

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 372 OF 2023

BETWEEN : **AJESHNI CHAND & BENAI DEO**
Plaintiffs

AND : **RITA PRASAD**
Defendant

Counsel : **Ms S Narayan and Ms K Saumaki for the Plaintiffs**
Ms A Singh for the Defendant

Hearing : **18 June 2024**

Supplementary Submissions : **2 and 8 July 2024**

Judgment : **29 November 2024**

JUDGMENT

- [1] The Plaintiffs have brought this proceeding seeking to have a concrete wall on their property removed. The Defendant is responsible for the construction of the concrete wall.
- [2] The Plaintiffs and the Defendant are in co-ownership of the property on which the concrete wall is situated. Each has an undivided share, along with four others, in the property as tenants in common. The Defendant claims that she is entitled to build the concrete wall. The Plaintiffs claim that the wall is impeding their use and enjoyment of the property.

Background

- [3] The material facts can be briefly stated as follows:
- i. The Plaintiffs and the Defendant are three of seven tenants in common, who own an undivided one-seventh share of Certificate of Title No 7111 described as Lot 2 on

Deposited Plan 1469 comprised of an area of two roods, fourteen perches ('CT No. 7111'). The property is freehold.

- ii. Each of the seven co-owners has constructed a dwelling on CT No 7111.
- iii. The Defendant has access to her house by way of a concrete driveway. There is a disagreement between the parties as to whether this driveway is on CT No 7111 or in fact on Certificate of Title 13661, being Lot 1 of DP 1469 ('CT No. 13661'). The Defendant is also a co-owner of CT No 13661.
- iv. The concrete wall is situated on CT No 7111 below the Defendant's dwelling, between her dwelling and the two dwellings of the Plaintiffs. The concrete wall is constructed on a pathway that was used by the Plaintiffs to access their dwellings by foot. They want the concrete wall removed.
- v. There is no dispute that the Defendant did not obtain the consent of the Plaintiffs or any of the other co-owners of CT No 7111 to construct the concrete wall. There is also no dispute that the Defendant has not obtained the consent of the Suva City Council - although the Defendant contends that such consent is not required on freehold land.

[4] The Plaintiffs filed the present proceedings on 18 December 2023 by way of an Originating Summons and supporting affidavit. The orders sought by the Plaintiffs are:

1. *An order that the Defendant forthwith removes and/or demolishes the illegal boundary/ concrete fence/wall that she has been erected on Certificate of Title No. 7111 described as Lot 2 on DP No. 1469 consisting of two roods, fourteen perches in the district of Suva.*
2. *An order that the Defendant whether by her servants, agents or otherwise howsoever be restrained from creating further walls/petitions on the said property unless with consent of all the owners.*
3. *An order that the Defendant be forthwith restrained from restricting access to the Plaintiffs and/or to their authorized occupants of their property to and within the boundaries of Certificate of Title No. 7111 being Lot 2 on Deposited Plan No. 1469.*

4. *Such further order and/or other orders as the Honourable Court deems just and necessary.*

[5] The Plaintiffs supporting affidavit executed on 6 December 2023 annexes the Certificate of Title for CT No 7111, a copy of an aerial photograph of CT No 7111 and several photographs of the concrete wall and the surrounding area. A supplementary affidavit was filed by the Plaintiffs on 24 January 2024.

[6] The Defendant filed an affidavit in opposition on 29 January 2024. She states that the only access to the pathway where the concrete wall is constructed is via a concrete driveway which is owned by the owners of CT No 13661 which the Defendant is entitled to use but the Plaintiffs are not. She claims that the '*core reason*' for constructing the concrete wall was to prevent soil erosion but also for '*partition of the two properties between CT 13661 and CT 7111*'.

[7] An affidavit in reply was filed by the Plaintiffs on 10 April 2024.

Decision

[8] The Plaintiffs seek an order compelling the Defendant to remove and/or demolish a concrete wall that she has constructed on CT No 7111. Further orders are sought restraining the Defendant from constructing any further walls or partitions without the consent of each of the co-owners.

