**IN THE HIGH COURT OF FIJI**
**AT LABASA**
**CIVIL JURISDICTION**

Civil Action No. **HBC 11 of 2015**

**BETWEEN** : **MANOJ KUMAR**

***1st PLAINTIFF***

**AND** : **ADI NARAYAN**

***2ND PLAINTIFF***

**AND** : **PREM CHAN**

***3RD PLAINTIFF***

**AND** : **AMAR DEO**

***4TH PLAINTIFF***

**AND** : **JAMUNA PRASAD**

***5TH PLAINTIFF***

**AND** : **PRATAP CHAND.**

***6TH PLAINTIFF***

**AND** : **SATYA WATI**

***7TH PLAINTIFF***

**AND** : **ANAND PRASAD**

***8TH PLAINTIFF***

**AND** : **DINESH CHAND**

***9TH PLAINTIFF***

**AND** : **SUMITRA WATI aka SUMITRA** as the Administratrix in the Estate of Moti Lal

***10TH PLAINTIFF***

**AND** : **BAL RAM**

***11TH PLAINTIFF***

**AND** : **VIMAL CHAND**

***12TH PLAINTIFF***

**AND** : **SANTARAM AND SHIU RAM** as Executor and Trustee of the Estate of Ram Bram

***DEFENDANTS***

**BEFORE** : M. Javed Mansoor, J

**COUNSEL** : Mr. S. Sharma and Ms. S. Naidu for the appellants

Mr. S. Kumar for the respondents

**Date of Hearing** : 20 October 2020

**Date of Judgment** : 22 July 2022

# JUDGMENT

*APPEAL Interlocutory injunction – Joint tenancy – Tenancy in common – Severance – Survivorship — Undertaking of damages – Balance of convenience – Constructive trust – Prescription – Whether injunction should be issued in the circumstances of the case*

The following decisions are referred to in this judgment:

a) *Wakaya Ltd v Chambers [2012] FJLawRp 70; [2012] 2 FLR 76 (9 May 2012)*
b) *Jas v Ram [2015] FJHC 172 (11 March 2015)*
c) *Jas v Ram [2016] FJHC 652 (19 July 2016)*
d) *Gissing v Gissing [1971] AC 886*
e) *Nisha v Munif [1999] FijiLawRp 1; [1999] 45 FLR 246 (10 March 1999)*
f) *Semi v Wati [2010] FJHC 279; HBC 35.2005 (7 June 2010)*
g) *Prasad v Wati [2011] FJHC 442; HBC 315.2010 (12 August 2011)*
h) *Williams v Hensman [1861] 1 J & H 546; 70 ER 862*
i) *Malayan Credit v Jack Chia – MPH Ltd [1986] 1 All ER 711*
j) *Burgess v Rawnsley [1975] Ch 429*
k) *Dunbabin v Dunbabin [2022] EWHC 241 (10 February 2022)*
l) *Natural Water of Viti Ltd vs. Crystal Clear Mineral Water (Fiji) Ltd [2004] FJCA 59; ABU 0011.2004S & ABU 0011A.2004S (26 November 2004)*
m) *Graham v Campbell [1878] 7 CH D 490*
n) *The Financial Services Authority v Sinaloa Gold plc and others [2013] 2 WLR 678*
o) *Hoffmann - La Roche (F) & Co. AG v Secretary of State for Trade and Industry [1974] 2 All ER 1128*
p) *Honeymoon Island Fiji Ltd v Follies International Ltd [2008] FJCA 36; ABU 0063.2007S (4 July 2008)*
q) *Professional West Realty (Fiji) Limited v Professional Limited [2010] FJCA 50; ABU 0072.2008 (21 October 2010)*
r) *NWL v Woods [1979] 3 All ER 614*
s) *Buckinghamshire County Council v Moran [1989] 2 All ER 255*
t) *Mulcahy v Curramore Pty Ltd [1974] 2 N.S.W.L.R*

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**1.** This is an appeal from the decision of the master refusing to grant an interlocutory injunction among other reliefs which the appellants sought sometime after they filed an action by writ. After pleadings were closed, the appellants filed an application seeking orders to restrain the respondents from dealing in the lands, which the respondents say legitimately belong to them. The appellants occupy the

plots of land on which they have constructed dwellings, and claim that they are the rightful owners, that the respondents, though they are the registered proprietors, are holding the lands for them in trust and are obliged to transfer title to the appellants.

