

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 198 of 1990

BETWEEN : **VIRENDRA KUMAR** and **SHALENDRA KUMAR** both sons of
Ami Chand Prasad as the Executors of **AMI CHAND PRASAD**
(son of Baijnath Prasad (late of Drasa, Lautoka and as the Ultimate
Executors and Trustees of the Estate of **BAIJNATH PRASAD** (son
of Sheo Raj) late of Drasa, Lautoka.

PLAINTIFFS

AND : **SUMINTRA ARJUN** widow and executrix/trustee of the estate of
ARJUN.

DEFENDANT

Appearances : Mr. W. Pillay of Gordon & Co. for the Plaintiffs
Mr. N. Nand of Vijay Naidu & Associates for the Defendant
Trial Dates : 15 & 16 April 2014
Date of Judgement : 18 June 2019

JUDGEMENT

INTRODUCTION

1. Earlier, I delivered an oral judgement in this case in Court. I also handed down an unedited written judgement last month. This is the final edited version. My reasons remain the same.
2. The action was filed twenty nine years ago and the matter has had a rather chequered history. Throughout this judgement, I make references to one Ami Chand Prasad and one Ami Chand. These are two different gentlemen. They were not related, as far as I am aware. Both are now deceased.
3. Ami Chand Prasad died in June 1990. He was the plaintiffs' father.

4. Ami Chand died on 01 November 2009. He was a registered Surveyor. At all material times, he worked for a firm of surveyors called Harrison Grierson Partners (“HGP”).
5. In the mid 1980’s, HGP was engaged by six individuals to survey and partition a large piece of freehold land which they co-owned as tenants in common. The land in question is legally described as Lot 4 on DP No. 1442 situated at Drasa in the District of Ba. It is all comprised in Certificate of Title 7706 (“**the land/CT 7706**”). CT 7706 was 1378 acres, 2 roods, and 17 perches in size¹. It was Ami Chand who supervised the partitioning of this land into six new titles.
6. The partitioning of CT 7006 saw the inclusion of a portion of land comprising 45 acres into the defendant’s large share of 308 acres. The plaintiffs were allotted a smaller share. They claim a beneficial entitlement to the 45 acres in question.

THE PLAINTIFFS

7. The plaintiffs describe themselves as the “*ultimate current executors and trustees*” of the estate of Baijnath Prasad (“**Baiju**”). They assumed these roles following the death of their father, Ami Chand Prasad, in June 1990².
8. Ami Chand Prasad was one of the two original executor/trustees of the Baiju estate. He was the son of Baiju. The other co-executor/trustee was Hans Raji. She was Baiju’s widow and grandmother of the plaintiffs.

THE DEFENDANT

9. The original defendant, Arjun, was the nephew of the late Jaganath Prasad (“**Jaganath**”). Arjun died on 30 May 2009. The current defendant, Sumintra Arjun, is the widow and the executrix and trustee of the estate of Arjun, and ultimately, the executor/trustee of the estate of Jaganath.

FAMILY

10. As I have said, CT 7006 was co-owned by six persons. They were Baiju, Jaganath, Ramsamujh Prasad, Buchunnu, Ramsuchit and Chakra Prasad³. Ramsuchit, Chakra Prasad, Jaganath and Baiju were brothers. Their sisters

were married to Ramsamujh and Buchunnu. These men each held 1/6 undivided share in CT 7706. There was nothing memorialised on CT 7706 to indicate whether the six men were joint-tenants or tenants in common. Applying section 34 of the Land Transfer Act, they are deemed to be tenants in common⁴.

PARTITIONING OF CT 7706

11. In April 1983, the decision was made to partition CT 7706 into six lots. When talks of partitioning began, Baiju and Jaganath had already passed on⁵. The personal representatives of their respective estates were involved in the decision.
12. The partitioning of CT 7006 was completed on 09 July 1986. Six new lots were carved out of the land, each with a separate title, and each title under the names of all the six men. Later, each one of them was allotted a particular lot over which he was given legal title severally in his own name, after relinquishing, by transfer ("**partial transfer**"), his interest in each of the other newly created titles.
13. The Baiju estate was allotted a plot in the name of its trustees. This lot is comprised in Certificate of Title 24843⁶ ("**CT 24843**"). CT 24843 has a total acreage of 186 square meters. The estate of Jaganath was allotted Certificate of Title 24535 ("**CT 24535**"). This plot has a total acreage of 308 acres.

WHAT IS THIS CASE ABOUT?

14. As I have said, at the heart of this case, is some 45 acres of prime agricultural freehold land ("**45 acres**"). This 45 acres is included in the defendant's CT 24535.
15. The plaintiffs seek the following relief:
 - (a) A declaration that the defendant holds 45 acres as Trustee or as constructive trustee for Baiju estate.
 - (b) defendant, by conduct, created equitable interest or equitable estate or charge in favour of Baiju estate or by doctrine of estoppel, created

(c) defendant to have a survey carried out and Survey Plan be registered with Registrar of Titles as to enable transfer or vesting of the 45 acres unto plaintiffs as Trustee of Baiju estate and plaintiffs to bear all legal costs

(d) defendant then to execute transfer to plaintiffs.

16. In their statement of claim, the plaintiffs plead at paragraph 13 that Arjun executed a "deed" in 1982. This deed was purportedly made immediately prior to the partitioning of CT 7006. It is claimed that, by the said deed, Arjun undertook to hold the 45 acres in question in his title, on trust, for the Baiju estate.
17. That deed is the basis of the plaintiffs' claim to a beneficial entitlement to the 45 acres in question.
18. In the alternative, the plaintiffs plead that Arjun, by conduct, created an equitable interest or equitable estate or charge in favour of the Baiju estate or by the doctrine of estoppel. This is premised on the promissory aspect of the same "arrangement", and the detriment purportedly suffered by the plaintiff in reliance on the promise.
19. The statement of defence was filed in November 1990. At paragraph 3, the defendant simply **"admits to the contents of paragraphs (5), (6), (7) and (8) of the claim"**. At paragraph 4, the defendant asserts that the six co-owners of CT 7006 had agreed that each of them **"would get his one sixth share wherever possible and subject to the nature and type of the land involved"**.
20. The defendant refutes the alleged "arrangement", let alone, that Arjun did promise to return the 45 acres to the estate of Baiju or to its trustees.
21. Both aspects of the plaintiffs' claim turn ultimately on the question - whether or not Arjun and Ami Chand Prasad did enter into an arrangement over the 45 acres and if so, what was the nature of the arrangement.

HISTORY OF PROCEEDINGS

22. The plaintiffs filed their statement of claim after the late Arjun (defendant's father) placed an advertisement in the Fiji Times on 08 September 1988 for the sale of CT 24535. As I have said, CT 24535 includes the 45 acres in question.

23. Following the advertisement, on 19 September 1988, Ami Chand Prasad (plaintiffs' father) caused a caveat to be placed on the CT 24535. This stopped Arjun from proceeding with any of the offers on CT 24535.
24. On 30 July 1990, Mr. Justice Saunders granted the plaintiffs an interim injunction to restrain Arjun from disposing of CT 24535 until the issues in this case are resolved. However, this interim injunction was dissolved by Mr. Justice Lyons on 11 December 1998 on an application by a Mr. Atma Arjun who was then the lawful attorney of the late Arjun.
25. Barely a month later, on 15 January 1999, Mr. Justice Madraiwiwi struck out the plaintiffs' claim altogether for want of prosecution⁷. On 11 February 1999, Vuataki Law filed a Motion to restore the action on the cause list and to renew the interim injunction. However, this application was dismissed by Madraiwiwi J on 23 July 1999.
26. Seven years later, on 10 July 2006, Gordon & Co filed a Notice of Change of Solicitors to act for the plaintiffs. About ten months later, on 16 May 2007, they filed a summons to restore the action and renew the interim injunction.
27. On 07 May 2008, Mr. Justice Finnigan reinstated the plaintiffs' action on the cause list. He also ordered that the interim injunction be "*renewed*".
28. On 30 May 2009, Arjun, the original defendant, passed away. On 24 May 2009, an application was filed to substitute Sumintra (Arjun's widow and current defendant) as defendant. Order in terms of substitution was granted by Justice Fernando on 07 June 2010.

SURVEY OF THE 45 ACRES

29. This action was originally set for trial on the 05 and 06 December 2011 before Mr. Justice Fernando. However, the trial was vacated on 05 December on Vijay Naidu & Associates' application.
30. Before vacating the trial, Fernando J observed that there was no survey plan to demarcate the boundaries of the 45 acres.
31. The plaintiffs were, all along, relying on a sketch plan marked "**AC1**" which is annexed to an affidavit of Ami Chand filed on 16 May 2007.

32. With the consent of both counsel, and probably, because the plaintiffs' possession of the 45 acres has never been an issue of fact, Fernando J ordered the Director Surveyor, Western to survey the said 45 acres.
33. The survey was duly carried out in August 2012 by Surveyors in the Department of Lands and Mineral Resources. An affidavit of Kesho Sharma⁸ sworn on 06 September 2012 attaches a copy of the relevant Survey Report. Sharma is a Senior Technical Assistant Survey based at the Department's Lautoka office. Virendra Kumar (**PW1**) referred to this report in his evidence in chief to highlight the extent of his family's occupation and cultivation of the 45 acres in question.

TRIAL

34. The trial finally happened over two days on 15 and 16 April 2014 before me. The plaintiff called the following witnesses:
 - (i) **PW1** Virendra Kumar (who gave evidence on 15 and 16 April 2014)
 - (ii) **PW2** John Krishna (gave evidence on 16 April 2014)
35. The defendant only called one Pradeep Kumar (**DW1**). He gave evidence on 16 April 2014.

ONUS

36. The 45 acres vests legally in the defendant. The onus is on the plaintiffs to prove their alleged equitable interest.

THERE WAS AN ARRANGEMENT BETWEEN ARJUN & AMI CHAND PRASAD

37. The following emerged clearly from trial:
 - (a) that Arjun and Ami Chand Prasad did enter into some discussion about the 45 acres immediately before CT 7006 was partitioned.
 - (b) that Arjun and Ami Chand Prasad did enter into some sort of consensus or arrangement concerning the 45 acres.

- (c) that their arrangement was recorded by Ami Chand (surveyor) on the back of the Survey Plan.
- (d) both parties signed this. It was all witnessed by a Leone Kolikoli, technical officer who was assisting Ami Chand in the survey. Kolikoli co-signed as witness.

COMMENTARY – PECULIAR EVIDENTIARY PROBLEMS

- 38. The two persons at the center of the “arrangement” are long deceased. **PW1** and **DW1** are the two main witnesses. While they both confirmed in their evidence that Arjun and Ami Chand Prasad did enter into an arrangement, they gave differing accounts about what that “arrangement” was.
- 39. **PW1**’s account is supported by an affidavit of Ami Chand the Surveyor. Chand was on site carrying out survey works when Ami Chand Prasad and Arjun came to him and talked about their arrangement regarding the 45 acres. The arrangement was made in front of Chand. He was asked to document it. He did so on the Survey Plan. His documentation of the arrangement is a contemporaneous record.
- 40. **DW1**’s evidence is supported by a letter dated 12 October 1992 written by Arjun, his father. That letter was written years later (see **Appendix 1**). Although the letter is not a contemporaneous record, the writer, Arjun, was one of parties privy to the arrangement.
- 41. Both **PW1** and **DW1** appeared to be truthful. Their account was based on what their respective fathers told them years ago. However, as Pearce LJ said in **Onassis v Vergottis** [1968] 2 Lloyds Rep 403 at page 431⁹, a witness appearing generally to be truthful¹⁰ may be telling less than the truth on a particular point. Yet again, a generally untruthful witness may still be speaking the truth on that same issue, or, on any other particular issue¹¹. And yet again, still, a truthful person may tell the truth as he sees it, although, his recollection may be unreliable¹².
- 42. Lord Bingham of Cornhill in “**The Judge as Juror: The Judicial Determination of Factual Issues**” published in “**The Business of Judging**”, Oxford 2000, reprinted from Current Legal Problems, Volume 38, 1985 pages 1 to 27, emphasises that the credibility of a witness should be tested against the uncontroverted facts¹³.

TO WHAT LEVEL OF SRCUTINY SHOULD THE EVIDENCE BE TESTED?

43. As I have said, at the heart of this case, is an arrangement was reached between two persons who are now long deceased. I have to determine what it was they had agreed to.
44. Any claim based on an assurance by a deceased person is fraught with difficulties as it is. Needless to say, such a case requires careful scrutiny of the evidence¹⁴.
45. Where, as in this case, the party that filed the claim has also passed away, there is an even greater need for careful thought and reflection.
46. A civil court would be well advised to look for corroboration in assessing the credibility of witnesses who come to give secondary evidence in such cases.
47. In **Weeks v Hrubala** [2008] NSWSC 162 at [20], Young CJ said:

*In a case of a person suing a deceased estate the court normally looks for some sort of corroboration: see **Re Hodgson** (1886) 31 Ch D 177 even though, as a matter of law, corroboration is not absolutely necessary. Experience, however, shows that when plaintiffs are making a claim against a deceased estate the court is wise to look for corroboration.*

48. In **Plunkett v Bull** [1915] HCA 14; (1915) 19 CLR 544, Isaacs J said:

..... and undoubtedly it is established that in cases of this sort the Court scrutinizes very carefully a claim against the estate of a deceased person. It is not that the Court looks on the plaintiff's case with suspicion and as primâ facie fraudulent, but it scrutinizes the evidence very carefully to see whether it is true or untrue.

