

IN THE SUPREME COURT OF FIJI
CIVIL APPELLATE JURISDICTION

CIVIL PETITION NO. CBV 0008 of 2020
Court of Appeal No. ABU 0006 of 2019
High Court No. HBC 103 of 2014

BETWEEN: **RAJ DATT**

Petitioner

AND: **SUNIL DATT**

First Respondent

AND: **RAM DATT**

Second Respondent

AND: **ANIL DATT**

Third Respondent

AND: **MANJULA WATI**

Fourth Respondent

AND: **DIRECTOR OF LANDS**

Fifth Respondent

Coram: **The Hon. Mr. Justice Anthony Gates**
Judge of the Supreme Court

The Hon. Mr. Justice William Calanchini
Judge of the Supreme Court

The Hon. Mr. Justice Filimone Jitoko
Judge of the Supreme Court

Counsel: **Mr P. Niubalavu for the Petitioner**
First Respondent in person
No appearances for Second, Third and Fourth Respondents
Mr J. Mainavolau for the Fifth Respondent

Dates of Hearing: **6 and 7 June 2023**

Date of Judgment: **30 June 2023**

JUDGMENT

Gates, J

- [1] I have had the advantage of reading the following judgment in draft. I agree with it, its reasons and orders.

Calanchini, J

Introduction

- [2] This is a petition for leave to appeal from the judgment of the Court of Appeal delivered on 28 February 2020. The Court of Appeal dismissed the Petitioner's appeal from the High Court judgment dismissing both the Petitioner's claim and the First Respondent's counterclaim.
- [3] The Petitioner Raj Datt was the uncle of the First Respondent Sunil Datt. However Raj Datt passed away on 14 January 2023 at Lautoka Hospital. By his will, Raj Datt appointed his son Raveen Datt as the sole executor and Trustee. Raveen Datt subsequently filed an ex parte motion seeking an order from the Court that Raveen Datt as the intended trustee of the Estate of Raj Datt deceased be substituted and entered on the record in place of Raj Datt deceased. On 26 May 2023 Temo ACJ ordered that Raveen Datt be substituted and entered on the record in place of Raj Datt deceased. The orders had not been sealed at the time of the hearing of this Petition. (Any reference in this judgment to "the Petitioner" is a reference to either Raj Datt or Raveen Datt according to the context).
- [4] The Second, Third and Fourth Respondents are the children of the First Respondent. The Fifth Respondent, the Department of Lands, was at all material times the lessor of State Land situated at Wailoaloa and Navakai. The Second, Third and Fourth Respondents did not attend and were not represented at the hearing of the Petition.
- [5] At the commencement of the hearing two preliminary issues were raised. The first concerned any objection the parties may have to the present composition of the Court as Justice Calanchini had presided over the initial interlocutory proceedings in the Court of

Appeal. Counsel for the Petitioner and counsel for the Fifth Respondent indicated that they had no objection to the composition of the Court including Justice Calanchini. After the preliminary issue was explained in (Hindustani) to the First Respondent, he also indicated that he had no objection.

- [6] The second issue concerned the short service of the Petitioner's submissions on the First Respondent who objected on the basis that he did not have sufficient time to consider the submissions. The Court indicated that the First Respondent could re-appear before the Court the next day to make any further necessary submissions and in the meantime the hearing would proceed. The First Respondent appeared before the Court the following day and indicated that for a number of reasons he did not intend to present any further submissions.
- [7] A third issue has arisen since the hearing of the petition. The petition is out of time by 13 days. This matter was not brought to the Court's attention at the hearing.
- [8] Ordinarily the Court would consider the question of late filing upon a formal application for an enlargement of time together with a supporting affidavit. There was no such application in this case nor was there any reference to the matter in the submissions filed by the parties. The factors that the Court considers in such an application have long been settled and were clearly stated in **Kumar and Sinu -v- The State** [2012] FJSC17; CAV 1 of 2009 (21 August 2012) as:
- (a) The reason adduced by the petitioner for his failure to file within time;
 - (b) The length of the delay;
 - (c) Whether there is a ground of merit justifying the appellant court's consideration;
 - (d) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed;
 - (e) If time is enlarged will the Respondent be unfairly prejudiced.
- [9] Of course none of these matters have been addressed by either party in their written submissions or before the Court. Although there has been non-compliance with the Rules

the Court may in certain circumstances consider whether an enlargement of time should be granted. In **Nabainivalu -v- The State** [2015] FJSC 22; CAV 27 of 2014 (22 October 2015) Marsoof J (with whom Gates CJ concurred) observed that:

“Ultimately it is for the Court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of the Court.”

