the circumstances, I have to say, with the greatest respect to Counsel for the plaintiff and with no pleasure that I totally disagree with his argument in relation to constructive trust. I must confirm that I am not aware of any authority for

such an argument, and I do not think that his argument can be supported on principle. Anything more shadowy, anything more unsatisfactory, anything more unlikely to produce persuasion or conviction on the mind of the Court, I can scarcely imagine.

(g) Under these circumstances, **I am unable to accept the position taken by the plaintiff and the following propositions of the plaintiff are untenable in Law.**

- ❖ *The plaintiff and his two brothers acquired an equitable interest pursuant to what became a constructive trust with Rudra Datt, upon his being registered as proprietor of Crown Lease 10093, as trustee.*
- ❖ *Rudra Datt remained Trustee until he had executed a proper title to each of his brothers in accordance with clause (3) of the deed.*
- ❖ *Sheela Wati, the wife of Rudra Datt and the defendants' mother was required to perform the function of trustee of the constructive trust under the deed of settlement.*

(xii) **False representation?**

- (A) In early 1991, Rudra Datt passed away and on 03rd May 1991 his widow Sheela Wati became registered lessee on transmission by death as the administratrix of the estate of Rudra Datt.
- (B) On 07th August 1997, Sheela Wati applied for subdivision (plaintiffs' exhibit 12). The letter is as follows;

*The Assistant Director of Lands
Lands Department
PO Box 335
Lautoka
Dear Sir*

*Re: Proposed Subdivision of Lot 7 SO
Your Ref: 4/10/*

I, SHEELA WATI daughter of Agnu Prasad of Navakai, Nadi, Domestic Duties as executrix and trustee for the Estate of RUDRA DATT son of Badal advise you that:-

- (1) I intend to proceed with subdivision of above land.
- (2) The purpose of this application is to allocate shares to SUNIL DATT, ANIL DUTT, RAM DATT and MAJULA WATI being issues of Rudra Dutt deceased who holds shares under provision of Successions Probate and Administration Act (Cap 60).
- (3) That the other occupants RISHI DATT, RAJENDRA DATT are now deceased while PREM DATT has moved to re-settle elsewhere.
- (4) The only other person residing on the land is RAJ DATT who will be properly re-allocated to reside on the land after the subdivision is complete.

DATED this 7th day of August 1997.

.....
SHEELA WATI

(Emphasis Added)

- (C) On 09th September 1998, the Divisional Surveyor, Western informed Sheela Wati that her application for subdivision has been approved.
- (D) The plaintiff alleges that Sheela Wati made false representations to the Director of Lands. Sheela Wati's failure to acknowledge in the letter the equitable interest of the plaintiff and his three brothers in the land or the constructive trust with Rudra Datt is alleged to be fraudulent. Mr. Maopa, in arguing for the plaintiff, put his contention, thus; (Reference is made to para 34 to 36 of plaintiffs' written submissions)

[34] Issue no.4 deals with false representation by the late Sheela Wati to the Director of Lands to acquire the subdivision of the estate land. She applied to the Lands Department for subdivision of land (on 7th August 1997) and specifically mentioned that the plaintiff Raj Datt who will be properly re-located to reside on the land after the subdivision is completed [Refer to PEx12 paragraph4]

[35] *In this regard Sheila Wati was the administratrix of the estate of Rudra Datt, her late husband, since his death on 1st February 1991 [Refer to PEx4]. The approval for subdivision was granted on 9.9.98 [D5 Ex 11-Vol 1 – Tab 11 P1. Bundles of Doc.] She died on 5th January 2001 [refer to PEx 4 p2] but failed to relocate the plaintiff during her life time. Instead applied for subdivision to relocate her children on the estate land.*

[36] *The late Sheela Wati was fully aware of the existence of the Deed of Family Settlement. In her application for subdivision she did not mention her brothers in law, Rishi Datt, Prem Datt and Raj Datt have shares and or interest of one quarter area of the estate of Rudra Datt. However, she mentioned only her children, the defendant's shares.*