49. Of course, verified contemporary documents are always useful for this purpose. Oral evidence is sometimes sufficient, once its veracity is tested against the uncontroverted facts (see **Wetton (as Liquidator of Mumtaz Properties) v. Ahmed and others** [2011] EWCA Civ. 61)¹⁵

THE UN-CONTROVERTED FACTS

50. As I have said, the six co-owners of CT 7706 were tenants in common. Each had a 1/6 undivided share. In April 1983, they decided to partition CT 7706

into six lots. They instructed HGP to carry out the necessary survey and compliance work. Accordingly, survey instructions were given to HGP.

51. There is no suggestion in the evidence that a Deed of Partition or Partition Agreement or any document of the sort to record their intention was ever signed by the six tenants in common¹⁶.
52. On 09 July 1986, six lots with separate new titles were carved out of CT 7706. Each one of the six owners was allotted a plot over which he was given legal title severally in his own name, after the necessary reciprocal partial transfers were carried out. The estate of Baiju was allotted CT 24843. This plot is 186 acres in size. The estate of Jaganath was allotted CT 24535. This plot is 308 acres in size.
53. Included in CT 24535 is the 45 acres in dispute.
54. The Baiju family has enjoyed a long, continuous and uninterrupted occupation and possession of this 45 acres since the 1950s¹⁷. Their possession began when the late family patriarch, Baiju, went to settle there, shortly after he and the other five co-owners purchased CT 7006.
55. Baiju's grandchildren, including the plaintiffs (who, judging by their age, I believe also have grandchildren of their own) continue to occupy the said 45 acres to this day.
56. CT 7706 is 1378 acres, 2 roods and 17 perches in size. If it was to be partitioned equally into six lots of equal size, each one of the six lots created would be 230 acres or so in size. This is the ideal plot size, based on size alone.
57. The plaintiffs' CT 24843 is roughly 50 acres short of that idealised plot size. The defendant's CT 24535 is approximately 78 acres more. In simple mathematical terms, if the said 45 acres were to be given to the plaintiffs' it would increase their share close to the ideal lot size. That would result in a reduction of the defendant's share closer to, but still considerably more than, the idealised lot size.
58. There was in fact an arrangement between Arjun and Ami Chand Prasad about the 45 acres in question. This arrangement was made immediately prior to the partitioning of CT 7006. It was recorded by Ami Chand (Surveyor) on site in the course of surveying the land.

ISSUES

59. Against the uncontroverted facts, I have to assess the witnesses credibility in terms of the following:
- (i) given that there was no formal partition agreement or deed to evince the intention of the co-owners of CT 7006, what survey instructions did they give to HGP?
 - (ii) as a question of fact, what exactly was the nature of the arrangement between Arjun and Ami Chand Prasad regarding the 45 acres?
 - (iii) was their arrangement sufficient to create an equitable entitlement or interest in favour of the Baiju estate?

BAIJU ESTATE'S LONG & UNINTERRUPTED POSSESSION OF THE 45 ACRES – IS THAT A BASIS FOR AN EQUITABLE CLAIM?

60. The Baiju family has a sense of entitlement to the 45 acres in question. That appears to stem from the fact that Baiju actually began occupation and cultivation of the land years before the decision was made to partition CT 7706. He passed away ten years before CT 7006 was formally partitioned. His descendants have carried over possession and occupation¹⁸ right through to this day.
61. From the pleadings, it is common ground that “prior to 02 December 1959, all parties were occupying the land informally”¹⁹. This acknowledges that, before partition, the tenants in common had an undivided 1/6 interest in the entire CT 7006 and had unity of possession over the land.
62. The word “**undivided**”, when used in relation to any co-owned land, is a reference to the fact that the land has not been divided physically, even though the co-owners each own a share in it. Their share is thus said to be “undivided”. The co-owners, thus, are said to have “**unity in possession**”. Simply put, it means that they share an equal right to possess the land.
63. As Brennan J said in Nullagine Investments Pty Ltd v Western Australian Club Inc [1993] HCA 45; 177 CLR 635; 116 ALR 26:

The share or interest which a tenant in common has in land is an “undivided” share, that is to say, “a distinct share in property which has not yet been divided among the co-tenants” ((2) Megarry and Wade, The Law of Real Property, 5th ed. (1984), p.422.).

64. Because “unity in possession” denotes a shared right to possess land, it is not possible for any particular shareholder to own separately any physically distinct area of land, with boundaries, within the common-property²⁰.

65. Brennan J further explains this effect as follows:

A division of the property is repugnant to the nature of a tenancy in common ((3) Fisher v. Wiggs (1700) 12 Mod.296, at p 302 (88 ER 1332, at pp 1335-1336).), for it is an essential characteristic of a tenancy in common that each of the tenants has the right to occupy the whole of the property in common with the others. Like joint tenants, tenants in common have a unity of possession; unlike joint tenants, they need not have a unity of interest, nor a unity of title, nor need there be a unity in the time when the interests of the co-owners vest.

66. Hence, whilst CT7006 was yet undivided, the Baiju family’s possession of the 45 acres cannot per se, equip them with a legal entitlement to, for example, section off the said 45 acres, to the exclusion of the other co-owners. *Prima facie*, the estate also cannot stake an equitable interest based solely on their pre-partition occupation and possession.

67. However, the plaintiffs may yet succeed in staking an equitable claim on the 45 acres if there was an agreement or an arrangement committing the parties to partition along possession and occupation lines. In such a case, the plaintiffs’ entitlement to the 45 acres will stem from the agreement rather than from the fact of their pre-partition possession.

68. Alternatively, the plaintiffs may still stake an equitable claim based on any alleged pre-partition conduct or promise by the other co-tenants, and, on which promise or conduct the plaintiffs had relied, and acted to their detriment.

THE EVIDENCE

69. The key things I look for in assessing the evidence are:

- (i) what did the co-owners agree in terms of how to partition CT 7006? A partition agreement or deed of partition would be clear evidence. The survey instructions actually given to the Surveyors will be rather conclusive. Such instructions would be primary evidence of the co-owners intention as to whom to allot the 45 acres.

- (ii) since it is clear, from the evidence, that Arjun and Ami Chand Prasad did enter into an arrangement, what exactly was the nature of their arrangement.
70. Again, as I have said, there was no written agreement between the six co-owners on how to divide CT 7006 between them. However, the parties did meet on numerous occasions over the years to discuss the matter. The outcome of all this was the issuing of survey instructions to HGP.
71. In chief, **PW1** said HGP was instructed to “mark and survey the land into six equal shares”. This was to mirror the fact that the six co-owners each held one-sixth undivided equal share in CT 7706. The aim was to allot each shareholder a plot of approximately 230 acres in size²¹. To back this assertion, **PW1** referred to the affidavit of the Surveyor, Ami Chand (Surveyor).
72. In cross-examination, **PW1** was referred to all the partial transfers executed by the six co-owners (**DEX 1 to DEX 5**). **PW1** was then led to the fact that his father, Ami Chand Prasad, did sign all the partial transfers, and thereby, had totally surrendered his interest in the other plots, including all the land comprised in CT 24535, including the 45 acres therein.
73. **PW1** was adamant that Ami Chand Prasad only executed the survey instructions, and the partial transfers, on the comfort and assurance of the agreement he had signed earlier with Arjun.
74. Although **PW1** was not present when the survey was conducted, as far as he was aware, HGP was instructed to divide CT 7006 into 6 equal shares. He said the six co-owners had talked about this for years spanning decades but could not agree²².
75. It was put to **PW1** in cross-examination that Ami Chand Prasad was offered to take Lot 1 on DP 560 (i.e. CT 24535) but he opted to take Lot 2 (CT 24838) because Lot 1 had a lot of sitting tenants. **PW1** said the Baiju estate had various sugar cane contracts on Lot 1²³.
76. As I have said, **PW1** backs his assertion by the affidavit of Ami Chand. Chand was the surveyor who supervised and oversaw the drawing of the survey plan and the subdivision of CT 7706. He passed away on 01 November 2009²⁴. He swore an affidavit on 26 March 2007. This was tendered through **PW1** and marked **PEX 05**.

77. Chand deposed as follows:

1. THAT I am a registered Surveyor in accordance with the relevant laws and regulations applicable and in force in Fiji. My licence number is 123.
2. THAT I was also the Manager of the Lautoka Office of Harrison & Grierson & Partners, consulting Engineers, Registered Surveyors and Town Planners.
3. THAT Harrison & Grierson & Partners were engaged by the then surviving, remaining and interested registered proprietors of Certificate of Title Number 7006 namelyeither themselves if they were alive or through their executors, trustees or administrators to carry out a subdivision of Certificate of Title Number 7006 so as to divide the said land into six (6) equal shares or less and have six (6) separate Certificates of Title issued.
4. THAT I was the Principal and Chief Surveyor who carried out the said survey(s).

(my emphasis)

78. Chand also deposed that, whilst he was present on site to survey the land and mark out the boundaries, he found that Ami Chand Prasad and Hans Raji were occupying the 45 acres. This 45 acres was to go to Arjun's share²⁵. He deposed that Arjun was aware that if the plaintiffs' families were to be relocated, they would suffer great expense and hardship²⁶.
79. Chand said that if CT 7006 was to be divided equally into six shares, each shareholder would get approximately 230 acres²⁷. He said that, in his presence, Arjun and Ami Chand Prasad reached an agreement. The agreement was that the partitioning of the land was to go ahead with the 45 acres being included in Arjun's share. Arjun would hold the 45 acres as trustee for the Baiju family for the time being. He was to transfer the 45 acres to the estate of Baiju with associated extra-legal and survey costs to be borne by the latter²⁸, when the latter was in a position to pay for these.
80. Based on the above assurance and promise by the late Arjun, Ami Chand Prasad and Hans Raji agreed to vary the survey instructions to HGP. The Registrar of Surveys was to give effect to that arrangement²⁹.
81. Annexed to Chand's affidavit marked "AC1" is a copy of the survey plan. On the flip side, is some handwritten notes. Chand confirmed in paragraphs 15 and 16 of his affidavit that the handwriting was his and that the note was his

record of the arrangement that was reached in front of him between the late Arjun and the late Ami Chand Prasad.

15. *That I have been shown a photocopy of a survey plan which has some handwriting on it at the bottom and which is marked as "AC1" and annexed hereto. I confirm that this is a photocopy of the survey plan of the land on which I in my handwriting wrote out the agreement between Arjun and Ami Chand Prasad and the representations and promises made by Arjun and had them sign the same in my presence and in the presence of Leone Kolikoli a technical assistant that was in the employ of Harrison & Grierson & Partners and under my supervision who affixed his signature to the same as a witness.*

16. *That my reading of the said photocopy shows that the following is written:*
(handwritten note, see below)

17. *That based on the above an additional 45 acres more or less of land that fell into that part of the land that was to be subdivided and given to Ami Chand Prasad and Hans Raji as Executors and Trustees of the Estate of Baij Nath Prasad namely Lot 2 was transferred and/or shifted and/or given to Arjun to be part of his share namely Lot 1.*

82. **DW1's** evidence tells a different story. He said that the co-owners' instruction to HGP was to survey and partition the land so that they each receive one sixth share "**whenever possible and subject to the nature and type of the land involved**".

83. Unlike **PW1** who more or less conceded that he was not privy to discussions between the six co-owners, **DW1** said he was well aware of all that was happening. In chief, he said he was already a University graduate in the 1980s. Because of this, his father, Arjun, depended on him on all matters legal pertaining to the discussions.

84. At some point during examination in chief, when asked if he knew how CT 7006 was to be subdivided, **DW1** began to refer to a copy of a 1954 Agreement. However, I upheld an objection from Mr. Pillay and disallowed any further examination on this. The document had not been discovered by the defendant. Also, it was never put to **PW1** in chief and offended the rule in **Browne v Dunn**. In any event, **DW1** said he has only seen a copy of the Agreement, but never the original³⁰.

85. **DW1** said he was present in all, except one, of the many meetings between the co-owners. These were meetings where they were trying to decide on a

scheme to partition CT 7006. He said it was impractical and unfair to divide CT 7006 into six shares of equal size³¹. He said that at a meeting held in 1984, it was agreed that CT 7006 was to be split up into two parts and then into 6 parts³².

86. As I have said above, the plaintiffs plead in their statement of claim that there was a “deed” instrument executed by the late Arjun and the late Ami Chand Prasad. The defendant denies this in their defence.
87. It emerged from the cross-examination of **PW1** that the reference to a “deed”³³ in the claim is in fact a reference to Ami Chand’s (Surveyor) freehand note on the flip side of a survey plan.
88. That the handwritten note was in fact made by Ami Chand is not in dispute. Both **PW1** and **DW1** referred to the said note in their evidence.
89. **PW1** referred to the note when he tendered the affidavit of Ami Chand sworn on 26 March 2007 (marked **PEX 05**). Chand had annexed to his affidavit marked “**AC1**” a copy of the survey plan which records the following arrangement on its flip side:

I, Arjun agree that as soon as the survey is finalised, will proceed with further subdivision of lot 1 and transfer 45 acres to Ami Chand.

Boundaries to be finalised in field during course of survey.