[9] The first question for the Court to consider is its power to make the orders sought. According to the Plaintiffs' Originating Summons, the Court has inherent jurisdiction to make the orders. The Plaintiffs go further in their written submissions, arguing that the Court has power under 0.29, r.1 of the High Court Rules 1988, s 34 of the Land Transfer Act 1971 and s 7 of the Town Planning Act 1972.

[10] The Defendant's focus is not on the Court's power to grant the Plaintiff's relief but instead on her right to construct the concrete wall.

[11] Section 34 of the Land Transfer Act permits co-ownership of land in the form of a tenancy in common. The legislation does not define a tenancy in common or set out the rights of co-owners. In my view, the outcome of this proceeding turns on a consideration of the rights of the parties as

tenants in common. As the legislation does not define these rights, it is necessary to have regard to the common law and, helpfully, these principles are set out in Hinde McMorland & Sim, *Land Law in New Zealand*, and Peter Butt, *Land Law*, Sixth Edition.¹

- [12] In Hinde McMorland & Sim's *Land Law in New Zealand*, the authors discuss co-ownership, noting at paragraph 9.030:

*It is now necessary to consider the cases where two or more persons are entitled to the simultaneous enjoyment of the same parcel of land. Such persons are said to hold the land concurrently, or in co-ownership, and they have concurrent interests. One feature is common to all forms of co-ownership: namely, unity of possession. This means that each co-owner is entitled concurrently with the other co-owners to possession of the whole of the Land and has no exclusive right to possession of any particular part. Each co-owner is as much entitled to possession of all or any part of the land as the other or others....*²

- [13] The authors proceed at 9.031 to discuss the rights of co-owners as between themselves, stating:

....Because they have unity of possession co-owners are all concurrently entitled to use and enjoy the land or, if they are not in occupation of it themselves, to receive the rents and profits in appropriate shares.

*One co-owner cannot compel the others to contribute towards the cost of repairs, nor can one owner recover from the others a proportion of any money which he or she has voluntarily spent on repairs or improvements. However, upon a partition or sale of the common property a co-owner who has improved it at his or her expense is, in general, entitled to an allowance to be extent to which the value of the land has been increased by the expenditure.*³

- [14] The authors explain the differences between a tenancy in common and a joint tenancy at 9.045, stating:

¹ This Court has relied on these texts in a number of previous decisions, including *Chand v Bharti* [2016] FJHC 103 (15 February 2016), *Lata v Registrar of Titles* [2017] FJHC 164 (3 March 2017), *Ram v Sarita* [2022] FJHC 278 (2 June 2022) & *Singh v Singh* [2023] FJHC 464 (17 July 2023).

² My emphasis.

³ My emphasis.

- (b) *Only unity of possession is essential. Although the four unities of a joint tenancy are sometimes fortuitously present in a tenancy in common, the only unity essential to the existence of a tenancy in common is unity of possession. If there are two or more tenants in common each has an equal right with the other or others to the possession of the whole of the land. But tenants in common may each hold different interests, as where one is entitled for life, and the other in fee simple: they may each hold under different titles, as, for example, where one has bought and the other has succeeded to his or her share; and their interests may have vested at different times, as, for example, where each bought his or her interest at a different time.*
- (c) *Tenants in common hold undivided shares. In Blackstone's words, there is a 'thorough and intimate union' between joint tenants. By contrast, tenants in common have separate and distinct shares in the same parcel of land, the only factor which makes them co-owners being their unity of possession ...⁴*

[15] The authors turned to a more detailed discussion of the forms of co-ownership. The following definition was provided for tenants in common, at 9.043:⁵

...A tenancy in common exists whenever two or more persons hold undivided shares in the same parcel of land. It has been said that:

Each tenant in common is entitled to the possession of the whole of the land, and yet, unlike a joint tenant, is entitled only to a distinct share thereof, a combination of concepts possible only because the physical boundaries of his share, called an undivided share, have not yet been determined.