(E) I feel, myself, quite unable to assent to the proposition of the plaintiff. As I said earlier, the deed did not create a constructive trust because the deed has no force or avail in law. Therefore, the plaintiff did not acquire an equitable interest in the land under the deed, because;

- ❖ The Deed of Settlement dated 16th day of October 1990 is null and void ab initio pursuant to Section 13 (1) of State Lands Act.
- ❖ There was no consent first had and obtained from the Director of Lands for the Deed of Settlement dated the 16th day of October 1990 and therefore the Deed is void and unenforceable. It has no force or avail in law. It is a nullity.
- ❖ The plaintiff wrongfully and unlawfully occupied the late Rudra Datt's property and had constructed a dwelling house on the late Rudra Datt's property without obtaining the prior consent from the Director of Lands and other relevant authorities. As for the improvements to the land in the form of residence and its extension of facilities, I accept the testimony of the plaintiff that he had never sought nor been granted consent to such alterations.

There was no valid 'Deed of Settlement' binding Sheela Wati. She was not bound by the void and unenforceable Deed of Settlement dated 16th October 1990. The deed is a nullity. The plaintiff and his two brothers cannot acquire an equitable interest in the land under the Deed of family settlement which is void and unenforceable. Under these circumstances, there could be no question of

'equitable interest' of the plaintiff in the crown leasehold or constructive trust with Rudra Datt.

Therefore, there is no misrepresentation made by Sheela Wati, to the Director of Lands by applying for subdivision of the land for the purpose of allocating shares in the crown leasehold to 01st to 04th defendants.

(xiii) **Fraud?**

- (A) The plaintiff alleges fraud against the 01st to 04th defendants and Sheela Wati for acquiring Crown Leases for 01st to 04th defendants pursuant to subdivision.

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 part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."(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 Torren system of land registration and conveyancing 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 bona fide purchaser for value can safely deal with the registered proprietor and will acquire from him an indefeasible registered title."

The following exposition is a useful summary on indefeasibility of title under the Torren system.

"More succinctly, the Torren system is a system of "title by registration", as distinct from "registration of title" under the old system. Title under the Torrens system derives from Registrar General's action registering an instrument – the act of a statutory official acting under statutory authority-not from the parties, act in executing the instrument. Commonwealth v State of New South Wales (1918) 25CLR 325 at 342; Hemmes Hermitage Pty Ltd v Abdulrahman (1991) 22 NSWLR343 at 344-345. In doing so the Torrens system substitutes conveyance by registration for conveyance by deed." Clements v Ellis (1934) 51 CLR 217 at 232 per Rich J. Registration is the source of title – it confers on the person registered as proprietor a title that did not previously exist. Peldon v Anderson (2006) 227 CLR 471 at [20]. (Cited in Land Law, Peter Butt, Thomson Reuters, Sixth Ed, 2010, paragraph 21 – 12, p.751).

In Assets Co Ltd. v. Mere Roihi [1905] AC 176 at 210, the Privy Council, in explaining the meaning of 'fraud' in early New Zealand Torrens Registration held that:

"By fraud is meant actual fraud, that is, 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, the fraud which must be proved in order to invalidate the title of the registered purchaser for value . . . 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."

As I said earlier, the plaintiff in the case before me has **no** equitable interest in the land or constructive trust with Rudra Datt due to breach of Section 13 (1) of the State Lands Act. Therefore the court of equity will not impose a constructive trust on the defendants for the benefit of the plaintiff.

The 01st to 03rd defendants obtained leasehold title to the crown land after subdivision and their title is not subject to an equitable claim or constructive trust or encumbrance, because at the time of registration there was no any legal agreement or deed affecting the State Land or an agreement or deed or constructive trust which is enforceable either at law or in equity. There was no valid contract/agreement or deed or constructive trust binding the defendants, because the plaintiff did not acquire equitable interest in the land under the deed due to breach of Section 13(1) of the State Lands Act.