Signed Arjun Signed Ami Chand Witness Leone Kolikoli

90. **DW1** referred to the same note above when he read his father’s letter dated 12 October 1992 in chief (see *Appendix 1*). The letter reproduces the same note verbatim. It confirms that the surveyor Ami Chand did record the arrangement in question, that he (Arjun) did sign the note.
91. The following facts are not really contentious in terms of how the evidence evolved:
- (i) that Ami Chand wrote this note on the flip side of the survey plan,
 - (ii) that the note documented an arrangement,

- (iii) that the arrangement was between the late Ami Chand Prasad and the late Arjun,
- (iv) that the arrangement pertained to some 45 acres of land, and
- (v) that the arrangement was made in front of Ami Chand.

Ami Chand's Handwritten Note – What Does It Evince?

92. In examination in chief, **DW1** said that his father only “agreed to give 45 acres for consideration”³⁴. He interprets the note accordingly.
93. **DW1**'s father's letter (Appendix 1), *inter alia*, gives some background to the note as follows:

When it was decided lot 1 will be mine, then Ami Chand request me the bhaiya (brother) since me, my brother and mother have our house in your area and we also have some cane contracts there as well, I will buy about 45 acres around our ... from you and pay all the cost and the price of 45 acres.

I agreed and said since I am not going to come and live with my parents or do any farm in Drasa. I will have to sell all my land one day so why can't I sell 45 acres to you.

We asked the surveyor Mr Ami Chand to make a small note and we both sign so he wrote on a piece of paper.

“I Arjun agree that as soon as the survey is finished, will proceed with further subdivision of lots and transfer 45 acres to Ami Chand. “Boundaries to be finalized in field in course of survey.”

Even this does not state that 45 acres will be the part of the estate of Baij Nath. It was Ami Chand himself asked for that area for himself. He himself cannot be the owner of Baij Nath's property. There were two trustees appointed by Baij Nath - His wife and Ami Chand. So there is no reason why I give 45 acres to Ami Chand free of charge. If it was to be the part of the estate of Baij Nath, it should have been included in the Lot 2 to make one title and there was no reason to make another title to include in Lot 2.

94. In cross-examination, **DW1** agreed that the arrangement between Arjun and Ami Chand Prasad was made before the completion of the survey³⁵. **DW1** even vouched for the veracity of the late Ami Chand's recollection as follows in cross examination³⁶:

Q. You said on issue of subdividing, Ami Chand was the "key" guy because he was present all along.

A. Yes. He was vital to the agreement.

Q. He would know the ins and outs of what really was agreed.

A. Yes.

95. DW1 said that his father only agreed to give the house sites on the 45 acres to the plaintiffs, for free³⁷. He referred to that part of his father's letter which reflects this position. In cross-examination, it was put to him that his father had reneged on the arrangement because he knew the 45 acres has a prime value. DW1 responded that the 45 acres can be transferred to the plaintiffs if they are willing to pay the market price³⁸. He maintained that there was never an agreement for Arjun to hold the 45 acres on trust for the plaintiffs.

96. I set out below the relevant portion of DW1's father's letter:

*Now I have given you a fair picture from the beginning to the end. You can put it on your own way and rearrange if necessary. Give the lawyer what he needs and **not the whole story**. Ring me if you cannot follow any ...*

In the map enclosed, our area is marked in heavy dark. The lots 1,2 and 3 are shown in little circles. The parts one and two in red for you to follow.

*That agreement on a piece of paper **should not have any value**. Because it is **not registered** and does **not even make clear why I should give 45 acres to Ami Chand**. Does not say it is a part of estate of Baij Nath. Most of the wordings are in short hardly visible. Actually **that part of land is the most valuable** **in the whole property**. It is the frontage, close to the road, electricity and water and if subdivide into residential lots it will value more than all our property. Therefore the property of that value should produce in proper agreement if it is to be given away.*

Anyway when we are making a separate Title for 45 acres tell the surveyors to make it longer taking Johnson's margin and shouldn't touch the estate the estate of Badri Prasad's 15 acres which we suppose to give free of charge. We don't have to bother about Kaushilia's contract. That can't be missed out for we don't want to make it wider to loose better part along the roadside. If we were to give away, we just have to think of 45 acres, wherever it makes up.

97. The last line, when read in context, would appear to be a concession that: "if we have to give away 45 acres, we can give 45 acres from any other part of our land

but not the one that the plaintiff's family has been occupying". The instruction at the top to - "give the lawyer what he wants but not the whole story" - is fodder for thought.

98. **DW2** further said as follows in cross-examination.

Q. Does it not make sense, to protect estate of Baiju, Ami Chand enter into Agreement on partition of land

A. History relevant. Why did Baiju pick Lot 2 if he has homes of sentimental value in Lot 1?

Q. I put to you that in order to protect assets of Baiju estate, Ami Chand Prasad entered into an Agreement with your father.

A. Does not make sense to me. Normal person would protect his home. Does not make sense why he picked Lot 2 when his home in Lot 1.

Q. You are saying that 45 acres, which includes site of Baiju house, to be sold

A. Before or after subdivision?

Q. Before subdivision, it was no man's land. No one owned the 45 acres. Would your father or you sell the 45 acres to Baiju Prasad?

A. Yes

Q. Ami Chand Prasad already has his home there. It would not make sense for Ami Chand Prasad or executor to be buying land he sits on.

99. As for **PW1**, he said in chief that Ami Chand's note records the arrangement that Arjun was to hold the 45 acres on trust for Ami Chand Prasad as executor-trustee of the Baiju estate and to transfer the 45 acres to the plaintiffs when the plaintiffs were in a position to pay for the associated extra-legal and survey costs³⁹.

100. **PW1** relies on the affidavit of Ami Chand the surveyor to corroborate his account⁴⁰. He said that a Justice of Peace namely John Krishna (**PW2**), was also present when Arjun and Ami Chand Prasad made that arrangement. He said the note documented the fresh instructions by Arjun and Ami Chand Prasad to surveyor Ami Chand⁴¹ only in relation to the 45 acres.

101. It was highlighted to **PW1** in cross-examination that Ami Chand's handwritten notes make no reference to Hans Raji, the other trustee of the Baiju estate. Also, it was pointed out that the note does not refer to Ami Chand Prasad in his capacity as executor/trustee of the Baiju estate. **PW1** said the intention behind the document was well known to everyone.

102. **PW1** refutes the suggestion that the note simply documents Arjun's willingness to transfer the 45 acres to the plaintiffs upon payment of a

consideration. He said the arrangement is explained in clear terms by the surveyor Ami Chand in his affidavit.

103. While **PW1** concedes that each of the six co-owners had relinquished their individual interest in the other five Lots by signing their respective partial transfers, he said that Arjun and Ami Chand Prasad recorded their arrangement through Ami Chand well before the partial transfers for Lots 1 and 2 were even drafted⁴².
104. **PW2** John Krishna is a retiree and a pensioner and also a Justice of the Peace. He married a granddaughter of the late Baiju. He said he witnessed the agreement between Arjun and Ami Chand Prasad. He reiterated **PW1**'s and Ami Chand's (Surveyor) account and interpretation of the note.

FINDINGS OF FACT & APPLICATION OF THE LAW

Survey Instructions

105. Partition (or subdivision)⁴³ entails a redistribution of land among its co-owners. The result of it is that each shareholder, eventually, will be allotted a defined portion of the land to which he or she will have exclusive right of possession.
106. When a tenants in common sign a partition agreement to subdivide along pre-existing occupation or cultivation lines, both the agreement and the occupation, together, would confer upon the joint tenant an equitable interest.
107. Usually, a partition agreement will form the basis of the survey instructions. In the absence of such an agreement, the survey instructions signed by all the tenants in common, evinces a shared intention or common purpose as to how the land is to be partitioned.
108. **DW2** appeared to suggest in his evidence that, although the Jaganath estate was allotted more land compared to the Baiju estate's allotment, the value of the Jaganath-allotment was about the same as the Baiju-allotment.
109. However, **DW2** did not call any registered valuer to substantiate the differential value in the lots carved out of CT 7006. There is no evidence before me either that the parties had an arrangement by which they would ensure some equality in their exchange.

110. In the absence of any partition agreement or any valuer's report, I would have to:
- (i) accept **PW1's** evidence that CT 7006 was meant to be divided equally in size as far as possible and that
 - (ii) if CT 7006 was to be subdivided equally in size as far as possible, each original owner would receive an allotment of 230 acres more or less.
111. The best evidence available is what Ami Chand the Surveyor had deposed in his affidavit. Chand died on 01 November 2009. However, he had sworn an affidavit in 2007 by which he disclosed his recollection of the instructions that were given to him.
112. Admittedly, Chand's recollection was made some twenty years or so after the instructions were issued to him. He clearly could not be cross-examined on the veracity of his recollection.
113. However, while Chand's recollection may not be a contemporaneous document, it was the best available evidence in the circumstances. I say that because:
- (i) Chand has no vested interest in the property and, from where I sit, was as veritable as can be as an independent witness
 - (ii) he received the instructions directly from the co-owners
 - (iii) as Chief Surveyor of HGP, he supervised the execution of those instructions
114. I accept the evidence of Ami Chand the Surveyor that the survey instructions issued to him was "to divide the said land into six (6) equal shares or less and have six (6) separate Certificates of Title issued".

Certainty & Fairness Of Equal Division

115. The estate of Baiju was allotted 186 acres out of the partition. On the other hand, the estate of Jaganath was allotted a total of 308 acres. Clearly, in terms acreage, the latter was allotted a considerable more.
116. Quite apart from the fact that it has considerable more acreage than the Baiju estate, the estate of Jaganath also has the 45 acres in question. In his letter to

DW1 (Appendix 1), Arjun emphasised the need to make sure that this land is not given away easily because it has considerable more value and because of its tremendous economic potential in the real estate market for residential property.

117. Arjun then said in his letter that if there was a need to give away 45 acres to the plaintiffs, that can be taken off from elsewhere in their land.

Actually that part of land is the most valuable ... in the whole property. It is the frontage, close to the road, electricity and water and if subdivide into residential lots it will value more than all our property. Therefore the property of that value should produce in proper agreement if it is to be given away.

Anyway when we are making a separate Title for 45 acres tell the surveyors to make it longer taking Johnson's margin and shouldn't touch the estate the estate of Badri Prasad's 15 acres which we suppose to give free of charge. We don't have to bother about Kaushilia's contract. That can't be missed out for we don't want to make it wider to loose better part along the roadside. If we were to give away, we just have to think of 45 acres, wherever it makes up.

118. The above, when taken together with what Arjun has said earlier in his letter, and DW1's evidence, tells me at least four things:

- (i) that the 45 acres, in the eyes of Arjun, has tremendous value.
- (ii) that, for that reason, Arjun was adamant that the 45 acres be not given away.
- (iii) that if, in the event the defendant was to be required to give away 45 acres to the plaintiffs, then DW1 is to carve it out of any other portion of CT 24535, but keep the 45 acres in question at all costs.
- (iv) if the plaintiffs desire to have the 45 acres in question, let them pay the market price.

119. If 45 acres was to be carved out of the defendant's CT 24535 and given to the plaintiffs, it would increase the plaintiff's total acreage to around 231 acres. This is the idealised share based on size. It would also reduce the defendant's share to 263 acres, which is still more than the plaintiffs' share by 30 acres or so.

120. In **Snell's Equity** (1990) 29th edition at page 36, the learned authors say that, in the absence of sufficient reasons for any other basis of division, the certainty and fairness of equal division is to be preferred:

"It has long been a principle of equity that in the absence of sufficient reasons for any other basis of division, those who are entitled to property should have the certainty and fairness of equal division; for 'equity did delight in equality'. The maxim is 'equality is equity', and this has been applied in a variety of ways."

And at page 38:

*"[The] maxim 'equality is equity' may be illustrated by a number of more modern instances. In general, the maxim will be applied whenever property is to be distributed between rival claimants and there is no other basis for division. 'I think that the principle which applies here is Plato's definition of equality as a 'sort of justice'; if you cannot find any other, equality is the proper basis: **Jones v Maynard** [1951] Ch. 572 at 575, per Vaisey]"*

121. As I have said, in the absence of any evidence of a written agreement or deed between the six original owners of CT 7006, and in the absence of evidence as to the value of each Lot, I find that if 45 acres was to be carved out of the defendant's CT 24535 and given to the plaintiffs, it would bring the plaintiffs and the defendant closer to equality in their respective shares.
122. I see no reason why 45 acres has to be carved out from any other portion of CT 24535 other than the one that the plaintiffs and their ancestors have been occupying and cultivating for generations now.

The Arrangement Between Arjun & Ami Chand Prasad?

123. The freehand note by Ami Chand speaks for itself:

"I Arjun agree that as soon as the survey is finished, will proceed with further subdivision of lots and transfer 45 acres to Ami Chand. "Boundaries to be finalized in field in course of survey."

124. I start with the observation that the note records a promise by Arjun to transfer 45 acres to Ami Chand. That promise is conditional only upon the demarcation of the boundaries. As I have said at the outset, the demarcation

of the boundaries was carried out in August 2012 by Order of Fernando J (see paragraphs 29 to 33 above).

125. Admittedly, the 45 acres is not defined with any specificity in the above document, its boundaries are not delineated, and Ami Chand is not described as Ami Chand Prasad the executor/administrator of the estate of Baiju. There is no suggestion in the evidence that Ami Chand (Surveyor) had the necessary training to be alert to such niceties as a lawyer would.
126. However, the note must be read in proper context. It is crystal clear in my view that the 45 acres referred to therein could only be a reference to the 45 acres at issue in this case.
127. In his letter (*Appendix 1*), Arjun describes the effect of the above words as follows:

That agreement on a piece of paper should not have any value. Because it is not registered and does not even make clear why I should give 45 acres to Ami Chand. Does not say it is a part of estate of Baij Nath. Most of the wordings are in short hardly visible. Actually that part of land is the most valuable in the whole property. It is the frontage, close to the road, electricity and water and if subdivide into residential lots it will value more than all our property. Therefore the property of that value should produce in proper agreement if it is to be given away.