**2.** The appellants filed action against the respondents on 4 May 2015. By their amended statement of claim dated 11 April 2016, the appellants pleaded the following matters. They are *bona fide* purchasers of separate lots contained in a property bearing certificate of title number 21230. The respondents are the last registered owners of the property. The previous registered owners were Ram Baran and Ram Jas. They had purchased the property from South Sea Lands Limited for a sum of $11,250.00. By agreement dated 26 January 1997, Ram Baran and Ram Jas agreed to divide the property equally. They subdivided the property into two equal lots and agreed that Ram Baran would take lot 1 and Ram Jas lot 2. The appellants agreed with Ram Jas to purchase ¼ acre of the property for residential purposes. In terms of their agreement with Ram Jas, the appellants were to engage surveyors and obtain a registered plan depicting the portions that would be conveyed to them. Ram Jas undertook to execute the transfer documents in respect of the portion to be conveyed. However, Ram Jas died on 2 August 2000. Thereafter, Ram Jas's son Mishri Prasad was appointed as executor and trustee of his estate. Upon the death of Ram Jas, the surviving owner, Ram Baran, became the lawful owner and registered proprietor of the property. Ram Baran died on 25 August 2010. Sant Ram and Shiu Ram were appointed as his executors and trustees. The respondents became the registered owners of the property upon the death of Ram Baran. The appellants engaged a surveyor to prepare a sub division plan of the portion of the property they had purchased from Ram Jas. The sub division plan has been approved by the director of town & country planning, Savusavu Town Council and the Ministry of Health. Solicitors were engaged to apply for a new certificate of title. However, the respondents have refused to execute documents of title. Mishri Prasad, the son of Ram Jas, instituted proceedings in the High Court of Labasa for a declaration that Ram Jas held the property as a tenant in common and not as a joint tenant. The orders he sought were not granted, and Mishri Prasad is unable to execute transfer documents. The appellants are residing in lots 1, 2, 3, 4, 5, 7, 9, 10, 11, 12, 13, 16 and 17 which have

been purchased from Ram Jas. The appellants have been residing on these lands for several years. The purchase consideration for the land was paid in full to Ram Jas, his executors and trustees. The appellants have paid sub division costs and charges. The agreement between Ram Jas and Ram Baran entered into on 26 August 1997 is binding on the respondents. Ram Baran, the respondents' father, sold his share of the property to various purchasers. The respondents' refusal to complete the sale is a breach of the agreement between Ram Jas and Ram Baran. This was the appellants' case.

**3.** The appellants sought a declaration that the agreement between Ram Jas and Ram Baran was an agreement to partition CT 21230 into two separate lots for each owner, for the respondents to execute transfer documents to convey the separate lots individually to the appellants, for declarations that the respondents are holding the several lots in trust for the appellants and that the appellants are in adverse possession of their plots of land, for injunctions restraining the respondents from disposing CT 41523 until the determination of the case and an injunction restraining the respondents from entering the lands occupied by the appellants, damages for breach of contract, and general and punitive damages.

**4.** By their amended statement of defence, the respondents denied *inter alia* that the appellants had any legitimate interest in the subject land, and prayed for dismissal of the action. They pleaded *inter alia* in this way. The conveyance to Ram Jas and Ram Baran was as joint tenants. They recorded the death of Ram Jas on 13 November 2013. Ram Baran was the sole registered proprietor of CT 21230 from 2 August 2000, the day on which Ram Jas died. As the present registered proprietors of CT 21230, they have taken steps to sub divide the property and deal with it. By ruling dated 11 March 2015, the High Court of Labasa disallowed an application by Mishri Prasad to sever the joint tenancy in case number 34 of 2014. The appellants are in illegal occupation of the property and are subject to eviction proceedings.

**5.** In their reply to the amended statement of defence, the appellants pleaded *inter alia* that they purchased separate lots of land from Ram Jas when he was alive and was a registered owner of the property, that Ram Baran and Ram Jas agreed to sell

their portions of land by dividing the land into separate lots, that the respondents have the authority to execute documents in respect of CT 21230, that the respondents had full knowledge of the agreement dated 26 August 1997 executed between Ram Jas and Ram Baran.

**6.** Several applications were made to the master after the filing of the action. What is germane to this appeal is an application for an interlocutory injunction filed by the appellants after the closure of pleadings and discovery, pre-trial minutes were filed and when the master was ready to fix the case for trial. The orders sought by the summons filed on 9 July 2018 are stated in this way: "That the defendants either by themselves or through their agents, employees or servants be restrained from sub leasing, alienating, mortgaging or transferring or dealing of any kind in respect Certificate of Title Number 41523 until the final determination of this matter".