In **Nabainivalu** (supra) Marsoof J proceeded to consider the issue of enlargement of time on the basis of the usual factors and noted that the delay of 141 days was substantial. On the basis that there was no ground of appeal that was likely to succeed, the application for enlargement of time was refused and his petition subsequently dismissed.

- [10] In my opinion the delay of 13 days is relatively short and as a result, in the absence of any explanation for the delay, the only remaining question is whether there is a ground of merit justifying the appellate court’s consideration. That question must be considered in the context of section 7(3) of the Supreme Court Act 1998 which provides that:

“... the Supreme Court must not grant ... leave to appeal unless the case raises:-

(a) a far reaching question of law;

(b) a matter of great general or public importance;

(c) a matter that is otherwise of substantial general interest to the administration of civil justice.”

Background

- [11] For many years prior and up to 1990 the Petitioner (Raj Datt) and his three brothers Rudra Datt, Rishi Datt and Prem Datt together with their families occupied State leased land at Wailoaloa (the Wailoaloa lease). It appeared not to be disputed that Rudra Datt was the registered lessee as a result of his being the eldest brother. In view of the long term occupation of the leased land at Wailoaloa it is not unreasonable to conclude that the Lands Department was aware of the residential arrangements that had existed at Wailoaloa.

- [12] In early 1990 Rudra Datt sold the Wailoaloa lease to Club (Fiji) Limited for \$90,000.00. As the purchaser subsequently required immediate vacant possession Rudra Datt commenced negotiations to purchase a lease of State Land at Navakai Nadi being lease No. 10093. Rudra Datt and those occupying the land at Wailoaloa needed to vacate the Wailoaloa lease. Rudra Datt purchased lease 10093 for \$21,000.00. In order to facilitate the move and to make arrangements for his family and his brothers and their families Rudra Datt entered into a Deed of Family Settlement which was executed by the four brothers on 16 October 1990. It should be noted that the Preamble to this Deed of Family Settlement (P439 Record) set out most of the facts stated above and in my opinion cannot now be refuted by Sunil Datt. Nor for that matter can he deny the existence of the obligations and the terms agreed upon by his father Rudra Datt. Furthermore it is not the execution of the Deed that offends section 13(1) of the State Land Act. It is the subsequent performance of any term that requires the prior consent of the Director of Lands.
- [13] I do accept that the reference in the Preamble to the approval / consent from the Director of Lands on 24 September 1990 is a reference to the approval required for the lessee of Lease 10093 to sell the lease to Rudra Datt. It must also be noted that the approval predated Rudra Datt's becoming registered as lessee on 17 December 1990. It is reasonable to conclude that sometime after 16 October 1990 and before 17 December 1990 (a period of about 2 months) Rudra Datt and those of his brothers and their families who wanted to move into lease 10093 had commenced to occupy Lot 7 (being the lot number of the land described as Lease No. 10093 at Navakai).
- [14] In my opinion the relocation of the extended families from Wailoaloa to the land at Navakai State land lease 10093 cannot be regarded as premature performance of the terms of the Deed of Family Settlement. Furthermore, having relocated to the land at Navakai, arrangements needed to be made for the immediate occupation of that land in terms of whereabouts on the land each brother and his extended family would reside. In my opinion those preliminary arrangements needed to be made with immediate effect and were unrelated to the performance of any of the terms and conditions of the Deed of Family Settlement. It was a private arrangement (*in personam*) that did not touch upon the land.