128. I refuse to accept that the arrangement which the note records is one where Arjun had agreed to sell the 45 acres in future to Ami Chand Prasad. I hold this view for the following reasons.
 - (i) firstly, it is highly unlikely, in all probabilities, that the personal representatives of the estate of Baiju would accept a partitioning scheme which would jeopardise its members' settlement on the land. Why would the estate want to incur money in purchasing the said 45 acres when it could simply insist on a scheme of partition which would secure the 45 acres in its favour, given its history of continuous uninterrupted possession?
 - (ii) secondly, there is not even the slightest hint in the wording of the note that it was meant to record an agreement to sell, or to confer a right of first refusal or an option to purchase.

- (iii) thirdly, the note was recorded before the survey instructions were given to HGP. Given that timing, together with the Baiju family's long sense of entitlement over the 45 acres, it is highly probable that a trust-like arrangement was intended, rather than a sale and purchase agreement.
129. I state here for the record that the question was put to **PW1** in cross-examination as to why Ami Chand Prasad did not just insist on including the 45 acres in his title during pre-partition talks? That is a valid question.
130. It is clear from the evidence that no lawyer was involved in talks between the original owners of CT 7006 as to how to sub-divide. It is clear also from the evidence that the late Arjun was much more sophisticated than the late Ami Chand Prasad in terms of education.
131. The evidence of Ami Chand (Surveyor) at paragraphs 78 and 79, when read between the lines, seems to suggest the following:
- (i) that it was he (Ami Chand) who discovered that the 45 acres which Ami Chand Prasad and Hans Raji were occupying would go to Hans Raji, if sub-division was to be carried out to completion.
 - (ii) that Ami Chand Prasad and Hans Raji were one way or another, oblivious to that fact.
 - (iii) that Ami Chand then alerted Ami Chand Prasad and Arjun accordingly
 - (iv) that the arrangement in question was then entered into between the two
132. Ami Chand also deposed that carving out the Lot 45 even at pre-partition stage, would entail extra survey and legal costs, which would have to be borne by the plaintiffs. They were not able to afford that, at the time. I accept this.
133. I accept **PW1**'s evidence which is corroborated by the affidavit evidence of Ami Chand's on this point. Accordingly, I find that the arrangement between Arjun and Ami Chand Prasad was that the former would hold the 45 acres on trust for the latter in the latter's capacity as executor-trustee of the Baiju estate and would transfer it back to the latter at some point in future.

Express Trust?

134. Is Ami Chand's note then an express declaration of trust, or is a trust to be implied from Arjun's and Ami Chand Prasad's arrangement?
135. Generally, where the property is a personality (as opposed to a realty), no specific formalities are required. An oral declaration has been held as sufficient to constitute an express trust (see **Paul v Constance** [1977] 1 WLR 527 - for instance, a case which concerned money deposited in a bank account, an express trust was said to have arisen from the parties' conduct and especially in the words spoken).

Hepburn⁴⁴ summarises **Paul v Constance** thus:

In this regard, words and conduct carried out over a period of time may be taken into consideration. On the facts of the case – the history of the relationship between Constance and Paul, the fact that he repeatedly stated during their relationship "This money is as much mine as it is yours", as well as the joint deposits made into the bank account and the interview with the bank manager – were all considered to amount to an intention on the part of Constance to declare himself trustee of the money for himself and Paul jointly.

136. When it comes to land (realty), the three board requirements are:
- (i) that some written note signed by the person declaring the trust is required to comply with the statute of frauds provision which, in Fiji, is to be found in section 59 of the Indemnity, Guarantee & Bailment Act.
 - (ii) the said written note must comply with all three certainties of intention, subject matter and object, and
 - (iii) provided that the written note is not vitiated by fraud, misrepresentation, undue influence, unconscionability, or mistake.
137. Hepburn, citing **Gardner v Rowe** (1828) as authority, said the written note need not be created at the point of the declaration of trust. However, it must be available at the point of enforcement:

It [is] not necessary for the trust to be created in writing on the date that it was declared as long as some written evidence of the trust was available for the court at the point of enforcement.

138. In my view, Ami Chand Prasad's note is sufficient to satisfy the requirements of section 59.
139. However, even if I am wrong in this regard, the note, in my view, when taken in context, is sufficient evidence for this Court to impose a constructive trust on the defendant.

Or Constructive Trust ?

140. I start by saying that an equitable proprietary interest in land may arise nonetheless, even in the absence of an express trust.
141. A constructive trust is one in which a court determines that, although there was no written document to formally create a trust, the parties' conduct and actions demonstrated that a trust was intended, that is, an intent that the property would be transferred from the legal owner to another.
142. Where such a finding is made, it is open to the Court then to impose a constructive trust on a defendant. Constructive trust, thus, is imposed as an equitable remedy to prevent or to remedy an unjust result. To succeed, a plaintiff must establish (i) common intention and (ii) detrimental reliance.
143. In Kumar v Wati [2017] FJCA 126; ABU0011.2014 (14 September 2017), the Fiji Court of Appeal explained this as follows:

Constructive Trust

[66] *A constructive trust is imposed by the law as an 'equitable remedy'. This generally occurs due to some wrongdoing, where the wrongdoer has acquired legal title to some property and cannot in good conscience be allowed to benefit from it. A constructive trust arises where equity regards it as against conscience to allow a person to deal with property as if it were his own or where it would confer 'a manifest and unfair advantage' or it would be unjust to allow the apparent owner of property to deny a claimant's beneficial interest or that others have a claim to that property. In Hussey v. Palmer [1972] 3 All ER 744; [1972] 1 WLR 1286 Lord Denning defined a constructive trust as 'a trust imposed by law whenever justice and good conscience require it.... It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution'. Constructive trusts contain a remedial element as well (vide Muschinski v Dodds [1985] HCA 78; [1985] 160 CLR 583).*

[67] In Gissing v. Gissing [2] [1971] AC 886 at 902; Lord Diplock said

“A resulting, implied or constructive trust—and it is unnecessary for present purposes to distinguish between these three classes of trust—is created by a transaction between the trustee and the cestui qui trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui qui trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui qui trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land...”

Common intention

[68] It is said that at the heart of this doctrine is the existence of a common intention (see Ogilvie v Ryan [1976] 2 NSWLR 504) relied on by the claimant to his or her detriment. Common intention could be shown either by way an express agreement or in the absence of such an agreement, an act (such as direct contribution of money towards the purchase of the property) by the claimant from which the court may infer a common intention giving rise to an interest under a constructive trust (Lloyds Bank plc v Rosset [1991] 1 AC 107). Stack v Dowden [2007] 2 AC 432; [2007] 2 WLR 831 and Jones v Kernott [2009] EWHC 1713 (Ch); [2010] 1 All ER 947 have enlarged the circumstances in which a common intention may be established.

[69] In Gissing's case (*supra*) the House of Lords held that a common intention has to be inferred from the parties' conduct as to how the beneficial interest is to be held. The relevant intention is that which a reasonable person would draw from the parties' words or conduct. The court must determine what inferences can reasonably be drawn in each case. In Grant v Edward[3] [1986] 2 All ER 426 it was held “Mrs Grant was entitled to half of the beneficial interest under a constructive trust. There was a common intention that she was to have a share in the property. She had acted to her detriment by making substantial contributions to the house hold expenses which she would not have done unless she had believed that she would have an interest in the house.” In Nisha v Munif [1999] 45 FLR 246 a mother and son shared the family home of which the son was the registered owner. The mother claimed that she had contributed to the home by donating building materials and furnishings and by helping with the mortgage. She claimed a half share in the property. The High Court of Fiji held that in the circumstances of the case it was clear that the parties had intended to share the property equally. Accordingly a constructive trust to that effect was imposed on the son. Shameem J. said “the defendant cannot now, in all conscience, insist that the plaintiff live elsewhere, nor can he deny, her beneficial interest in the property.”

[70] In Sami v Wati Civil Action HBC No. 35 of 2005 decided on 07 June 2010; [2010] FJHC 279 Calanchini | (which Master Amartunga quoted with approval in Prasad v Wati Civil Action No. HBC 315 of 2010 decided on 12 August 2011; [2011] FJHC 442) said

“Where there is no express declaration of a trust, it is necessary to determine whether there existed a common intention of the parties concerning the equitable ownership of the land.

However that presumption may be rebutted. For instance, if the evidence established that there was an agreement, arrangement or understanding between the Plaintiff and the deceased as to the beneficial ownership of the land, then the Court would give effect to that common intention by means of a constructive trust or by means of a proprietary estoppel if the Plaintiff had suffered detriment. Proprietary estoppel enables an equitable interest to be granted to a person who has been induced to suffer detriment upon reliance on a representation that the Plaintiff would acquire ownership of the land as a result. Under the remedy the court may award one of a number of rights ranging from freehold title through to merely equitable compensation in money.

“A recent development in the law that applies to cases such as the present is an approach based on avoiding unconscionability if the First Defendant were permitted to deny the Plaintiff an equitable interest in the land. This approach looks for an agreement between the parties and then examines the entire course of dealings between the parties. The aim is to reach a fair result and to supply the parties with a common intention if that is necessary.”

[71] A further survey of legal literature shows that common intention could now be established by (1) express or overt statement, agreement, promise, assurance, arrangement or understanding, before or after the acquisition between the parties (e.g. **Rosset and Grant**) but it does not matter that the express assurance in whatever form occurs after the legal owner has acquired the property (see **Clough v. Killey** [1996] 72 P & CR D 22; [1996] NPC 38) (2) inferred common intention by way of a direct contribution to the purchase money such as lump-sum or mortgage payments (e.g. **Rosset and Burns v. Burns** [1984] Ch 317) (3) inferred common intention from the parties' entire course of conduct (e.g. **Gissing, Hammond v. Mitchell** [1992] 1 WLR 1127, **Chan v. Leung** [2003] 1 FLR 23, **Stack, Kernott, Geary v. Rankine** [2012] EWCA Civ 555) where evidence of common intention can come from a wide-ranging of factors which are not exhaustive (4) imputed common intention which is an intention the parties would have had, had they thought about it. In **Kernott** the majority of judges determined that there may be circumstances when it is permissible to impute a common intention to the parties, at least as to the quantification of shares when the parties are already co-owners and the same view of was taken in **Geary** as well. Thus, where it is possible the parties are deemed to have a common intention to share the property in such proportions as is fair in all the circumstances. However, the Court of Appeal in **Geary** indicated that the imputation is relevant only to quantification, not acquisition.

Detrimental reliance

[72] With regard to the detrimental reliance which is the second limb of establishing a constructive trust, Lord Denning in **Greasley v. Cooke** [1980] 2 All ER 710 suggested that if there is evidence of 'detriment', there should be a presumption of

*reliance. Consequently, in the absence of evidence to the contrary adduced by the legal owner, the court is entitled to assume that the claimant did, indeed, rely on the assurance made. This is so even if the evidence suggests that the claimant had been motivated partly by other reasons such as love and affection for the legal owner (see **Chun v. Ho** [2002] EWCA Civ 1075). ‘Detriment’ may take many forms. For example, it may be financial or any other conduct. Giving up of existing accommodation, doing extraordinary work of the property, spending one’s life savings and sacrificing other opportunities are some examples of ‘detriment’ which does not have to be detrimental in the sense of being harmful. Further, detriment need not necessarily be made in relation to the property in which the claimant acquires an interest either. Payments or conduct is evidence upon which a common intention can be established and they also can be the detriment consequent on the said intention.*

144. Because equity follows the law, and accordingly, because there is a presumption that legal ownership coincides with beneficial ownership, the onus is thus on he who asserts beneficial ownership to establish that “beneficial ownership is different from the legal ownership”.

145. As Baroness Hale of Richmond said in **Stack v Dowden** [2007] UKHL 17:

56. Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest.

146. The parties’ entire course of conduct in relation to the property will need to be examined in proper context. As Baroness Hale said in **Stack v Dowden** at paragraph 69:

69. In law, “context is everything” and the domestic context is very different from the commercial world. Each case will turn on its own facts.

147. If I may say so again, the Baiju estate’s pre-partition possession and occupation cannot be the basis of a beneficial entitlement *per se*. However, in this case, it seems nonetheless that all those involved in CT 7006, including Arjun, recognised the Baiju estate’s sense of entitlement over the 45 acres. That, coupled with Ami Chand Prasad’s insistence, led to the separate agreement that he had with Arjun.