**7.** An affidavit, supporting the application for an injunction was given by the ninth appellant, Dinesh Chand. He averred that while the case was pending, the respondents executed transfer documents on 9 July 2015 to transfer certificate of title number 41520 to one Racheal Rohini Kestevan and Salesh Biran Prasad. He averred that the transfer was executed even though the respondents were aware that the appellants are claiming rights to CT 41523. However, the transfer registration number 840969 endorsed on CT 41523 was cancelled by the Registrar of Titles due to certain errors in the transfer document. Mr. Chand averred that the appellants have resided on the lands purchased by them for more than 20 years and have developed the lands during that time. He claimed that the respondents were attempting to mortgage the land under CT 41523. Mr. Chand averred that unless restrained the respondents would attempt to mortgage, sublease or transfer the property to a third party, and that thereby the appellants would be prejudiced.

**8.** The respondents opposed the application and filed an affidavit in opposition sworn by Sant Ram, the first named respondent. He stated that he and his brother are the beneficiaries of the estate of Ram Baran. He averred that Ram Baran and Ram Jas were joint tenants of the property described in CT 21230. An instrument to sever the joint tenancy between Ram Baran and Ram Jas was not registered with the Registrar of Titles before the death of the joint tenants. Following the death of Ram Jas on 2 August 2000, Ram Baran became entitled to Ram Jas's interest by the

right of survivorship. Ram Baran died on 25 December 2010. He said that the respondents caused to be registered at the Registrar of Titles, Ram Jas's record of death and a transmission by death over CT 21230 on 7 September 2013. He averred that CT 41523 is a sub division of CT 21230, and that the respondents are the registered proprietors of CT 41523. He said that the appellants are illegal occupants of CT 41523 and that they have no interest to the land equitable or otherwise. He averred that the application for an interlocutory injunction was to prevent the respondents from exercising their rights over CT 41523. Pointing out that the appellants have not provided an undertaking as to damages, Mr. Sant Ram averred that CT 41523 had a market value of $514,000.00 and that the undertaking should be a sum equal to or greater than the land's market value.

**9.** In his affidavit in reply, Mr. Chand denied that the appellants were in unlawful occupation of the land. He stated that the appellants were invited by Ram Jas to purchase half of the property. The Appellants, he said, were *bona fide* purchasers. The property, he averred, was not sub divided and issued as separate lots before Ram Baran became the owner after the death of Ram Jas. He averred that the appellants were in occupation of the lands for more than 20 years, and have constructed large dwelling houses. He gave an undertaking as to damages, and described himself as a businessman with a healthy bank balance. He tendered a bank statement with his affidavit showing a bank balance of approximately $22,473.80. Mr. Chand declared that the other appellants also had healthy bank balances and that they have carried out substantial development on the lands. He estimated the value of each land plot occupied by the appellants to be $200,000.00.

**10.** The application for injunction came before the master. By her decision dated 10 August 2018, the master said that the appellants failed to show that there were serious issues to be tried. The master held that the appellants have not shown that they have any legal or proprietary rights over the property or that the respondents have infringed the rights of the appellants. She did not think it was necessary to consider the balance of convenience as between the parties, for which she relied upon the Fiji Supreme Court decision of *Wakaya Ltd v Chambers*[1]. The master pointed out that the affidavit in support given on behalf of the appellants did not

[1] [2012] FJLawRp 70; [2012] 2 FLR 76 (9 May 2012)

contain an undertaking in damages, and was only given in the affidavit in reply. As a result, it was held, the respondents were deprived of the opportunity to reply. In any event, the master was of the view that the appellants' undertaking as to damages was woefully inadequate. The application for injunction was dismissed with costs in a sum of $800. The present appeal is against this ruling.

**11.** The appellants' grounds of appeal are reproduced below:

*i.* "That the learned Master of the High Court erred in Law in not exercising proper discretion, in refusing to grant an interlocutory injunction in favor of the appellants;

*ii.* That the learned Master of the High Court erred in Law and in fact in failing to properly evaluate that there is a serious issue to be tried.