[15] The Deed contained the following terms and conditions:

"1. That the said Rudra Dutt shall give to each of them Rishi Dutt, Prem Dutt and Raj Dutt a sum of \$2,000.00 (Two Thousand Dollars) as a non-refundable loan which sum is to be released as follows-

\$500.00 (five hundred dollars) upon they giving vacant possession of the said property (LD Ref 4/10/1500) and balance thereafter on the date of vacant possession.

2. *That the said Rudra Dutt to give one quarter area of residential site on Crown Lease 10093 (LD Ref 4/10/1926) to each of them Rishi Dutt, Prem Dutt and Raj Dutt. The said portion of lease is hereby given permanently and each of the parties shall pay land rent to Lands Department in respect of Crown Lease No. 10093 on apportion basis.*
3. *That upon transfer of Crown Lease No. 10093, the said Rudra Dutt shall execute a proper title to each of the parties and should the lease become necessary as a result of Director of Town and Country Planning Board's refusal to grant permission for subdivision the Donor shall be prepared and willing at all times thereafter to re-apply at the request of the Donees provided however that the Donee shall bear all costs incurred for such an application.*
4. *That the said Rudra Dutt consents Rishi Dutt, Prem Dutt and Raj Dutt to create substantial developments on Crown Lease No. 10093 for their occupation as stated herein above.*
5. *That the said Rishi Dutt, Prem Dutt and Raj Dutt upon receipt of \$2000.00 (two thousand dollars) and a residential site of ¼ (quarter) on Crown Lease No. 10093 (LD Ref 4/10/1926) hereby dismiss all their other claims in respect of Crown Lease LD Ref 4/10/1500 against the said Rudra Dutt.*
6. *That all legal costs including Stamp Duty and Survey Fee are to be paid by each of the Donees."*

[16] The loan of \$2,000.00 specified in clause 1 related to Rudra Datt's three brothers being required to give vacant possession of the land at Wailoaloa and in my judgment was not a matter that was of any concern to the Director of Lands, let alone requiring consent.

[17] It is my opinion that any attempt to perform clause 2 and 3 of the Deed requires prior consent under section 13 of the State Lands Act. They are the clauses that bind Rudra Datt upon his becoming the registered lessee of lease 10093. Under section 13 the lessee is required to obtain the consent of the Director before any purported performance of clauses 2 and 3. From the material available it was Sheela Wati, as the administratrix of the estate of Rudra Datt who had passed away on 3 May 1991, who applied to the Director for consent for the subdivision of Lot 7 being the State land under lease 10093. By a letter dated 4 August 1997 Sheela Wati sought approval from the Assistant Director of Lands for the subdivision in the following terms:

"(1) I intend to proceed with subdivision of above land.

(2) The purpose of this application is to allocate shares to Sunil Dutt, Anil Dutt, Ram Dutt and Manjula Wati being issues of Rudra Dutt deceased who holds shares under provision of Successions Probate and Administration Act (Cap 60).

(3) That the other occupants Rishi Dutt, Rajendra Dutt are now deceased while Prem Dutt has moved to re-settle elsewhere.

(4) The only other person residing on the land is Raj Dutt who will be properly re-allocated to reside on the land after the subdivision is complete."

This application was made some seven years after the execution of the Deed and after Rudra Datt had become the registered lessee. By that time two of his brothers Rishi Datt and Prem Datt had also passed away. The only surviving brother to the Deed was the Petitioner Raj Datt. Sheela Wati acknowledged in the letter that Raj Datt was still residing on the land and that he *"will be properly re-allocated to reside in the land after the subdivision is complete."* The subdivision is to be for the benefit of the four children of Rudra Datt and Sheela Wati. There was no reference in the letter that Raj Datt had taken up occupancy of a one quarter area of the lease.

[18] I have concluded in view of the above that at no stage had there been a breach of section 13(1) of the State Lands Act. The Deed of Family Settlement was not at any time rendered

null and void. Sheela Wati was, required to apply to the Director of Lands for consent for a sub division for (a) the estate of Rudra Datt (b) the estate of Prem Datt (c) the estate of Rishi Datt and (d) for Raj Datt in accordance with the terms of clauses 2 and 3 of the Deed of Family Settlement.