148. The original co-owners severed their tenancy in common and unity in possession when they partitioned CT 7006.
149. **PW1** said in chief that Ami Chand Prasad only signed the survey instructions after making the arrangement in question with Arjun. The arrangement, as I have found, constituted an assurance by Arjun that he (Arjun) would hold the said 45 acres on trust and would transfer it back to the Baiju estate at such time convenient to the Baiju estate.
150. The evidence is clear that, without that assurance from Arjun, the alternative for Ami Chand Prasad was to not sign the survey instructions. If he had refused to sign, the result is that CT 7006 would remain undivided in whole as it was. Alternatively, at the very least, sub-division could proceed anyway with other shareholders getting their individual shares whilst the Baiju estate and the Jaganath estate's respective shares remain lumped together undivided. Either way, the Baiju estate would, thus, continue to at least have some reprieve and security in its continued occupation and cultivation of the 45 acres by virtue of the principle of unity of possession.
151. The bargain which Ami Chand Prasad made with Arjun was:
- "Give us the 45 acres, or no partition".*
152. When Ami Chand Prasad signed the note, he was, thereby, treading on delicate ground and placing the security of the Baiju estate on the line. Therein lies his detrimental reliance on Arjun's promise.
153. When Arjun agreed, and signed the note, Arjun was then, by agreement, creating an equitable interest in the Baiju estate.
154. I believe that the note is evident of an arrangement whereby Arjun had committed the estate of Jaganath to hold the said 45 acres on trust for the estate of Baiju until such time when the latter desired the said land to be transferred back to it. I believe that the late Ami Chand Prasad, in reliance on the assurance on that note, then signed the Survey Plan which would see the said 45 acres being included in the Jaganath estate's share from CT 7006.
155. If the defendants were to be allowed to keep the 45 acres in question, they would be unjustly enriched. They already have more land in terms of acreage ,

as well as having to keep the valuable 45 acres. They all have lived abroad for many years. Their only intention is to sell the 45 acres.

156. The plaintiffs on the other hand have settled on the land for generations up to the present day. Even if the 45 acres were to be transferred to them, they would still have 30 acres less than the defendants' share.

ORDERS

157. In the circumstances of this case, this court makes the following declarations and orders.

1. I declare that the defendant holds 45 acres as constructive trustee for Baiju estate or alternatively, that the defendant, by conduct, created equitable interest or equitable estate or charge in favour of Baiju estate or by doctrine of estoppel.
2. I order that the defendant cause a survey to be carried out and a Survey Plan be registered with Registrar of Titles to facilitate the transfer or vesting of the 45 acres unto plaintiffs as Trustee of Baiju estate and plaintiffs.
3. The plaintiffs are to bear all survey and legal costs.
4. The defendant is then to execute transfer to plaintiffs.



Anare Tuilevuka

JUDGE

Lautoka

Appendix 1

49 Barrack Rd

Mt. Wellington
Auckland, New

Zealand.

12.10.92

Dear Pradip,

Yes I have received your letter. Pleased to hear everyone in Fiji are doing well and you have seen Ben Uma rang Rosy yesterday and mentioned about you. They are happy that you are working on the land. Ben is fit now, by doing all that you have taken most of the problems from head. What you are doing now should have been done long ago but anyway it is not late even now. What I want to see that my children were happy with the income of my property before I am gone. I am so happy that besides many other things you have done for the family, you put your step on a very major work which will make the family life happy. I and Amma are very proud of you and always talk about you, that you always think of your brothers and sisters which now days very few people will do.

I have almost finished paying Man Singh for the Korotogo property. After you paid the major amount what was left. I was paying 2 weeks' pay to you and the other 2 weeks to Man Singh's lawyer in Fiji. So after that I will have some money to use for our self. Now I can apply for our citizenship which is about \$270 for both of us. The next thing after subdivisions we will have to pay your bank off and for that the quickest one will be the Property (Estate of Badri Prasad). We suppose to give them 15 acres free of charge and whom they have 15 acres title they want another 20 acres to buy for the brother. That time they can mortgage the two Titles to obtain money for the 20 acres. That is where Saten Nandan can help us and we will be able to pay off Ben and your bank easily. Anyway I am sure everything will work out well when you have taken interest on it. May God help us. Now I will tell you the story about this property from the start, then you will realize what I am doing and why. How my father and other 3 brothers were bitten and how I came in ...

My father Bhagwandin were seven brothers, the eldest being Jhakari, the second was my father and the third Ganga Prasad, the fourth Jagan Nath (the one who gave me his property) the fifth Baij Nath (father of Ami Chand) sixth Pardesi (father of Subhas Chand) and the last one Badri Prasad (father of Ghotka – Baichuka).

Our uncle (Fuffa) Buchuna Prasad were three brothers – Buchuna Prasad, Ram Samy Prasad and Ram Suchit Prasad (The Prasad's Studio family).

In 1946 the two families decided to buy a piece of land 1387 acres of freehold land. It was to be 50-50. The price of the land was 12 shillings and 10 shillings per acre (1 dollar 20 cents and 1 dollar) which would be about 800 pounds (1600 Dollars) for the most of the land was hilly and the hilly land was \$1 and flats \$1.20 per acre.

The money to pay the survey fees and deposit to start with from ... side was paid by my Aji. That time Aja was dead. Aja had 84 acres of cane farm (Leasehold) from Johnson where we are now. That farm of 84 acres had only one contract. After the

death of Aja (Shri Raj) the contract was somehow transferred to the elder brother Jhakari.

They also had one rice farm close to Vakabuli known as Aladubu. Aji and Aja most of the time lived in that farm about six miles from the cane farm. All their brothers used to go in the rice farm in turns. I used to be the pet of the grandparents and lived most of the time with them and also their youngest son Badri Prasad. That time they had one hundred pounds in their tin suit case. That one hundred pounds was a big money for that time. When Aja died the rice farm was sold to one Sesa Reddy (father of Jai Ram Reddy – Solicitor) for dairy farm for 98 pounds. These 198 pounds were used to pay the deposit and the survey fees for the said freehold land bought in the share of 2 families.

That 198 pounds supposed to be Badri Prasad's money because he was the youngest and always lived with his parents and looked after the cattles and also a sickly person from the beginning. Even then you will see how his eldest brother bit him at the end.

You might think how I know all this exact figures. Firstly how I know how much Aja and Aji had with them, as I told you earlier that I was their pet and lived with them the most, secondly I was the only most educated in the whole family. I was the only one went up to class 8. In 1946 I was in class 8 and was used by Jakan Prasad as his clerk. All the school teachers went to teachers training after class. There was only one secondary school in Lautoka of whole of Western side and only the choiced went to secondary school. I went to Natabua Secondary School in 1947.

Alright the said freehold land 1378 acres Title 7006 the 50% would have been about 400 pounds Aja whose name should go on the Title. Jakri Prasad told his brothers, since the others party are only 3 brothers we put 3 names from our side to make 50-50 share and after the mortgage is paid off, then the whole land will be subdivide. Then there will be seven names in our share but not in written. So the title showed 3 names on each side. The Buchuna Prasad 3 brothers on one side and the other parties instead of three names from elder and down, Jhakari chose himself and the fourth and the fifth brothers on the title. Why he left aside the second one and the third name which we later realize that he had in his mind from the beginning to bit the quite ones. He took on his side whom he thought to be smarter ones and will fight later.

Now to make the payment as I previously said 84 acres of cane land was on Jhakari's name. The seven brothers has separate areas to work on. Every year total harvest used to be close to 1600 tons. That means each one had 200 to 300 tons in each farm. But all the money came on Jhakar account. The first cane payment (the biggest payment) each paid 50 pounds (\$100) for the payment towards the freehold land. I was the clerk of the family used to do all the accounts. Take out the harvesting expenses manure and others. That is 7 x 50 pounds almost paid off the whole amount which I now realize. Those days I was also very ignorant that I was cutting my own throat. I left Drasa and came to Sigatoka in 1953. From 1946 – 1953 that is 8 years they kept on paying 50 pounds each and even after I came away they kept on paying till 1958 when Jhakari went to India and after coming back he demanded 117 pounds each and said if you all pay that amount then I will give your share of freehold. By that time they all realized it was wrong. After paying so much how come they have to pay 117 pounds each to pay off the title. Big trouble started The four left overs refused to

pay and the land ... by remained on the name already on the Title Jhakari, Jagan Nath and Baij Nath (Baiju) which was the main aim of Jhakari Prasad.

You know how I became a third shareholder I never thought I would ever inherit or become a owner of Kaka Jagan Nath's property, because many others especially Jhakan's sons were after his property and many times they warned me indirectly that they will kill somebody who talked about Kaka's property. The only place where I succeeded was they always ill-treated him and on the same place I always showed him the fatherly treatment. After the death of my own father I and Anna always looked them as my own parents. Helped them anyway possible. Gave them clothing and cash whenever they came home. Even one time the whole roof of their new house was blown roof and when I saw they live without roof, only under the ceiling for about six months and when we went to see then Kaka started crying. I went home and give order to Burn's Philip store to give all the materials on my account to Kaka. Even my own brother and mother did not like why I helped Jagan Nath so much. But I never asked them whom they will give their property.

After Kaka's death in 1975 all the cousins were jealous why he gave his property to me. All get together in which Ami Chand also gave hand and helped Tota Ram – the man used to live with Kaka but Kaka was tired of him because he hardly worked on farm and only used to drink and steal people's goat, chicken pig etc. Even he took away chicken and pig from Kaka's place. We had Supreme Court case for more than three years – three-four types of claim but I won all the cases because Kaka made the proper documents. Sam Matawalu was my solicitor. He never asked for fees instead he gave cash and drinks each time I visited and asked for cash for my pocket expenses. The probate was approved in 1978 but because of all the cases I could sell the Johnson land cane farm in 1980 or 1981. Then I paid Matawalu about \$7000 dollars as he billed when my name came on the Title in place of Jagar Nath, then I asked Matawalu to subdivide it into six shares.

When you are writing to surveyor next, tell them to make Badri Prasad's area to 15 acre lot. Their Contract Number as shown in this map attached C.N.14144 and the area 40750 ha. Next to that make one 20 acre lot for them to buy later as I stated earlier.

There is a creek running across, the land as I have coloured blue. In the first place the land was to be divided into two parts for 2 separate families. One side of the creek was for the one family and the other side of the creek the other I have marked Part 1 and Part 2 in red on the map attached. According to the agreement if there is a big difference in area then the land on the hillside to be used to make up the difference. This meant the flat lands on the both sides of the creeks were nearly same.

When the surveyors did that, they found part one that is our side to be 120 acres bigger than the Part 2. Which means 60 acres from our side to go into part 2 to make the area equal. To do that a separate Title was to be made on the hill side. A meeting was called in the surveyors office and the matter was brought up.

A piece of best agricultural land lies between the road and the creek marked red with the area 12-15 acres leased by Prakash's father Rameshwar Prasad. Prakash's father has his house on one corner and Prakash on the other corner. In value that piece of land is higher than 60 acres on the hillside. According to the agreement to follow the

creek, that piece of land should come in part one. Before any talk of subdivisions came, Mr. Ram Suchit from the other party used to collect rent from Rameshwar Prasad. But now when the subdivision started, that came in our side that is part 1.

Now in the meeting about extra land in our side, Ram Suchit and his

Early 80's I and solicitor Sam Matawalu decide to subdivide the title 7006 containing 1378 acres into six shares. Out of those six, one in Canada the executor and Trustee of late Jhakari. Late Baij Nath Trustees and Executors were Mrs Baij Nath and Amila the eldest son. I, Arjun the Executors and Trustee of late Jagannath, and the other party Mr Ram Suchit who is only person alive, out of six and the trustees of both Buchamu Prasad and Ram Sanujh Prasad were Mr Balram, Vinay Kumar and late Buchama's wife Dukhni.

Therefore in the first subdivision meeting the following people were present – ARJUN, Ami Chand, Mrs Baij Nath, Ram Suchit, Balram, Vinay Kumar and Dukhni. One Narend Prasad in Canada was ... According to the registered Agreement signed by the six shareholders, it states that at any time if 3 of the six want to subdivide the land, they can do so. So we started the work and also informed Narend Prasad about it. He agreed that we should subdivide but refused to take part in the costs. All the costs were divided among the other five shares ignoring the sixth one. That is he got his Title free of charge.

Sam Matawalu arranged the bank of ANZ (Australian and New Zealand) for finance. We arranged the Surveyors – Harrison and Grierson in Lautoka. Before that we talked to many other surveyors. Their fees was from 15 thousand to 22 thousand dollars to subdivide the said land into 6 parts. But Harrison and Grierson agreed to do it for 5 thousand dollars only. The Solicitors fees was to be 5 thousand as well. Party were told, you have two choice whether you have 60 acres on hill side with separate Title OR you take the area leasing by Rameshwar Prasad. Ram Suchit agreed that they will have that 15 acres along the creek and not the 60 acres. Since that 15 acre area lies or would have come in Lot 1 of Part 1. Therefore the 60 acres automatically should come in lot 1 which now belongs to me (Arjun).

Another 15 acres of land (freehold), we all agreed to give to our youngest uncle (Kaka) Bachamu Prasad free of charge. The surveyors were told to put extra 15 acres out of Part 1 into Lot 1, to give to Badri Prasad which I will give from my area. That means 60 acres + 15 acres equal to 75 acres shows extras in my area and the average shows by making the area 317 acres. But it is actually $317 - 75 = 242$ acres.

From the beginning the understanding was that whenever the subdivision is done, in Part 1, the Lot 1 should belong to Jhakari, the lot 2 to Baij Nath and the last and Lot 3 to Jagannath. No body lived on the land because there was no cane contract there. Later when FSC (Fiji Sugar Corporation) or CSR Co. (the Colonial Sugar Refining Co.) started giving cane contracts in urban areas, Baij Nath (Ami Chand's father built his house in Lot 1 as it is now and Ram Kirpal's wife (Ram Kirpal son of Jhakari Prasad) built their house in Lot 3 and had a cane contract in that area. Ami Chand's father Baij Nath was very clever and did not allow any tenant to occupy land and cane contract in Lot 2. He and his sons had all contracts in Lot 2. That is in the middle of the whole area. The advantage they now have that they don't have to deal with the tenants now and the separate titles were made. They have a clear title that is

Lot 2. Whereas in Lot one which is mine now and Lot 3, ... as Executors and Trustees have many tenants.