The only factor which makes tenants in common co-owners is their unity of possession. 'A tenant in common is, as to his own undivided share, precisely in the position of the owner of an entire and separate estate'.⁶

[16] The authors define 'unity of possession' as follows, at 9.035:

⁴ My emphasis.

⁵ Footnotes not included.

⁶ My emphasis.

...Unity of possession means that no joint tenant has an exclusive right to possession of any particular part of the land which is held on joint tenancy. Each joint tenant is just as much entitled to possession of all or any part of the land as the other or others...⁷

[17] Finally, at 9.057 the authors state:

It follows that whenever a tenancy in common exists at law, there will also be a tenancy in common in equity...

[18] To gain a fuller understanding of the rights of tenants in common it is helpful to include some explanations from Peter Butt's Land Law, Sixth Edition. The author notes at 14 02:

Where two or more persons hold land as tenants in common, each has a proportionate interest in the land. Their interests are not identifiable in any physical sense. One cannot say, 'This is my physical portion, and that is yours'. For this reason, the share of a tenant in common is said to be 'undivided', - meaning that, though a distinct share, it has not been physically divided from the other shares. Rather, each has an 'aliquot' portion of all those rights that together make up ownership of the whole. Each is 'seised' of his or her own share only, not of the whole. In this way, the seisin of the property is distributed amongst them all.

A tenant in common may generally deal with his or her undivided share as he or she wishes - for example, by alienating it in fee simple, granting it for life with remainders over, or devising it. On death intestate, a tenant in common's share descends to the persons entitled to his or her property under the rules governing intestate succession.⁸

[19] And at 14 51:

From the principle of unity of possession, follows the rule that one co-owner cannot generally sue another for trespass, since a person entitled to possession is not a trespasser. Each co-owner is entitled to possess the whole of the property, though not in a way that excludes the other co-owner(s) from enjoying the same right. There can

⁷ My emphasis.

⁸ My emphasis.

*be no trespass where a co-owner merely uses and possesses the land in accordance with his or her rights as co-owner. However, trespass lies against a co-owner who has 'ousted' another from the premises, as by forcible ejectment.*⁹

[20] Accordingly, a co-owner enjoys the usual rights of an owner over the land. However, they do not enjoy those rights to the exclusion of their co-owners. Inevitably, a balance is required between exercising rights of ownership yet not excluding a co-owner's use and enjoyment of their ownership. In terms of balancing these rights and obligations, I am assisted by Asher J's discussion in *Wu v Body Corporate 366611* [2011] NZHC 561 (30 May 2011). That case involved a claim for nuisance. Asher J stated:¹⁰

[29] It has been said that –the essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land. The focus is on the particular interest of the plaintiff which the Court protects, rather than the defendant's conduct, which is the focus of negligence. In Bank of New Zealand v Greenwood Hardie Boys J observed that it gave the owner a remedy for –certain interferences with the occupier's use or enjoyment of his land,

[30] There is a lack of formalism about the law of nuisance, which has allowed it to adapt to the changing circumstances of property ownership and developing community standards. There is no need for the defendant to have any particular status and in particular no need for the defendant to be an adjoining owner or adjoining occupier. Providing the plaintiff does not have exclusive control over the area from which the nuisance emanates, there appears to be no restriction on the place from which a nuisance must emanate. Thus, co-owners may sue each other in nuisance since they cannot exclude each other from the land in question or control each other's activities. In Clearlite Holdings Ltd v Auckland City Corporation the injury to the plaintiff's land resulted from an act on the plaintiff's own land, the nuisance being a shaft dug by the defendant under the plaintiff's land. It was held that it was not a prerequisite to a cause of action in nuisance that the nuisance emanate from neighbouring land.

⁹ My emphasis.

¹⁰ Footnotes not included.

...

[36] *There is no doubt that an unreasonable interference lies at the heart of nuisance. In Cambridge Water Co v Eastern Counties Leather plc Lord Goff said:*

[I]f the user is reasonable, the defendant will not be liable for consequent harm to his neighbour's enjoyment of his land; but if the user is not reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it.