[19] On 9 September 1998 the application for subdivision was approved by the relevant authority and as a result Sunil Datt became registered lessee of Lease 14796 being one of the sub-divided leases from head lease 10093. It was part of subdivided State lease 14796 that was occupied by Raj Datt and from which he and his family were evicted in 2005 following an ex tempore judgment under section 169 of the Land Transfer Act. In addition there is an earlier letter from the law firm of Pillay Naidu and Associates to Raj Datt dated 21 February 1991 which stated:

“Dear Sir,

Re : Estate of Rudra s/o Badal

We have now been instructed to act as Solicitors for the estate of abovenamed deceased.

The widow of the deceased Sheela Wati and other beneficiaries today called into our office and upon their instructions we hereby notify you that they do not have any objections for you to continue your occupation on Crown Lease No. 10093, but they strictly want you not to re-build any houses, etc or construct any new houses that are unlawful to Nadi Rural Local Authority.

Further they have proposed to re-arrange your settlement upon receipt of Probate after granted in respect of the above estate.

Thanking you.

*Yours faithfully,
Pillai, Naidu & Associates.”*

This letter is dated just two days after Rudra Datt had passed away and certainly acknowledges the occupation of the land by the Petitioner without any suggestion that he was a trespasser. It is clear the last paragraph concerning re-arranging the Petitioner's

settlement does not refer to the Petitioner either occupying a one quarter at that time nor in the future.

- [20] Section 13(1) does not indicate what amounts to an alienation of a dealing with the land that would require the consent of the Director of Lands. The Section does state however that it is the sale, transfer, sub lease assignment and other alienation or dealing affected without such consent that is rendered null and void., Hence it is not the agreement to sell, to transfer or to sub lease that is rendered null and void. It is in fact any act done in pursuance of the agreement to alienate or deal with the leased land that requires the prior consent of the Director of Lands.

Dealing with an alienation of State Land

- [21] It is clear that section 13(1) was intended to include the various forms which such an alienation of or a dealing with the land comprised in the lease or any part thereof can take by stating that the alienation of or a dealing with the land “whether by sale, transfer or sub lease or in any other manner whatsoever” requires the written consent of the Director. In my opinion the words “in any other manner whatsoever” restrict the operation of section 13(1) to any other form of alienation of or dealing with the land comprised in the lease. The issue then is whether a particular arrangement other than a sale, transfer or sublease of the land comprised in the lease amounts to an alienation of or a dealing with the land contemplated by section 13(1).
- [22] In the High Court the learned Judge had concluded, relying on the correspondence between Messrs. Pillai Naidu and the Lands Department dated 21 February 1991 and 22 December 1992, that the Director had “not consented to the Deed of Settlement.” However on its face that statement is inconsistent with the earlier observation of the learned Judge that “of course I do not deny for a moment that Section 13(1) does not prohibit the mere making of a contract on a deed of settlement.” In my view the unfortunate conclusion was the starting point of the Court’s approach to the resolution of the dispute. The letter of 21 February 1991 from Messrs Pillai Naidu and Associates contributed to this approach by seeking a

grant of consent to the agreement. As previously noted the consent was not required for the Deed of Settlement, consent was required prior to any step in the implementation of the clause 2 and of the agreement. Not all the clauses in the agreement required the consent of the Director prior to implementation. The loan of \$2,000.00 to Rudra Datt's three brothers was related to encouraging them to vacate the land at Wailoaloa sooner rather than later to enable the purchaser of the lease to take vacant possession. It was an incentive payment.