*iii.* That the learned Master of the High Court erred in Law and in fact in holding that there is no serious issue to be tried as the Appellants Statement of Claim discloses several causes of action which consists of serious issues to be tried;

*iv.* That the learned Master of the High Court erred in Law in failing to find and take into account, in the circumstances of the case that damages are not an adequate remedy;

*v.* That the learned Master of the High Court erred in Law when dealing with the issue of the "balance of convenience" in failing to take into consideration all material facts and circumstances of the case and in particular that the balance of convenience favored Appellants;

*vi.* That the learned Master of the High Court erred in Law and in fact in not considering that the undertaking provided by the Appellants was adequate and further failed to take into consideration the extent of injuries, losses or damages the Respondents will suffer if the Injunction is granted".

**12.** The application for leave to appeal was heard by Kumar J (as he then was) on 4 October 2018. Leave to appeal the master's decision was granted on 10 June 2020 by Kumar, acting CJ (as he then was). By the same ruling, Kumar, acting CJ, restrained the respondents from disposing or selling off the property comprised

and described in certificate of title number 41523 until final determination of this appeal.

**13.** In his ruling the acting CJ (as he then was) stated that the applicants had raised questions that were not frivolous or vexatious, and the questions were quite serious in nature. He expressed the view that the appellant's claim of a constructive trust was not fully considered by the master, and that the ruling had not considered the matter of the balance of convenience. In arriving at my decision, I have taken into consideration the ruling by Kumar, acting CJ.

**Joint tenancy or tenancy in common?**

**14.** The controversy between the parties has led to proceedings against the respondents in other actions. In her ruling, the master made references to these cases. A previous action HBC 34 of 2014 was dismissed by the preceding master[2]. In that action, Mishri Prasad sued the present respondents. Mishri Prasad is not a party to these proceedings. He is said to be the son of Ram Jas. He sought reliefs including a declaration that Ram Baran and Ram Jas held the freehold land comprised in CT 21230 "*as tenants in common and not as joint tenants*". Master Robinson referred to an agreement titled Provisional Boundary Agreement for Subdivision of CT 21230 between Ram Jas and Ram Baran to sub divide the land. The master held that it was necessary to register an instrument under the Land Transfer Act in order to dispose a joint tenant's right to a property. Making reference to section 37 of that statute, the master said, that the law did not provide for any mechanism to enable severance of a joint tenancy except by registration. The master's decision in HBC 34 of 2014 was appealed to the High Court on the basis that the master had no jurisdiction to hear and make orders in the matter. Alfred J dismissed the appeal by his order of 4 July 2018. It was submitted that the High Court's decision was appealed to the Court of Appeal. The court has not been informed of the status of that appeal.

**15.** The respondents submitted that Mishri Prasad – the plaintiff in HBC 34.2014 – filed another action bearing number HBC 18 of 2015 seeking a declaration that he

[2] [2015] FJHC 172 (11 March 2015)

is entitled to 1.0117 hectares of land in certificate of title number 21230[3]. The respondents submitted that pursuant to an application to strike out the action on the grounds of *res-judicata* and abuse of the process of court, that action was dismissed.

**16.** A reference to the decision of the master in HBC 18 of 2015 is appropriate, as the master has considered the joint tenancy question. Master Robinson came to the conclusion that there was no clear intention to separate the lots into different titles. The master reasoned that it was not clear whether there was a mutual intention between Ram Jas and Ram Baran to create or sever the joint tenancy. The master noted that during their attempt to sub divide the land, they were still joint tenants of the land. He said that if either of the parties did not obtain a separate title the other party could not compel him to sell the jointure. The master's conclusion was that there was no effective alienation of their rights under the joint tenancy. He had no difficulty in finding that both parties agreed to subdivide the land into their respective portions. The master concluded that the agreement between Ram Jas and Ram Baran did not address the aspect of survivorship of the joint tenancy. Since the sub division, the master noted, the parties have not made any effort to sever the joint tenancy, and neither party made an application to court to sever the joint tenancy. He posed the question whether it was possible to sever a joint tenancy after the death of one of the parties in the manner proposed by the plaintiff in that case. The master came to the conclusion that the issue of severance of the joint tenancy was determined by him in action 34 of 2014, saying that the ruling in that case followed the principle that a joint tenancy could not be severed by an agreement between the parties to sub divide the land without registration of the severance. The master dismissed Mishri Prasad's application. The order canvassed in the present appeal is not the order made by the master in HBC 18 of 2015.