A person who knows of another's legal interest, equitable claim or constructive trust or encumbrance and procures registration which cheats the other of that legal interest or equitable interest is guilty of fraud and his title can be impeached.

I have no doubt personally and I am clearly of the opinion that the defendants are not guilty of fraud and their title cannot be impeached because;

- ❖ The Deed of Settlement dated the 16th day of October 1990 is void and unenforceable pursuant to Section 13 (1) of State Lands Act.
- ❖ There was no consent first had and obtained from the Director of Lands for the Deed of Settlement dated the 16th day of October 1990 and therefore the deed is a nullity.
- ❖ The plaintiff wrongfully and unlawfully occupied the late Rudra Datt's property and had constructed a dwelling house on the late Rudra Datt's property without obtaining the prior consent from the Director of Lands and other relevant authorities. As for the improvements to the land in the form of residence and its extension of facilities, I accept the testimony of the plaintiff that he had never sought nor been granted consent to such alteration. **This therefore is the status of the plaintiff; a person without a lease or a tenancy or a licence of any kind enabling him to occupy the land.**
- ❖ **Therefore, deed of family settlement which created the transaction of alienation or dealing with the crown leasehold is illegal and void. Since equity follows the law, the impugned deed did not create a constructive trust.**
- ❖ **Therefore, the plaintiff did not acquire an equitable interest in the land under the deed. In the result, the plaintiff did not acquire an equitable interest under a constructive trust.**
- ❖ The defendants mere knowledge that there is a deed which is not enforceable either at law or in equity to grant a legal right or constructive trust is in existence, is not of itself to be imputed as fraud. Besides, Section 40 of the Land Transfer Act provides that knowledge of the existence of any trust or unregistered interest is not, of itself, to be imputed as fraud.
- ❖ The defendants' registration of the crown lease is not a violation of some equitable encumbrances, constructive trust, legal interest or valid legal contract, deed of some other party.

On the passing of 'Sheela Wati', 01st to 03rd defendants (sons of Rudra Datt) became registered lessees of Crown Lease No. 10093 as administrators on transmission by death. **That is the very basis upon which 01st to 03rd defendants applied for registrable lease over the subject land.** The 01st to 03rd defendants

are entitled to apply for leases in their names. The application made by 01st to 03rd defendants under Section 16 of the Crown Lands Act, Cap 132 is lawful. The applicants are not bound to declare and disclose to the Director of Lands the plaintiffs' purported equitable claim in the land or the purported constructive trust with Rudra Datt, because there was no agreement, deed or constructive trust which is enforceable either at equity or law. There was no valid deed, agreement or constructive trust binding the defendants.

I reiterate that on the passing of 'Sheela Wati', 01st to 03rd defendants (sons of Rudra Datt) became registered lessees of Crown Lease No. 10093 as administrators on transmission by death. This is the basis on which 01st to 03rd defendants applied and acquired the said leases in their names.

Section 16 of the Crown Lands Act, Cap 132 reads as follows:

“(1) No person, who at the time of making his application for a lease or licence has made any arrangement or agreement to permit any other person to acquire by transfer or otherwise the land in respect of which his application is made, or any part thereof, or the applicant's interest therein, and does not inform the Director of Lands of the existence of such arrangement, shall become a lessee or licensee under this Act.

(2) Every person who willfully commits, or incites, instigates or employs any other person to commit a breach of the provisions of this section shall be guilty of an offence against this Act.

(3) Any lease or licence acquired by breach of the provisions of this section shall be liable to be forfeited.”

Regulation (04) of the Crown Lands (Leases and Licences) Regulation Cap 132 states as follows:

“Any person desiring to lease Crown land shall himself or by his agent appointed under his hand lodge an application in the appropriate form with the Director and the information required in the form of application shall be fully and correctly stated.

Of course, I do not deny for a moment that any applicant applying for a lease must disclose to the Director of Lands the interests of any party or person who may have a claim or interest in the said leased land.