[23] The only basis upon which the trial Judge could conclude that there had been prior implementation of clauses 2 and 3 of the Deed was the letter from Pillai Naidu & Associates dated 21/2/91 to the Minister and Director of Land that stated:

- "(1) Our abovenamed client had previously owned Crown Land covered under LD Ref 4/10/1500.*
- (2) The said land covered under LD Ref 4/10/1500 was occupied by Rudra Dutt and his brothers Rishi Dutt, Prem Dutt, Raj Dutt and Rajend Dutt as one family.*
- (3) That other crown land 4/10/1500 (Wailoaloa lease) was sold by his client, all occupants moved to live in Crown Lease 10093 under Deed of Settlement dated 16th day of October 1990 reached between the parties.*
- (4) That we as solicitors acting for Rudra Datt hereby enclose a copy of the said agreement for your grant of consent to the agreement as under this circumstance the persons named above are still occupying above lease."*

[24] Contrary to the claim in (3) above the relocation to and occupation of State land lease 10093 does not in itself constitute implementation of the Deed. There is no reference in the above letter to any of either Rudra Dutt or Raj Datt or any of the other brothers taking up "occupation of a one quarter area of residential site on State lease 10093." There was no evidence before the Court that upon arrival on State lease 10093 the four brothers had immediately identified the one quarter area each was to be given after relocation. As previously noted the relocation of the various extended families upon the sale of Wailoaloa lease to Land Lease 10093 was to (a) give vacant possession of the Wailoaloa lease to the purchaser and (b) provide land for the extended families to reside with him after they had vacated the Wailoaloa lease. Rudra Datt had not attempted to implement the Deed by allocating to his brothers and their families a one quarter area each. There was no evidence before the Court that the long standing arrangement at Wailoaloa had been consented to by the

Director nor that it was even required to be obtained. It appears that the arrangements that existed at Wailoaloa were replicated when the brothers relocated to land lease 10093. Furthermore there was no evidence before the Court that Rudra Datt had undertaken any activity that would amount to giving the one quarter area to each of his brothers under clause 2 of the Deed. There was no evidence as to the engagement of a surveyor or for that matter of the brothers attempting to identify a one quarter area for each of them and their families.

- [25] The evidence from Raj Datt was to the effect that Rudra Datt's wife became administratrix and subsequently some years later applied for consent for a subdivision that was inconsistent with the Deed. As administratrix of the estate of Rudra Datt she was required to implement the Deed.
- [26] It appears that no application was made in the intervening years following Rudra Datt's death to seek consent to implement either clauses 2 or 3 of the Deed. However as there was no evidence that Raj Datt had even taken up a one quarter area of land lease 10093 since commencing occupation of the land, the Deed, according to its terms, was still binding on the heirs and administration of the estate of Rudra Datt. This appeared to be acknowledged by Sheela Wati when both the Solicitors for the estate and Sheela Wati had stated in the letters to Raj Datt that there was no objection to him remaining on the property although he was not to be included in the proposed subdivision.
- [27] The Court of Appeal's judgment confirmed the findings and conclusions of the High Court and dismissed the Petitioner's appeal. Although the High Court had dismissed the First Respondent's counter claim for damages, the First Respondent did not appeal that decision to the Court of Appeal.
- [28] In view of the above I have concluded that:
- (a) The occupation of land lease 10093 by the extended families following the sale of the Wailoaloa lease before Rudra Datt was registered as lessee did not constitute an implementation of the Deed of Family Settlement.
 - (b) The payment of \$2,000.00 by Rudra Datt to his brothers was attributable to the sale of the Wailoaloa lease and the need to give vacant possession to the purchaser. The

payment did not activate section 13 of the State Lands Act and did not render the Deed of Family Settlement null and void.

- (c) The Deed of Family Settlement was not rendered null and void as there was no evidence to indicate that Rudra Datt had attempted to implement either clause 2 or 3 of the Deed of Settlement.
- (d) Following the death of Rudra Datt representations were made by or on behalf of the administratrix Sheela Wati that the Petitioner could remain on the land lease although perhaps later on a different location within the property. There was no evidence that the Petitioner had even identified or occupied a one quarter area of land lease 10093.
- (e) Sheela Wati by subdividing the land lease 10093 for the benefit of her children each of whom became a registered lessee of subdivided lots acted in contravention of the Deed of Family Settlement. The Petitioner was entitled to receive a one quarter area which would ultimately result in a registered lease of a subdivided lot.