**17.** At the hearing before this court, the appellants submitted that they were *bona fide* purchasers of separate portions of the land. They said they expected Ram Jas to execute the transfer documents with separate titles. They submitted that Ram Jas and Ram Baran could not complete the sub division process and transfer the land

[3] [2016] FJHC 652 (19 July 2016)

to the appellants. The appellants submitted that the last registered owners i.e: Santram and Shiu Ram, have acknowledged and recognised the dealings between Ram Jas and the appellants. On 24 May 2010, they submitted, Santram wrote to Ram Jas's son, Mishri Prasad, giving consent and authority for the sub division of the land that was occupied by the appellants. This, they submitted, was because the appellants had purchased the subject plots of land.

**18.** The appellants' position is that although the property was purchased from Ram Jas when it was in the form of a joint tenancy, the owners intended to sub divide their shares. The appellants submitted that after the death of Ram Jas and Ram Baran, the respondents became the last owners of the property and that they were holding the property under constructive trust for the benefit of the appellants. The appellants submitted that they have an equitable interest in the land. They submitted that 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. The appellants made reference to the decisions in *Gissing v Gissing*[4], *Nisha v Munif*[5], *Semi v Wati*[6] and *Prasad v Wati*[7]. The appellants submitted that the master erred in not considering the facts relating to a constructive trust as made out in Mr. Dinesh Chand's affidavit in support and the amended statement of claim.

**19.** The respondents submitted that after the death of Ram Jas, Ram Baran became the surviving owner of the property, and that upon the death of Ram Baran, his two sons, Santram and Shiu Ram, the respondents, became the last registered owners of the property. The respondents submitted that the question this court is required to answer is whether it is possible to sever a joint tenancy after the death of one of the parties in the manner proposed by the appellants. They submitted that neither Ram Jas nor Ram Baran lodged an application for registering the severance of the joint tenancy. The respondents submitted that the development carried out on the land by the appellants was done without consent and at the appellants' own peril as they did not have title to the lands on which they built houses.

[4] [1971] AC 886
[5] [1999] FijiLawRp 1; [1999] 45 FLR 246 (10 March 1999)
[6] [2010] FJHC 279; HBC 35.2005 (7 June 2010)
[7] [2011] FJHC 442; HBC 315.2010 (12 August 2011)

**20.** Over the years, equity has tempered the rules concerning the joint ownership of property in the form of a joint tenancy. In certain circumstances, equity has stepped into infer a tenancy in common. In *Williams v Hensman*[8], the High Court of Chancery discussed the circumstances in which a joint tenancy may be severed. The court stated:

> "A joint tenancy may be severed in three ways: in the first place, an act of anyone of the persons interested operating upon his own share may create a severance as to that share. The right of each joint tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the *jus accrescendi*. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund – losing, of course, at the same, his own right of survivorship. Secondly, a joint tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interest of all were mutually treated as constituting tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested. You must find in this class of cases a course of dealing by which the shares of all the parties to the contest have been affected…."

**21.** Equity's enlarging role with respect to a joint tenancy can be seen by the decision in *Malayan Credit v Jack Chia – MPH Ltd*[9]. The Privy Council held that there are circumstances in which equity may infer that the beneficial interest is intended to be held by the grantees as tenants in common. All the circumstances in that case were held to have pointed decisively to the inference that the parties took the premises in equity as tenants in common in unequal shares.

**22.** Peter Butt in 'Land Law' states:

> "Where persons in a joint business venture or partnership contributed money (whether in equal or unequal shares) towards the acquisition of land as part of their business, equity presumed a tenancy in common in shares proportionate to their respective contributions.

[8] [1861] 1 J & H 546; 70 ER 862
[9] [1986] 1 All ER 711

> Although these were the main situations where equity would presume a tenancy in common, they should not be regarded as an exhaustive list. Whenever the parties organized their affairs in a manner which demonstrated an intention to hold beneficially as tenants in common, equity would so regard them, notwithstanding that they held the legal title as joint tenants. Slight circumstances only were required, because of equity's dislike for joint tenancies.
>
> In all of the above situations, equity would compel the owners, who at law were joint tenants, to hold the property on trust for themselves as tenants in common in the appropriate proportions. If one of the owners died, the legal estate would be held by the survivors by the *ius accrescendi*, but equity would compel a trust of the deceased's beneficial share for those entitled under his will or on intestacy[10]".