On top of that Baij Nath acquired cane contracts to the name of his wife, himself and his son Ami Chand's wife around the place where they built the house which is now in my area.

While the subdivision was going on Ami Chand and Narend Prasad in Canada discussed that since Ram Kirpals wife had built a house and had cane contract in Lot 3. Ami Chand asked me to take Lot 1 instead of Lot 3 (the estate of Jagan Nath) and give lot 3 to (the estate of Jhakan) in place of lot 1 but he will have Lot 2 (estate of Baij Nath) as it was always to be.

I agreed and said I will have any lot as far as there is no problem in future. Later Jagan Nath did not have any cane contract or his house built on that land the time of subdivision, therefore for me it made no difference which lot I was to get. When it was decided lot 1 will be mine, then Ami Chand request me the bhaiya (brother) since me, my brother and mother have our house in your area and we also have some cane contracts there as well, I will buy about 45 acres around our ... from you and pay all the cost and the price of 45 acres.

I agreed and said since I am not going to come and live with my parents or do any farm in Drasa. I will have to sell all my land one day so why can't I sell 45 acres to you.

We asked the surveyor Mr Ami Chand to make a small note and we both sign so he wrote on a piece of paper.

"I Arjun agree that as soon as the survey is finished, will proceed with further subdivision of lots and transfer 45 acres to Ami Chand. "Boundaries to be finalized in field in course of survey."

Even this does not state that 45 acres will be the part of the estate of Baij Nath. It was Ami Chand himself asked for that area for himself. He himself cannot be the owner of Baij Nath's property. There were two trustees appointed by Baij Nath - His wife and Ami Chand. So there is no reason why I give 45 acres to Ami Chand free of charge. If it was to be the part of the estate of Baij Nath, it should have been included in the Lot 2 to make one title and there was no reason to make another title to include in Lot 2.

When the surveyors made the scheme plan everybody agreed including Narend Prasad and signed (the six parties - papers were sent to Canada for Narend to sign and he did) without all six parties signature the plan would not have been approved. And also when the major plan was prepared by the surveyor that was also signed by six parties (all the trustees of all the parties) including Ami Chand and his mother. That is six titles were made after everybody agreed that the areas shown were perfect. Copy of all this plans can be obtained from Registrar of Titles in Surva.

I still agree to give Ami Chand (now deceased or his sons 45 acres or even more provided they pay price for it. I would not like to evict them for they have their house built on it. If not, I agree to give them their house site free of charge because they

should use their cane contract in the estate of Baij Nath that is lot 2. They did not use that area for cane farm as Tenants but they used as freehold landlord. Therefore since the land now is legally subdivide and they have their price of share as Lot 2, so there is no reason why they cannot use their cane contracts from Lot 1 and Lot 2.

The witness who could prove that the agreement in the meeting that 60 acres be exchanged with 15 acres are Vinay Kumar only. All the others are dead and Ram Suchit is living but disabled who would not be able to explain the truth.

Another thing was that when the scheme plan was made and three sections were shown in Part 1, Ami Chand son of Baij Nath did not agree. He made the surveyors to change the scheme plan. They did not appreciate the idea but had to do it and asked Ami Chand to put all the pegs with his own hand and he did. Then the surveyors worked with those pegs. He told them the surveyors worked with these pegs. He told them that we should have fair share of cultivatable land and do not worry about the hill. The area could be small or large so they worked according to his instruction because Ami Chand was the only one available on the site. I lived in Sigatoka and Narend Prasad in Canada. Therefore how can Ami Chand or his executors say the subdivision is wrong. Ami Chand, the surveyor can prove that the scheme plan was altered because of Ami Chand the Trustee of Baij Nath. Secondly what right Ami Chand's sons have on the estate of Baij Nath. Baij Nath did not appoint Biren Prasad and Salen Prasad as his trustees and Executors. They could be trustees and Executors of Ami Chand. Property of Baij has given a share out of his estate to Ami Chand by his last will.

Now I have given you a fair picture from the beginning to the end. You can put it on your own way and rearrange if necessary. Give the lawyer what he needs and not the whole story. Ring me if you cannot follow any ...

In the map enclosed, our area is marked in heavy dark. The lots 1,2 and 3 are shown in little circles. The parts one and two in red for you to follow.

That agreement on a piece of paper should not have any value. Because it is not registered and does not even make clear why I should give 45 acres to Ami Chand. Does not say it is a part of estate of Baij Nath. Most of the wordings are in short hardly visible. Actually that part of land is the most valuable in the whole property. It is the frontage, close to the road, electricity and water and if subdivide into residential lots it will value more than all our property. Therefore the property of that value should produce in proper agreement if it is to be given away.

Anyway when we are making a separate Title for 45 acres tell the surveyors to make it longer taking Johnson's margin and shouldn't touch the estate the estate of Badri Prasad's 15 acres which we suppose to give free of charge. We don't have to bother about Kaushilia's contract. That can't be missed out for we don't want to make it wider to loose better part along the roadside. If we were to give away, we just have to think of 45 acres, wherever it makes up.

I think that is almost all for the moment. Wish you all the best.

If you want to see the agreement of subdivision of Title 2006 signed by six shareholders, tell To see in one of the large enclosures in the drawer of my room and make photocopy. It is definitely true.

Taji
(Sgd)

Endnotes

¹ A certified true copy of CT 7706 was tendered through **PW1 Virendra Kumar** and marked "PEX02".

² Probate No. 25896 was tendered in evidence and marked **PEX 01**.

³ As confirmed in chief by **PW1**.

⁴ Section 34 says:

Co-ownership

34.-(1) Subject to the provisions of any law for the time being in force relating to trusts and to the provisions of Part XV, unless the contrary intention is expressed in the instrument of title, where two or more persons are registered as proprietors of any estate or interest in land subject to the provisions of this Act, they shall be deemed to be entitled to the same as tenants in common, and on the death of any one of such proprietors there shall be no right of survivorship in the other or others and the share of such deceased proprietor shall pass to his personal representative.

(2) Where two or more persons are entitled as tenants in common to any estate or interest in land subject to the provisions of this Act, they shall unless the contrary intention is expressed in the instrument of title, be deemed to hold the same in undivided equal shares.

⁵ According to **PW1**, Baiju died in 1976. Thereafter, by his last will and testament, Baiju's son Ami Chand Prasad and his widow Hans Raji, were appointed executors and trustees of his estate. Hans Raji later passed away in June 1985. Upon her death, Ami Chand Prasad became the sole executor/trustee of the Baiju estate. Ami Chand Prasad died five years after Hans Raji on 11 June 1990. Upon Ami Chand Prasad's death, the plaintiffs who are his sons, became executors and trustees of the Ami Chand Prasad estate. Also, the plaintiffs, thereupon, became the ultimate executors of the Baiju estate.

⁶ A certified true copy of CT 24843 was tendered in evidence and marked **PEX 03**.

⁷ upon the defendant's summons dated 01 December 1998.

⁸ tendered by **PW1** and marked **PEX 07**.

⁹ as cited with authority by Simon Brown QC of the Queen's Bench Division of the High Court in **Excelerate Technology Ltd - v- Cumberbatch** [2015] EWHC B1. His Honour Judge Simon Brown QC referred to the following dissenting speech of Lord Pearce in the House of Lords in **Onassis v Vergottis** [1968] 2 Lloyd's Rep 403 at p 431 as a useful guideline for judges when assessing credibility.

¹⁰ In **Onassis**, Pearce LJ started by saying that assessing credibility is not just about assessing demeanour – that is – whether a witness appears to be telling the truth.

"Credibility" involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be.

¹¹ Pearce LJ went on to say that the starting point is whether a witness is truthful or untruthful. Having considered that, the Court must still keep an open mind to the possibility that a truthful witness may be telling less than the truth on an issue. By the same token, an untruthful witness may yet be speaking the truth on any other particular issue.

Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue?

¹² Pearce LJ warns that, though a truthful person may tell the truth as he sees it, his recollection of events however may be influenced by various other factors such as to reduce its reliability.

Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? *Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active.* For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred.

¹³ He said as follows:

"... Faced with a conflict of evidence on an issue substantially affecting the outcome of an action, often knowing that a decision this way or that will have momentous consequences on the parties' lives or fortunes, how can and should the judge set about his task of resolving it? How is he to resolve which witness is honest and which dishonest, which reliable and which unreliable? ...

The normal first step in resolving issues of primary fact is, I feel sure, to add to what is common ground between the parties (which the pleadings in the action should have identified, but often do not) such facts as are shown to be incontrovertible. In many cases, letters or minutes written well before there was any breath of dispute between the parties may throw a very clear light on their knowledge and intentions at a particular time. In other cases, evidence of tyre marks, debris or where vehicles ended up may be crucial. To attach importance to matters such as these, which are independent of human recollection, is so obvious and standard a practice, and in some cases so inevitable, that no prolonged discussion is called for. It is nonetheless worth bearing in mind, when vexatious conflicts of oral testimony arise, that these fall to be

judged against the background not only of what the parties agree to have happened but also of what plainly did happen, even though the parties do not agree.

¹⁴ (see New South Wales Supreme Court in Parveen Varma v Gautam Varma & Ors [2010] NSWSC 786); Clune v Collins Angus & Robertson Publishers Pty Limited [1992] FCA 503; (1992) 25 IPR 246, at 253).

¹⁵ Arden LJ in Wetton (as Liquidator of Mumtaz Properties) v. Ahmed and others [2011] FWC A Civ. 61 said:

11.The judge should consider what other independent evidence would be available to support the witness. Such evidence would generally be documentary but it could be other oral evidence, for example, if the issue was whether a defendant was an employee, the judge would naturally consider whether there were any PAYE records or evidence, such as evidence in texts or e-mails, in which the defendant seeks or is given instructions as to how he should carry out work. This may be particularly important in cases where the witness is from a culture or way of life with which the judge may not be familiar. These situations can present particular dangers and difficulties to a judge.

14. In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.

¹⁶Note: **DW1** did try to refer to a copy of a 1954 Agreement purportedly on this subject, but I disallowed the Agreement for reasons I state in the Ruling. Even if I had allowed the 1954 document, I would not give much weight to it, if at all if it did not reflect the actual instructions given to the Surveyors in the 1980s.

¹⁷ The evidence is clear that the Baiju family has been in continuous uninterrupted possession of the said 45 acres for a long time. In cross-examination, **PW1** was referred to some old photographs which are exhibited in his affidavit sworn in support of his injunction application in 1990:

Q. You filed affidavit in support of injunction and photographs in 1990.

A. Yes

Q. Prior to moving to Lot 1?

A. We always resided there.

Q. Your father and family, before residing on Lot 1.

A. Our grandfather lived there

Q. Your father resided at Johnson Road, about 1 km from main Johnson Road.

A. Same answer. My father was born there

Q. Your father moved to current place on or about 1970s.

A. No.

Q. I put to you that when your father moved to that site, he only had a tick timber and corrugated iron house as per your affidavit.

A. Page 1 of structure (?)part of photo is my grandfather's.

Q. That was the only structure there when instructions were given to the Surveyors in 1984.

A. My father's house is on the second page photographs, middle photo built in 1966.

Q. I put to you these structures came after 1970.

A. Not true.

The affidavit (which was tendered and marked **PEX 6**) referred to above deposes inter alia as follows at paragraphs 8 and 9:

8. THAT at the present time sugar cane is grown on the said 45 acres. There is a store premises built on it and there are four dwelling houses with other vegetables and domestic livestock . Annexed hereto and marked "G1 and G2" are the photographs showing all developments on the said land.

9. THAT there are twenty-five (25) persons living on the said 45 acres, who are all members of the family of the said Baijnath Prasad deceased.

DW1, in chief, said as follows:

A. Yes. I have had a look at the Affidavit of Virendra Kumar (PEX6)

Q. Please refer to photos

A. 1st photo on G1. This corrugated iron building was the only building when the titles were issued in 1986. All others were built after 1986 without our knowledge.

Q. When was that house built?

A. Corrugated iron roof originally built in Koro which is 1 km from main Johnson Road. Subsequently moved to bigger property in late 60s or early 70s.

Q. Lot 1 – disputed area of 45 acres in here

A. Best part of Lot 1 is area already farmed by owners of Lot 2. 60 acres is hardly arable.

¹⁸ They plead as follows:

....such possession and occupation of the said 45 acres of land were continued by Baijnath Prasad's Executor and Trustee, the said Jians Raji and Ami Chand Prasad.

¹⁹ As pleaded by the plaintiffs in their statement of claim and which the defendant admits to in his statement of defence.

²⁰ This means also, for example, that there is no concept of trespass between tenants in common (Jacobs v Seward (1872) 1.R 5 HL 464 at 472 as referred to by Blackburne J.J French v Barcham [2009] 1 WLR 1124).

²¹The examination in chief on this point went like this:

- Q. How CT 7006 subdivided?
A. 6 parties instructed surveyors. I Harrison Grierson to carry out.
1/6 of 1378 acres 2 roods 17 perches.
Q. Were there instructions to surveyors?
A. To mark and survey whole area into 6 equal shares.
Q. How did parties agree to subdivide?
A. Arrangement – 1 lot 1 230 acres. Lot 2 230 acres. Because we farmed on Lot 2 and lived on Lot 1, we decided to do a land swap. So ours, 230 acres less 45 acres. So Lot 2 would have 45 acres more.