[37] *In terms of the test as to what is reasonable, it was observed by Lord Wright in Sedleigh-Denfield v O'Callaghan:*

A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society.

[38] *The concept of unreasonableness is not approached only from the perspective of the defendant. As Hardie Boys J put it in Bank of New Zealand v Greenwood the test is –simply whether a reasonable person, living or working in the particular area, would regard the interference as unacceptable. He quoted Salmond on the Law of Torts:*

He who causes a nuisance cannot avail himself of the defence that he is merely making a reasonable use of his own property. No use of property is reasonable which causes substantial discomfort to other persons, or is a source of damage to their property.¹¹

[21] I am also assisted by the old English decision of *Bull v Bull* [1955] 1 Q.B 234. In that case, a mother and son co-owned a property as tenants in common. The mother fell out with her daughter-in-law and consequently her son brought proceedings to evict his mother. Denning LJ remarked that *‘[s]imilar circumstances must often arise in families, but strangely enough there*

¹¹ My emphasis.

is no authority on the point'. I raised the same point with counsel in the present case expecting that the present dispute between co-owners surely cannot be novel but counsel have been unable to find any useful authorities.

[22] Denning LJ proceeded to state at pages 236 and 237:

...the mother and son are, I think, equitable tenants in common. Each is entitled in equity to an undivided share in the house, the share of each being in proportion to his or her respective contribution. The rights of equitable tenants in common as between themselves have never, so far as I know, been defined; but there is plenty of authority about the rights of legal owners in common. Each of them is entitled to the possession of the land and to the use and enjoyment of it in a proper manner. Neither can turn out the other; but if one of them should take more than his proper share the injured party can bring an action for an account. If one of them should go so far as to oust the other he is guilty of a trespass...

[23] The Court of Appeal upheld the trial Judge's decision refusing the son's claim to evict his mother. Denning LJ explained at page 238:

...when there are two equitable tenants in common, then until the place is sold, each of them is entitled concurrently with the other to the possession of the land and to the use and enjoyment of it in a proper manner; and that neither of them is entitled to turn out the other.

[24] In the present matter, the Plaintiffs state that the Defendant has constructed the concrete wall on a pathway that is used by the co-owners for foot access to their dwellings. The pathway also provides close access to the roadway for everyday convenience, the Plaintiffs deposing:

...as it allows Taxi's and cars to come to our properties. Our grocery shopping, delivery of building materials, delivery of other supplies, guests. Tenants and car parking all depended on this access to the premises.¹²

[25] The Defendant states that her co-owner's access to the roadway via the footpath involves them trespassing on CT No 13661. She claims that the concrete wall is justified as a partition and to prevent soil erosion.


¹² Para 11 of Plaintiffs' affidavit dated 6 December 2023.

- [26] I am satisfied that the Defendant's construction of the concrete wall interferes with her co-owners use and enjoyment of CT No 7111. The maps and photographs annexed to both parties affidavits demonstrates that the concrete wall is clearly on CT No 7111 and situated on an existing pathway. The photographs do not support the Defendant's contention that it is a retaining wall to prevent soil erosion - the Defendant offers no cogent evidence to support this contention. It is evident that the main, if not sole, purpose of the concrete wall is as a partition between her dwelling and the other dwellings on CT No. 7111.
- [27] In these circumstances, and given that the concrete wall plainly interferes with the Plaintiffs use and enjoyment of their land, it was proper for the Defendant to discuss the construction of the concrete wall with her co-owners and obtain their consent before constructing the wall. The Defendant does not deny that she did not do so.

Orders

- [28] Accordingly, I make the following orders:
- i. The Defendant is to remove the concrete wall erected on Certificate of Title No 7111 described as Lot 2 on Deposited Plan 1469 comprised of an area of two roods, fourteen perches within three (3) months.
 - ii. The Plaintiffs are entitled to costs summarily assessed in the amount of \$1,750 to be paid by the Defendant within two (2) months.




D. K. L. Tuiqereqere
JUDGE

Solicitors:

Shelvin Singh Lawyers for the Plaintiffs
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