All I am saying is that the 01st to 03rd defendants, (the applicants) are not bound to declare and disclose to the Director of Lands the plaintiffs' purported equitable claim in the land or the purported constructive trust with Rudra Datt, because there was no agreement, deed or constructive trust which is enforceable either at equity or law. There was no valid deed, agreement or constructive trust binding the defendants. Besides, Section 40 of the Land Transfer Act provides that mere knowledge of the existence of any trust or unregistered interest is not, of itself, to be imputed as fraud.

I cannot for a moment accede to the argument of the plaintiff that the 01st to 03rd defendants had misled and misrepresented the Director of Lands and then obtained leases. The events leading to the act of acquiring leases were unimpeachable.

I can find no scintilla of evidence which would suggest that 01st to 03rd defendants obtained the leases in their names through material non-disclosure and fraud. The defendants are entitled to be issued with the leases in the first place. The issuing of the leases to 01st to 03rd defendants was bona fide act.

Thus, this action cannot be maintained against the Director of Lands. Besides, Section 28 of the Crown Lands Act reads;

"Neither the Director of Lands nor any authorized officer shall be liable to any action, suit or proceeding for or in respect of any act or matter bona fide done or omitted to be done in the exercise of the powers conferred by this Act".

(xiv) **Eviction process**

The plaintiff claims damages for unlawful dispossession. His claim is founded on the deed of settlement.

- (A) Rudra Datt was the registered lessee and after his death the Estate of Rudra Datt was the registered lessee of all that piece and parcel of land comprised in Crown Lease No. 10093 containing an area of 2.2442 ha (hereinafter referred to as the "Master Lease").

- (B) The sub-division of the Master Lease was duly consented to by the 5th Defendant upon application by the late Sheela Wati the then administratrix of the Estate of Rudra Datt.
- (C) The Master Lease was surrendered and fresh leases were issued to the First, Second and Third defendants.
- (D) The First defendant is now the registered lessee of all that piece and parcel of land comprised in Crown Lease No. 14796 known as "Solawaru & Enamanu and Nubu or Vakai" in Nadi district having an area of 6917 square meters being Lot 3 on SO 4425 (hereinafter referred to as "the Property") in his personal capacity.
- (E) The plaintiff does not have any rights, interests and/or entitlement in Crown Lease No. 14796 and prior to that did not have any rights, interests and/or entitlement in the Master Lease. The impugned Deed of Settlement is null and void and unenforceable. This, therefore is the status of the plaintiff; a person without a lease or a tenancy or a licence of any kind enabling him to occupy the land.
- (F) The Plaintiff's occupation of a portion of Crown Lease No. 14796 was illegal and unlawful and therefore the plaintiff was a trespasser on the First defendant's property.
- (G) The First defendant upon obtaining the consent of the 5th defendant and upon obtaining an Order from the High Court in Civil Action No., 189 of 2004 evicted the plaintiff from the First defendant's property sometime on or about November 2005.
- (H) Pursuant to the High Court Order and Writ of Possession issued against the plaintiff, the Lautoka High Court Sherriff evicted the plaintiff and the plaintiff's family from the First defendant's land.
- (I) The High Court Sherriff carried out the eviction process with the First defendant pursuant to the order for vacant possession obtained by the First defendant against the plaintiff.
- (J) The eviction process was carried out lawfully and with due diligence. I can find no scintilla of evidence which would suggest that the eviction process was unlawful.

Therefore, the plaintiffs' claim for damages for alleged unlawful dispossession is groundless.

Plaintiff's claim fails

- (xv) For the reasons which I have endeavored to explain in the preceding paragraphs, although I confess with some regret, for I have sympathy with the plaintiff, I come to the clear conclusion that the plaintiffs' claim wholly fails.