²² PW1 said as follows:

- A. *As far as I am aware, instructions to divide into six equal shares.*
Q. *How do you know when to not there?*
A. *Having looked at what transpired over the decades, it was quite obvious they would not have come to agreement. They talked and talked and talked and eventuated (sic)*
Q. *That statement was made not out of knowledge.*
A. *It is not out of knowledge.*
Q. *I put to you, initially, when instructions put to Surveyors, Surveyors were asked to demarcate into 6 lots.*
A. *Lots to be equal shares.*
Q. *But you were not there when the instructions were given to the Surveyors.*

²³ PW1 said:

- A. *The instructions were to take out 6 lots*
Q. *When? You have not led the Survey Plans in Court.*
A. *No.*
Q. *I put to you when 6 Lots taken out, Ami Chand was offered to take Lot 1 at a meeting. That is DP 5619 and DP 5620. How many Lots were taken out of DP 5620?*
A. *3 Lots*
Q. *Lot 1 transferred to Arjun?*
A. *Yes.*
Q. *Lot 2 transferred to?*
A. *Ami Chand Prasad*
Q. *I say that the meetings, Ami Chand Prasad was offered to take Lot 1 on DP 5620.*
A. *I cannot recall. There were several hundreds of meetings before agreement was reached. I was not present on any meeting. I did accompany my father to some meetings but I did not wait outside.*
Q. *Your father was offered Lot 1?*
A. *I do not recall.*
Q. *You agree Arjun was not residing there?*
A. *He never resided there. The late Jagannath Prasad did reside there.*
Q. *Your father did not opt to take Lot 1?*
A. *As far as I know, he did not opt to take the whole of Lot 1 but only a portion of Lot 1.*
Q. *I put to you your father opted to take Lot 2.*
A. *Yes.*
Q. *Reason he opted for Lot 2 because there were no sitting tenants on Lot 2. It was vacant land.*
A. *It had 3 sugar cane contracts of which beneficiaries of Bajmath Prasad were there and still there.*
Q. *When he opted to take Lot 2, no sitting tenants on Lot 2.*
A. *Beneficiaries on the land.*
Q. *I put to you in Lot 1, there were persons residing who were not relatives of your or your extended family.*
A. *Not my extended family, but relatives of Jakhri Prasad.*
Q. *At the time, on Lot 1, there were persons other than beneficiaries residing on Lot 1? They had no beneficial interest on the land.*
A. *They were beneficiaries of Jakhri Prasad.*
Q. *The people who live there, were given Notice to Vacate by the late Arjun.*
A. *I am aware that the late Arjun gave Notices to the beneficiaries of the late Jakhri.*
Q. *Because of the fact that there were others sitting on Lot 1, your father opted to take Lot 2 as he did not want to engage in eviction proceedings from Lot 1.*
A. *I do not know.*

Q. How come you do not know?

A. My father's thinking – I do not know. The fact is, there were people occupying Lot 1. That I know. We were living alongside the road. We were the first settlers. Then others came. They cultivated.

Q. Your father would have taken Lot 1?

A. The people concerned who were the registered proprietors of CT 7006 decided to buy land for the family. No one built houses with intention to have concrete buildings taken away. We had land. We farmed Lot 2. Lot 2 is our day to day income.

²⁴ The Certificate of Death No. 71098 (PEX 04) records Ami Chand's date of death as 01st November 2009.

²⁵ Ami Chand (Surveyor) deposed as follows:

5. That when I went to the field, that is physically onto the land, to carry out the survey process and to mark out the rough boundaries that will demarcate the respective shares and boundaries of each shareholder it was found Ami Chand Prasad and Hans Raji and their extended families with their houses, dwellings, stores and cane farms were residing on about 45 acres of that part of the land which was to form part of the share that was to go to and be within the boundaries of the share of Arjun the defendant herein.
6. That these families were immediate relatives and extended families and beneficiaries of the Estate of Baij Nath Prasad and also the immediate relatives and extended families of Ami Chand Prasad and Hans Raji.

²⁶ Ami Chand had deposed as follows:

10. That Arjun was aware and agreed that if this 45 acres went to him and Ami Chand Prasad and Hans Raji and their extended families with their houses, dwellings, stores and cane farms had to be relocated great harm, hardship, inconvenience and expense would be suffered and incurred by the Estate of Baij Nath Prasad and Ami Chand Prasad and Hans Raji and their extended families
11. That it was also agreed and accepted by Arjun that if a separate title in respect of that 45 acres of land was to issue to Ami Chand Prasad and Hans Raji as Executors and Trustees of the Estate of Baij Nath Prasad in addition to another separate title of another 185 acres of land so as to give the Estate of Baij Nath Prasad a total of 230 acres as it was entitled to additional survey and legal costs would be incurred unnecessarily.

²⁷ As Chand deposes:

7. That the late Baijnath was an equal one sixth shareholders and/or owner and/or registered proprietor of Certificate of Title Number 7006. He died before Certificate of Title Number 7006 was decided to be subdivided. He was represented in the subdivision by his Executors and Trustees Ami Chand Prasad and Hans Raji who were his son and wife respectively. His one sixth share was to go to his Executors and Trustees.
8. That if an equal subdivision of Certificate of Title Number 7006 was to be done it would give each of the six shareholders approximately 230 acres or 95 hectares of land each respectively.

²⁸ As Chand deposes at paragraph 12:

12. That then in my presence Arjun and Ami Chand Prasad agreed that the area that comprised the 45 acres where Ami Chand Prasad and Hans Raji and their extended families with their houses, dwelling, stores and cane farms were residing and occupying would continue and remain and be shown as being part of Lot 1 on the survey plan which was the lot that was going to be issued to Arjun and that a separate certificate of title would issue for lot 1 on the name of Arjun and that Arjun would hold that 45 acres where Ami Chand Prasad and Hans Raji and their extended families with their houses, dwellings, stores and cane farms were residing and occupying as Trustee for Ami Chand Prasad and Hans Raji who were the Executors and Trustees of the Estate of Baij Nath Prasad at the time. Arjun specifically in my presence agreed and declared and assured Ami Chand Prasad that he would not transfer, mortgage, charge or encumber the certificate of title for lot 1 when issued to him without first transferring the said 45 acres where Ami Chand Prasad and Hans Raji and their extended families with their houses, dwellings, stores and cane farms were residing and occupying. In my presence it was agreed that Arjun would execute a relevant transfer document and other necessary documents to issue a separate certificate of title and vest the said 45 acres unto Ami Chand Prasad and Hans Raji as the Executors and Trustees of the Estate of Baij Nath Prasad and with all the costs of survey, transfer and subdivision to be borne by the Estate of Baij Nath Prasad and/or Ami Chand Prasad and Hans Raji.

²⁹ As Chand deposes at paragraph 13:

13. That based on the above representations and promise and assurance Ami Chand Prasad and Hans Raji on behalf of the Estate of Baij Nath Prasad agreed to vary and varied their instructions to Harrison & Grierson & Partners and me and the Registrar of Surveys to give effect to the agreement between Arjun and Ami Chand Prasad and Hans Raji as Executors and Trustees of the Estate of Baij Nath Prasad.
18. That the survey pegs and marks on the said land and the survey plans were amended and changed and varied pursuant to the above representations, agreements, promises and arrangements.

19. That thereafter new separate certificates of title were issued to Arjun for Lot 1 on Deposited Plan Number 5620 and to Ami Chand Prasad and Hans Raji as Executors and Trustees of the Estate of Baij Nath Prasad for Lot 2 on Deposited Plan Number 5620. Lot 1 included the 45 acres where Ami Chand Prasad and Hans Raji and their extended families with their houses, dwellings, stores and cane farms were residing and occupying which Arjun held as Trustee for Ami Chand Prasad and Hans Raji as Executors and Trustees of the Estate of Baij Nath Prasad plus an additional 45 acres which was cut out from Lot 2 which belonged to Ami Chand Prasad and Hans Raji as executors and Trustees of the Estate of Baij Nath Prasad.

³⁰ The examination in chief of DWI on this point went as follows:

- Q. You know how subdivision was conducted?
A. Original Agreement was drawn up in 1954. The land was acquired in 1946. It took years to pay it off.
Q. You refer to the original Agreement in 1954. Did you ever come across this document?
A. Yes.
Q. Did you have the original of that Agreement?
A. Yes. I have seen a copy of that Agreement. I do not think I have seen Agreement (original)
Q. Would you recognise it?
A. Yes

³¹ He said as follows:

- Q. Have a look at this document (your father's letter to you). Can you tell us what the letter says as per the agreement about the land?
A. Lot 1,2 and 3 were sub-divided. Lot 1 has 70 to 80 acres more than others. None of the 6 lots is anywhere near the 1/6 estimate. Strangely, if you add up all lots, total is short by 33 acres of 1378 acres. I do not why this is so. My father was to get Lot 3. Pleading by Mr. Naren Prasad that because Ram Kirpal and wife already farming at They had option to take that Lot. My father moved to Sigatoka. He had no intention of Drasa. Baijnath, majority of his farm in Lot 1. Many squatters in Lot 1. Baijnath opted to take Lot 2. He happily took Lot 2 knowing Lot 1 had bigger acreage but least amount of fertile land.....

³² DWI said as follows:

- Q. *At meeting, agreed land had to be split up into 2 parts and into 6 parts?*
A. *One part was to be between the three brothers. The other part was to be between the 3 brothers in law. There is a creek running through the middle of the land. There is a road also. The stream is the demarcation line between the two divisions. Shareholders all agreed that it would be impractical to divide the land by two at 50% and further divide 1:3 each because there were flat areas, a lot of vacant hilly lands. None of shareholders had intention of relocating and moving families. Families were supposed to remain in areas they were cultivating. When...."who should get what", if one gets 5 acres of fertile land, 20 to 30 acres of hilly land.*
Q. *Explain*
A. *4-5 acres of flat land vs hilly land. More productivity on flat land. Subdivision went amicably. East side was to be given to sisters (brothers in law). The west side to be given to brothers. During sub-division, brothers side, Lots 1, 2 and 3, subject of this case. Lot 1 closest to main road. Lot 2, middle. Lot 3, north end. Lot 3 had wife of late Kirpal. Lot 2 vacant small portion farmed by Baijnath family. Lot 1 had the most sitting squatters. Farmed by Baijnath children. 15 acre portion of Lot 1 farmed by Rameshwar Prasad was to come to Lot 1. Sisters were already charging rent on that Lot. They assumed dwellings of that Lot on brothers side of creek. That caused a problem. Problem being, they did not want to resettle. Offer made for that 15 acres of flat land that would fall on Lot 1. Sisters side agreed to give up 60 acres of hilly side for 15 acres of flat land on brother's side. That cause problem as Lot 1 would have lots of land compared to Lot 2. Lot had best amount of land.....*

³³ PWI was referred to paragraph 13 of the statement of claim in cross-examination. When asked why he has not produced the Deed pleaded therein, PWI replied as follows:

- A.we knew there was a Deed written by both parties and late Arjun at the Surveyor's Office. It was in writing. We knew it existed. We did not have it handy. However, at later stage, we got it out of Harrison & Grierson, Auckland Office. That is where all the files were kept. We knew there was a written Agreement. There was Agreement made in presence of some witnesses. It was on a Plan. However..... That is why we sought injunction and went looking for Agreement. That is why we did not file Agreement with injunction application.
Q. Have a look at "ACI" of Ami Chand Affidavit – the writing on Survey Plan. It is not a Deed.
A. It is not a Deed.
Q. You did not have that in your possession when you instructed lawyers?
A. I did not have it.
Q. Yet, you gave instructions as per paragraph 13 of Statement of Claim that there existed a Deed.
A. We believed there was a Deed.
Q. You did not have the document with you.
A. We did not have the document.
Q. The document that you knew existed was not a Deed.
A. Without going into the legalities, for me it was a Deed.

- Q. Look at that document again, Surveyor's Instructions, you would agree that there was no specific date on the "Deed"?
- A. We maintain ...sometime in 1984.
- Q. Is there a date on this document that you refer to as the "Deed"?
- A. I cannot see date on Deed. But all the conversations led to this agreement.

³⁴ DWI was cross-examined as follows:

- Q. *Arrangement with regards to Lot 1 and Lot 2 initially, when Lots sub-divided. Who was allotted Lot 1?*
- A. *Allocation did not take place till acreage determined. There was no haggling as to who got what lot. My dad thought it would be better for him to get Lot 3. He asked to opt out of that as Kirpal family already farming that. My dad spoke to Ami Chand to take Lot 1 as Ami Chand Prasad came contracts on Lot 1. Baiju was cunning. He opted for Lot 2 as it had least amount of issues with squatters. My father said –"yes...Ok.. I will take Lot 1". After 1987, my father and I left Fiji and went to New Zealand. The land was unattended to. We have no income from that land. Most squatters and tenants leases expired. Pine trees stolen by people on land. No one charged. We try to sell but hindered by Court Orders and caveats.*
- I came to Fiji 20 to 25 times. A lot of costs. My father has said in letter already that he had never agreed to give 45 acres to Ami Chand Prasad and not to estate of Baiju. He agreed to give 45 acres for consideration.*

³⁵ In cross-examination, DWI said:

- Q. Letter says, 45 acres of land is to be sold to Ami Chand Prasad.
- A. Yes.
- Q. He agrees to sell to Ami Chand Prasad.
- A. Not only to him.
- Q. What your father says in the letter is not in the Statement of Defence
- A. I agree.
- Q. Let us go to the letter. Paragraphs 1 to 4.
- A. Reads paragraph 1 to 4.
- Short Break between 10.30 a.m. to 11.00 a.m.
- Q. Paragraph 2. Reference to "**small note**". Was that piece of paper attached to the letter?
- A. Not sure if attached. I may have misled lawyers that "Agreement" attached to letter. It may have been a note or diagram. If note attached to letter, my father would not have written note on letter.
- Q. Look at last page of DEX 7.
- A. Yes.
- Q. Small note there.
- A. Yes.
- Q. Reads notes.