**23.** In the English Court of Appeal case of *Burgess v Rawnsley*[11], Lord Denning, referring to the decision in *Williams v Hensman*, said:

> "In that passage, Page Wood V.C, distinguished between severance 'by mutual agreement' and severance by a 'course of dealing'. That shows that a 'course of dealing' need not amount to an agreement, expressed or implied, for severance. It is sufficient if there is a course of dealing in which one party makes clear to the other that he desires that their shares should no longer be held jointly but be held in common."

In the same case, Sir John Pennycuick said:

> "I do not doubt myself that where one tenant negotiates with another for some rearrangement of interests, it may be possible to infer from the particular facts a common intention to server, even though the negotiations break down. Whether such an inference can be drawn must, I think, depend upon the particular facts."

In that case, the court held that negotiations between the owners of the property fell far short of warranting such an inference.

**24.** In the recent case of *Dunbabin v Dunbabin*, the UK's High Court of Justice was satisfied by the evidence before the court that there was a course of conduct which

[10] 2nd edition, Page 191 (The Law Book Company Limited)
[11] [1975] Ch 429 at 439

showed that each party made clear to the other that each one desired that their property should no longer be held jointly but be held in common[12]. The court stated that the beneficial joint tenancy of the property was severed before the death of one of the joint tenants, and accordingly the property was thereafter held by them as joint tenants at law on trust for themselves as beneficial tenants in common.

**25.** The master has considered the general principles concerning joint tenancies, and has applied the principle of survivorship in reaching her conclusion. She has considered the title registration entry which showed Ram Jas and Ram Baran as joint tenants. However, it may be necessary for the court hearing the trial to decide whether the evidence taken as a whole leads to a finding in equity that supports a tenancy in common. The terms of the instrument of purchase by which Ram Jas and Ram Baran purchased the property, the circumstances in which the property was purchased, evidence, if any, concerning the arrangements made by Ram Jas and Ram Baran to sub divide and sell the property will be relevant considerations. So will be any evidence concerning the appellants claim of purchasing the property from Ram Jas and the conduct of the parties in the present litigation.

**26.** After considering all relevant evidence, the court makes a finding that Ram Jas and Ram Baran intended a severance of the property, the appellants' claims of rights to the property may stand vindicated. Findings on such disputed matters cannot be conveniently reached on affidavits alone. The evidence of the parties would have to be tested in court in order for the judge to make a finding on this issue.

**Damages undertaking**

**27.** The appellants submitted that the master erred in not considering the damages undertaking provided by them. They submitted there was a failure to consider the extent of injuries, losses or damages the respondents would suffer if the injunction is granted. They submitted that Dinesh Chand, the ninth appellant, tendered a bank statement with his affidavit in reply showing his bank balance. His interim statement of account showed a credit balance of $20,473.80 as at July 2018. Mr.

[12] [2022] EWHC 241 (10 February 2022)

Chand had averred that he is a businessman and that he, along with the other appellants, have healthy bank balances. The appellants submitted that they had carried out substantial development on the property. They estimated the average valuation of each plot of land to be about $200,000.

**28.** The respondents submitted that the applicants failed to give an adequate undertaking as to damages. They submitted that the appellants should provide an undertaking sufficient to cover the current market value of the property. In their estimation, the total value of the property was $514,000.00. Failure to provide such an undertaking, they submitted, was fatal to the appellants' application, especially as there is no threatened or eminent danger to any proprietary rights of the appellants as they did not have proprietary rights.

**29.** In her ruling, the master observed that the appellants did not give an undertaking as to damages in their supporting affidavit. An undertaking given in Mr. Chand's affidavit in reply was not to the master's liking. By doing so, the master ruled, the respondents were prevented from replying or commenting on the adequacy of damages. The master concluded that this was not sufficient.

**30.** The master made reference to the Fiji Court of Appeal decision of *Natural Water of Viti Ltd vs. Crystal Clear Mineral Water (Fiji) Ltd*[13], in particular to the following paragraph:

> **"**Applicants for interim injunctions who offer an undertaking as to damages should always proffer sufficient evidence of their financial position. The Court needs this information in order to assess the balance of convenience and whether damages would be an adequate remedy."

**31.** The purpose of a cross undertaking in favour of a defendant is to cover a possible loss if it turns out that the injunction should not have been granted. In *Graham v Campbell*[14], James LJ said:

[13] [2004] FJCA 59; ABU 0011.2004S & ABU 0011A.2004S (26 November 2004)
[14] [1878] 7 CH D 490 at 494

> "The undertaking as to damages which ought to be given on every interlocutory injunction is one to which (unless under special circumstances) effect ought to be given. If any damage has been occasioned by an interlocutory injunction, which, on the hearing is found to have been wrongly asked for, justice requires that such damages should fall on the voluntary litigant who fails, not on the litigant who has been without just cause made so."