Counter-claim

- (xvi) Let me now turn to the counter-claim of the First defendant. The First defendants' counter-claim in substance alleges that;

- ❖ *THAT the First defendant repeats the allegations contained in paragraphs 1-31 hereinabove.*
- ❖ *THAT the First defendant is the registered lessee of all that piece and parcel of land comprised in Crown Lease No. 14796 known as "Solawaru & Enamanu and Nubu or Vakai" in Nadi district having an area of 6917 square meters being Lot 3 on SO 4425 together with improvements (hereinafter referred to as "the Property").*
- ❖ *THAT the plaintiff had been in occupation of the property from November 1990 until November 2005 without the consent and/or authority of the First defendant and therefore was a trespasser on the Property.*
- ❖ *THAT despite numerous requests by the First defendant the plaintiff did not give vacant possession of the property to the First defendant.*
- ❖ *THAT by a Notice dated the 27th day August 2002 and a reminder notice dated the 30th day of January 2004 the First defendant gave the plaintiff Notice to vacate the property.*
- ❖ *THAT the plaintiff failed and or refused to give vacant possession of the property.*
- ❖ *THAT the First defendant instituted legal proceedings against the plaintiff to evict the plaintiff from the First defendant's property in Lautoka High Court Civil Action No. 189 of 2004.*
- ❖ *THAT the First defendant obtained orders of the High Court Lautoka to evict the plaintiffs from the property and the High Court Sheriff's executed the Court Order and evicted the plaintiff from the First defendant's property.*

- ❖ *THAT upon evicting the plaintiff from the property the First defendant proceeded to apply for the subdivision of the property.*
- ❖ *THAT the Fifth defendant granted its consent to the First defendant to subdivide the property.*
- ❖ *THAT while the First defendant was in the process of subdividing the property the plaintiff appealed the decision of the High Court in Civil Appeal Action No. 33 of 2013.*
- ❖ *THAT the First defendant had potential buyers for the lots and as a result of the plaintiff's appeal the First defendant could not proceed with the sale of lots.*
- ❖ *THAT as a result of the plaintiffs aforesaid actions the First defendant has suffered loss and damages.*

PARTICULARS OF LOSS AND DAMAGES

- i. *Unable to use and utilize the portion of the property illegally occupied by the plaintiff.*
- ii. *unable to proceed to subdivide the property.*
- iii. *unable to sell the lots to potential buyers*
- ❖ *THAT the plaintiff has caused great inconvenience and hardship to the First defendant as a consequence of which the First defendant has suffered loss and damages.*

(Emphasis Added)

As I understand the counter-claim of the First defendant, loss and damage were alleged by reason of unjustifiable intrusion by the plaintiff on to the land.

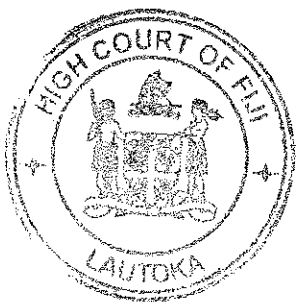
The First defendant must put forward some evidence to show that he was unable to proceed to subdivide the property and was **unable to sell the lots to potential buyers by reason of unjustifiable intrusion by the plaintiff on to the land.**

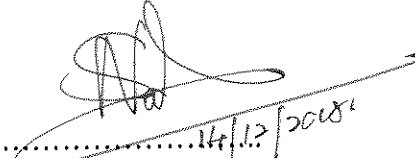
The First defendant called no evidence. The First defendant wants to be compensated for loss and damage by reason of unjustifiable intrusion by the plaintiff on to the land. For this, the First defendant needs to prove by evidence the amount of earnings that he actually lost or might reasonably be expected to have lost and to prove that the amount is due to him after allowing full credit for

any mitigation of the loss that was within his power. There was no evidence produced to court to indicate the loss and the damages. Thus, there is no basis for any award in special damages. Therefore, the First defendant failed to discharge the onus which lay upon him to prove the counter-claim. I will dismiss the counter-claim of the First defendant.

(H) Orders

- (i) The plaintiffs' claim is dismissed.
- (ii) The First defendants' counter-claim for damages is dismissed.
- (iii) As claim and counter-claim both have failed, each party will bear their own costs.




.....14/12/2018
Jude Nanayakkara
Judge

At Lautoka,
Friday, 14th December 2018