"I Arjun agree that as soon as survey is finished, will proceed with further sub-division of Lot 1 and transfer 45 acres to Ami Chand. Boundaries to be finalised in fielding course of survey"

- A. Yes.
- Q. Same reference in father's letter.
- A. He repeated the whole thing.
- Q. Same contents in last page.
- A. Yes.
- Q. Your father has signed.
- A. I have never seen original of note. He signed. It appears to be my father's signature but need original. My father, in letter, has not written "attached note".
- Q. The last page is part of your exhibits
- A. Yes.
- Q. Your father's letter, at page 11, says: "**I Arjun**"
- A. Yes.
- Q. Note says the same thing.
- A. Yes.
- Q. Besides the note, your father says
- A. I can only confirm if I see original of my father's signature.
- Q. At page 11 of your father's letter, he asks Surveyor to make a small note and "we both sign".
- A. Yes.
- Q. So he wrote a piece of paper
- A. Yes. Same words.

- Q. You have read letter?
A. Yes.
Q. "We ask Ami Chand to make small note and we later sign"
A. Yes. Letter says he signed note. He does not deny signing note. My father was grade 11 Senior Cambridge Educated.
Q. Did he sign a plan or piece of paper? You testified that in his letter, he does not deny signing note.
A. No
Q. Go back to last page of letter (Plan with Note). Something else is written beside that note.
A. Yes.
Q. Your father wrote it?
A. No. That is my handwriting.
Q. What have you written?
A. This was written after sub-division. 45 acres to be for consideration.
Q. Were you there when it was written?
A. No. I have a bit of doubt that this attachment was with letter. This piece of note given to me as another paper. I would have jotted this myself. I was not present when original note written.
Q. Back to note: "I Arjun agree.....". This was written and signed before sub-division?
A. Not sure.
Q. "...as soon as survey finished..."
A. If I say "yes"...I contradict myself.
Q. So it was written before survey finished and titles issued.
A. Yes.
Q. Before survey finished, safe to assume your father executed as trustee of Jagannath estate
A. Yes. Ami Chand Prasad would have executed as executor/trustee of estate of Baiju
Q. In CT 7006, 2nd page, 3rdyour father is registered on title as executor/trustee of estate of Jagannath over one undivided 1/6 share.
A. Yes
Q. On same title, the late Ami Chand Prasad is registered proprietor of 1/6 share of estate of Baiju Prasad.
A. Yes.
Q. This before survey finalised.
A. After survey finalised.
Q. When new titles issued?
A. July 1986.
Q. Look at date – 24 July 1980 when your father executor.
A. Yes – he held as executor/trustee before trustee finalised.
Q. Transmission By Death..not transfer
A. O.K
Q. From your answers, late Arjun's portion of land not given to him before survey finalised.
A. Yes
Q. Late Ami Chand Prasad's name not registered on separate title for estate of Baiju before survey finalised.
A. Yes
Q. Before survey finalised, Arjun and Ami Chand acting as executor and trustees of their respective estates?
A. Yes
Q. Last page of letter – "I Arjun.....". Does not say anything about costs.
A. No costs. No price.
Q. Does not say anything about Ami Chand Prasad paying Arjun consideration for the 45 acres.
A. Does not say so.
Q. Page 11 of letter, paragraph 2, your father says: "We asked Surveyor.....and we both signed". That is – he and Ami Chand Prasad.
A. "We" could be a reference to Ami Chand the surveyor or Ami Chand our cousin.
Q. "We asked Surveyor Ami Chand"
A. Yes. ...When I read letter, I did not look at it as issue of construction as it is now.
Q. Last page of letter (read). He is talking about discussions with Ami Chand.
A. Yes. It may be a reference to Ami Chand the surveyor rather than Ami Chand Prasad the plaintiffs 'father.
Q. I put to you it means Arjun and Ami Chand Prasad, Executor and Trustee of the estate of Baiju.
A. We should verify signatures.....
Q. Terms of little note. What was signed on last page. This is not a registered agreement.
A. No. Father knew.
Q. See page 13 of letter. Last paragraph. "That Agreement....."

- A. O.K
- Q.
- A. He educated to Senior Cambridge
- Q. He says that agreement was on a piece of paper
- Objection from Mr. Nand
- Q. You agree it is an Agreement
- A. Depends on legal argument.
- Q. He is educated. He says "Agreement"
- A. He says "Agreement".
- Q. Because it is safe to assume this was agreement
- A. According to my father, its not a contractual agreement.
- Q. I am talking about what he has written
- A. He says "Agreement"
- Q. Safe to say that in your father's mind, it was an Agreement.
- A. I do not know what was on my father's mind
- Q. I put to you that in his mind, it was an Agreement on a piece of paper
- A. No. He is denying that it is an Agreement
- Q. Your father has signed "Agreement". See pages 10 to 11 of the letter. "Why can't I sell 45 acres to you". Is it correct that the terms/words of small note are the instructions to Surveyor?
- A. Not. Cannot assume that. I am not sure. My father said it took many years to get everyone to agree to Scheme Plan. Ami Chand Prasad was the last to sign on Scheme Plan.....he told me he did not place value on paper. Not contractual agreement.

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- Q. Refer to page 13 of Letter where your father says: "**Now I have given you a fair picture...**"
- A. Lots of things in his story is irrelevant.
- Q. You would say things to suit your case.
- A. Yes.
- Q. Refer to page 11 of your father's letter. "**We asked Surveyor....**". Would not your father have asked Surveyor to record his intention of selling as well as the price if that was in fact the arrangement?
- A. Yes.
- Q. If he was selling, he would ask Surveyor to put price on note.
- A. There would have been a whole contract.
- Q. He would have asked surveyor to put price if that was the arrangement.
- A. Conversely, he could have put "Free of Charge".
- Q. You agree price not written. But Arjun has signed a note.
- A. Agree price not written.
- Q. But in letter, he said: "We both asked surveyor for small note and we both sign".
- A. Yes.
- Q. Page 12 of Letter. Look at paragraph 2: "**I still agree.....**"
- A. Reads

³⁶ DW1 also said as follows in cross-examination:

- Q. Refer page 13 of your father's letter, line 4: "Ami Chand, the Surveyor"
- A. Reads
- Q. So if Ami Chand (Surveyor) was to give evidence, he would assist Court in deciding alteration of Scheme Plan.
- A. Yes.
- Q. It would also assist us
- A. Yes
- Q. If Surveyor had given evidence, his evidence would assist us
- A. Yes

³⁷ DW1, in cross-examination, said as follows:

- Q. Your father agreed to give house site for free.
- A. Yes. House site. Not the full 45 acres.
- Q. Ami Chand and family had built houses on it.
- A. Yes.
- Q. Houses built by the late Baiju Prasad.
- A. One house.
- Q. I put to you that the houses there were built by the late Baiju Prasad
- A. Only one house was there before the subdivision. Not homes.
- Q. In your father's letter, page 9, he says: "**the houses were built by Baijnath**".
- A. Reads

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- Q. He says Baijnath built house on Lot 1 where it is now
A. Yes
Q. Was Baijnath alive in 1986?
A. I need to check on that.
Q. He was not alive in 1986. He died in February 1976. You agree Baiju house on Lot 1 before Lot subdivided.
A. Yes.

³⁶ DW1 was cross-examined as follows:

- Q. Reason why your father did notagreement is because the 45 acres is the most valuable part.
A. Absolutely. He did notAgreement. He has not sold land yet.
Q. Your father understood that the 45 acres is the most valuable...more valuable than the rest of the land. Refer to his letter (to the part marked **)
A. Yes
Q. That is the reason he did not transfer to Baiju estate free of charge
A. There was never an agreement to transfer free of charge
Q. Refer to page 13 of letter beginning with the words: "That Agreement a piece of paper"
A. Reads
Q. Because 45 acres is the most valuable, your father says he will give homes site free of charge
A. Reads page 9: "I agree....."
Q. I put to you ...he has seen the value of the 45 acres...he is renegeing
A. No
Q. Ruthless. He had agreed to transfer 45 acres to Baiju estate
A. Yes. If Baiju estate will pay.
Q. Paragraphs 16 and 17 of Statement of Claim may I lead?
CT. Ok
Q. Your father specifically states, he will give 45 acres free of charge. Title came to him in 1986.
A. Yes.
Q. He advertised property 08 September 1988.
A. Yes
Q. Reads advertisement.
A. I have not seen advertisement
Q. Pillay Naidu & Associates have advertised on your father's instructions. Following the advertisement, Ami Chand Prasad caused a caveat to be placed on Lot 1 on 19 September 1988.
A. Yes

³⁹ PW1 said as follows in chief:

- Q. What was the arrangement regarding 45 acres?
A. Arjun to hold that on trust for us. And then to discharge to us once survey completed. 45 acres still with Arjun estate. But we still occupying it to this day.
Q. Arrangement between Arjun to hold 45 acres...
A. My father and Arjun. 3rd party witness. His name is John Krishna JP.
Q. Recall the terms?
A. Arjun would hold 45 acres and we give him 45 acres in exchange. As soon as title issued to late Arjun's name, he would discharge 45 acres to us.
Q. Who was to pay for costs of subdivision?
A. Estate of Baijnath Prasad. I was present there physically. There is a document to record this. It is in one of the Plans signed by late Arjun and my father.
Q. If I was to show you this document...have you read it?
A. I know of it. Yes. I would recognise the document. Signed by Kolinio of Harrison Grierson.
Q. Based on this agreement, what were the instructions to surveyors?
A. Lot 1 – will have 230 acres plus 45 acres. And we have 180 acres on Lot 2. Surveyor is Ami Chand. Now deceased.

⁴⁰ PW1's evidence on this point follows:

- Q. Any documentation of this?
A. Yes.
Q. What documentation?
A. It's this document. Writing not clear. It's a surveyed
Q. You know who surveyed?
A. Surveyed by
- Q. Who prepared document?
A. Mr. Chand of Harrison Grierson.
Q. When prepared?
A. After initial instruction to subdivide into 6 equal shares

- Q. Why document prepared?
 A. So that both parties will have exact shares.
 Q. Which parties present when agreement made?
 A. Ami Chand, my father, and Arjun. Only they. Alongside with others. Also a JP who was negotiator.
 Q. JP?
 A. John Krishna.
 Q. How you know this?
 A. I was around and about. I was there when they talk about swapping land....
 Q. Would you know what they agreed to?
 A.. Lot 2 Baiju to give 45 acres of land plus 5 acres for late Jaikri Prasad towards Lot 1 and Lot 1 on South East corner.

⁴¹ PW1's evidence is as follows:

- A. Can't recall.
 Q. Swap and initial instruction to surveyor?
 A. New instructions relayed to surveyor by estate of Baiju and estate of Jaganath by late Ami Chand and Arjun.
 Q. Where was change of instruction noted?
 A. On Survey Plan
 Q. What Survey Plan?
 A. Annexed to Affidavit of Ami Chand.
 Q. Have a look at this document. Is it signed?
 A. Yes. Arjun and Ami Chan Prasad.
 Q. Anyone else witness?
 A. Yes. Witnessed.
 Q. What does content say?
 A. *"I, Arjun, agree that as soon as survey finished, proceed with further subdivision to be finalised"*
 Q. How do you know Arjun and Ami Chand Prasad signed?
 A. I am familiar with their signatures.
 Q. Is this document part of documents.....part of estate documents?
 A. Yes.
 Q. Wish to tender

⁴² PW1's cross-examination on this point went as follows:

- Q. I put to you that the defendant is willing to transfer 45 acres subject to payment of consideration.
 A. I deny that. A matter swap. Titles prove it. We gave it to him. We caused survey to that. And we transferred. Why should we pay?
 Q. Look at Transfer Document. No encumbrance registered on Lot 1. At the time transfer effected, he could have had registered a title over his interest.
 A. This is covered by the affidavit of Ami Chand (Surveyor).
 Q. When transfer documents signed before lawyer, all six parties went before a solicitor to sign and execute transfer.
 A. Yes. But we stress and emphasise that before survey of 1 of 1 and Lot 2, there was an agreement made.
 Q. He could have executed a Deed of Trust?
 A. We say there was an agreement....all this done on trust.....
What followed was some further cross-examination along the same line and then the following was put to PW1
 Q. The arrangement regarding the 45 acres was for your father to purchase from Arjun. The Agreement was for Ami Chand Prasad to purchase.
 A. Disagree.
 Q. I put to you that Arjun, at all material times, agreed to transfer 45 acres to Ami Chand – not to the estate – at a consideration.
 A.(response not clear on Court records)
 Q. Estate not mentioned in Survey Document
 A. Yes.
 Q. You agree, nowhere in any of the documents produced, no written document, in which an area of 45 acres was to have been transferred by Arjun to estate.
 A. We stick to "Agreement/Deed".
 Q. No other document. Sale & Purchase Agreement, or Trust
 A. No other document.

⁴³ The Subdivision of Land Act of Fiji defines "sub-division" to include inter alia partition.

⁴⁴ Hepburn, Samantha 2001, Principles of Equity and Trusts, Cavendish Publishing, Sydney, N.S.W..