**32.** In *The Financial Services Authority v Sinaloa Gold plc and others*, the UK Supreme Court said:

> "In private litigation, a claimant acts in its own interests and has a choice whether to commit its assets and energies to doing so. If it seeks interim relief which may, if unjustified, causes loss or expense to the defendant, it is usually fair to require the claimant to be ready to accept responsibility for the loss or expense"[15].

**33.** The court cannot impose a cross undertaking on a claimant against his will. However, it is the price he must pay for the grant of the injunction. In effect the court says, "I will not grant you an interim injunction unless you give the cross undertaking"[16].

**34.** The facts in this case can be distinguished from that in *Wakaya*. In this case, the appellants are attempting to set up a claim in equity over the property they have been occupying over a long period of time. There are eleven appellants. They claim to have purchased the property from Ram Jas. They say he was unable to sub divide and convey his share to the appellants before his death. After the purchase of the property the appellants claim to have built their residences on the property legally owned by the respondents. This is not disputed by the respondents, but they say that the appellants had no right to do so. The appellants claim each lot of land comprising their residences has a value of $200,000.00. There are several such lots. The respondents claim the property has a market value of $514,000.00. The parties have not submitted a valuation to the court to form an opinion on the property's market value. Nevertheless, the fact remains that the appellants' residences are built on the respondents' land.

[15] [2013] 2 WLR 678
[16] Hoffmann - La Roche (F) & Co. AG v Secretary of State for Trade and Industry [1974] 2 All ER 1128

**35.** I am of the view that the damages undertaking given by the appellants is sufficient in the circumstances. The master was righty concerned that the damages undertaking was not given in the supporting affidavit. That undertaking should have been given at the outset on behalf of the appellants, as is customary when applying for an interlocutory injunction. An undertaking has nevertheless been given to court, and, in the circumstances of the case, I am of the view that it can be accepted, even though the appellants failed to give an undertaking in the first instance.

**Balance of convenience**

**36.** The appellants submitted that the master failed to consider all material facts and circumstances in assessing the balance of convenience. The master was not satisfied that the appellants had shown the existence of serious issues for trial. That being the case, the master did not consider the question of the balance of convenience. The master referred to the Supreme Court decision in *Wakaya Ltd v Chambers*[17]. In that case, the Supreme Court of Fiji said there was no question of the balance of convenience in the circumstances of the case as there was no infringement of a proprietary or legal right of the petitioner.

**37.** The respondents referred to the decisions in *Honeymoon Island Fiji Ltd v Follies International Ltd* and *Professional West Realty (Fiji) Limited v Professional Limited* and submitted that the master rightly decided the question of damages and of the balance of convenience. In *Honeymoon Island Fiji Ltd v Follies International Ltd*[18], their Lordships of the Court of Appeal stated:

> "As a prelude to considering the balance of convenience, the Court must consider whether or not the applicant will suffer irreparable loss, being loss for which an award of damages would not be an adequate remedy, either because of the nature of the threatened loss, or because the party sought to be restrained would not be in a position to satisfy an order for damages".

[17] [2012] FJLawRp 70; [2012] 2 FLR 76 (9 May 2012)
[18] [2008] FJCA 36; ABU 0063.2007S (4 July 2008)

The Fiji Court of Appeal quoted with approval the following passage from *American Cyanamid*:

> "If damages... would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted"[19]

**38.** In *Professional West Realty (Fiji) Limited v Professional Limited*[20], the Fiji Court of Appeal stated**:**

> "The balance of convenience is often approached by considering the harm to the Plaintiff that may result in the event that the injunction is not granted and the harm to the Defendant that may result in the event that the injunction is granted. The onus lies on the Plaintiff to establish that on balance the harm that it is likely to suffer if the injunction is not granted outweighs any detriment to the Defendant in the event that the injunction is granted".

**39.** In *NWL v Woods*[21], the House of Lords said:

> "In assessing whether what is compendiously called the balance of convenience lies in granting or refusing interlocutory injunctions in actions between parties of undoubted solvency the judge is engaged in weighing the respective risks that injustice may result from his deciding one way rather than the other at a stage when the evidence is incomplete."

**40.** In my view, the balance of convenience is a material consideration in this case, considering the facts that have been placed before court by both parties. The master was probably correct in stating that the appellants had not established any legal or proprietary rights over the disputed property or that the respondents have infringed any such rights.

**41.** However, the appellants claim to have built houses on CT 41523 and lived in them for more than 20 years. Although they have not produced independent evidence

[19] [1975] AC 396 at page 408
[20] [2010] FJCA 50; ABU 0072.2008 (21 October 2010)
[21] [1979] 3 All ER 614 at 624

to show they lived on the property for more than 20 years or evidence of the type of dwellings they have constructed, the respondents do not deny in their affidavits that the appellants have lived on the property for a long time. The respondents have not adequately explained why the appellants were permitted to construct houses and reside on the property for long periods in the stated circumstances, but say that they did not consent to the appellants' occupation and development of the property.

**42.** The issue before court is not without difficulty, which is evident by the institution of other actions concerning these lands and on closely related issues. These include proceedings twice initiated by the son of Ram Jas. The affidavit in support said little of the background as to how the property came to be owned by Ram Jas and Ram Baran or how the appellants' interest in the land came about. The appellants also did not assist court by providing a copy of the instrument by which the property was purchased by Ram Jas and Ram Jaran or the agreement they were said to have made concerning the sub division of the land. I have considered the affidavit filed on behalf of the respondents as well as the agreed facts. Considering all the circumstances, I am of the opinion that the harm to the appellants by not granting the interlocutory injunction until the conclusion of the case outweighs the harm that could accrue to the respondents by granting the interlocutory injunction.

**Adverse Possession**

**43.** In their application to the master, the appellants contended that they were entitled to the property through their adverse possession of the land.

**44.** The respondents submitted that adverse possession could not be claimed as the appellants' initial possession of the property was not adverse to the then registered proprietors of the property, Ram Jas and Ram Baran. The respondents submitted that the appellants were residing with the permission of Ram Jas until his death. Therefore, the respondents submitted, the appellants were not in adverse possession of the property until the death of Ram Jas. They submitted that the property was transferred to them on 15 October 2017, and that adverse possession could have begun only after such transfer. In support of their contention the respondents referred to the case of *Buckinghamshire County Council v*

*Moran*[22]. The English Court of Appeal stated that possession is never adverse if it is enjoyed under a lawful title, and that if a person occupies or uses land by licence of the owner with the paper title and his license has not been duly determined, he cannot be treated as having been in 'adverse possession' as against the owner with the paper title.

**45.** On the appellants' claim of adverse possession to the property, the master concluded that the initial occupation of the property was with the consent of Ram Jas. The ruling stated that the claim for adverse possession requires possession of the land for a continuous period of 20 years. The master ruled that even if she considered the appellants' claim of adverse possession from Ram Jas or even Ram Baran's death, they would still fall short of the 20 years required under section 78 of the Land Transfer Act. The master quoted with approval the words of Sir Nigel Bowen, former Chief Judge in Equity of the Supreme Court of New South Wales in *Mulcahy v Curramore Pty Ltd* that adverse possession must be open, not secret; peaceful, not by force; and adverse, not by consent of the true owner[23].

**46.** In appeal, the appellants did not press their claim on adverse possession except for a brief sentence in their written submissions that they have continuously resided on the property for more than twenty years and that their claim is based on adverse possession and constructive trust. The grounds of appeal did not traverse the master's conclusion concerning adverse possession. This aspect of the ruling need not be disturbed.

**Conclusion**

**47.** I am of the opinion that in the circumstances of the case, damages are not an adequate remedy, and an interlocutory injunction should be issued staying the disposal of CT 41523 as prayed for by the appellants until the conclusion of the trial. It is possible that the appellants are not able to establish their claims to the property even after evidence is laid before court. In this event, the respondents can claim damages. The court is competent to direct an inquiry into the damages payable to the respondents as a consequence of the grant of the injunction. The

[22] [1989] 2 All ER 255
[23] [1974] 2 N.S.W.L.R

timing of such an inquiry is a matter for the judge to decide. In the circumstances of this case an order for costs in a sum of $500.00 would be reasonable.

**ORDER**

***A.*** The appeal is allowed.

***B.*** An interlocutory injunction is granted as prayed for by the appellants' summons filed on 9 July 2018.

***C.*** The respondents are to pay costs summarily assessed in a sum of $ 500.00 to the appellants within 21 days of this judgment.

Delivered at **Suva** on this **22nd** day of July**, 2022**


M. Javed Mansoor
**Judge**