Three Relevant Legal Principles and their Application

- [29] When Rudra Datt and the members of his extended family relocated to land lease 10093 they were not purporting to implement the Deed of Family settlement. The members of the extended families were not trespassers when they took up occupation of land lease 10093 with Rudra Datt. They were an extended family unit relocating to land lease 10093. If they were not trespassers and if their relocation, for the reasons stated, did not trigger the provisions of section 13, then the legal description of their occupation must be identified and under the circumstances should be regarded as the same as that which existed in relation to the Wailoaloa lease. Most of his extended family members had relocated with Rudra Datt. It was a matter for Rudra Datt to determine which members of his extended family were to relocate with him on to land lease 10093. This decision was unrelated to his obligations under the Deed of Family Settlement. Those obligations were to come into effect some time in the future and up until his death the only attempt to implement the obligations was by way of the letter dated 21 February 1991 from his Solicitors (P436 of the Record) seeking approval for the Deed. This application for consent was not necessary and nor was it granted. If anything it was Rudra Datt who had breached the Deed by failing

to seek the Director's consent to implement clauses 2 and 3 after becoming the registered lessee. The evidence did not support the claim that the initial relocation amounted to the implementation of clause 2 of the Deed. The relocation was not an alienation or dealing with the land requiring consent.

- [30] At the very least every person who relocated to land lease 10093 from Wailoaloa was a licensee in the sense they all had permission to relocate on to the land lease. This was a personal arrangement for the purpose of helping Rudra Datt's extended family in the interim until the formal arrangements contemplated by the Deed of Family Settlement were to be implemented. As Keith J observed at paragraph 49 in **Inspired Destinations (Inc) Limited v Grant Robert Graham and Brandon James Gibson and Bank of South Pacific** [2012] FJSC; CBV 3 of 2020 (28 October 2022) relying on the Privy Council decision in **Kulamma v. Manudan** [Privy Council Appeal No. 7 of 1966] [1968] AC 1062:

"Merely because an agreement can amount to a licence, it is not necessarily to be described as a dealing in land."

And again in paragraph 50:

*"... in **Kulamma** itself the grant of a licence to farm land could not be said to be a dealing in land. Nor could a purely personal right arising from promissory or equitable estoppel..."*

The re-location by permission remained as nothing more than a licence without creating any interest in land lease 10093 until there was an application for consent to implement the arrangements in the Deed. The relocation did not give rise to any proprietary interest and hence was not a dealing with or alienation of the leased land.

- [31] The representations made by or on behalf of Sheela Wati in the correspondence to which reference has been made did no more than extend the permission for Raj Dutt to remain in occupation as a licensee and to carry on what family activities he was undertaking without creating any proprietary interest in the land.

Limitation Act

- [32] The only action commenced by the Petitioner against the Respondents was by of Writ of Summons issued on or about 26 June 2014. The statement of claim alleges acts, facts and circumstances all of which occurred prior to 26 June 2008, including the acquisition of subdivided titles to Sheela Wati's children in July 2002 and the subsequent eviction proceedings commenced by the First Respondent on 29 June 2004. The action was commenced out of time.
- [33] It is a requirement of pleadings under Order 8 Rule 7 of the High Court Rules that the Respondents as defendants in the High Court were required to plead specifically any relevant statute of limitation which, it is alleged, would make the petitioner's claims not maintainable. When the statute is not specifically pleaded a court may do one of two things. First the offending party will not be allowed by the Court to rely on that defence or secondly the court may grant leave to amend the defence with time and costs to the other party. (See In Re Robinson's Settlement [1912] 1 Ch 717 at page 728). In the present case the defence was not pleaded and nor was any application made for leave to amend the Defence. No further consideration of this issue is required.
- [34] It may be that the delay by the Petitioner was the result of some confusion concerning the effect of the proceedings following the summary judgment delivered by the High Court in Lautoka granting to the First Respondent vacant possession of the land occupied by the petitioner pursuant to section 169 of the Land Transfer Act. The Petitioner's application for an enlargement of time to appeal the section 169 eviction was granted. His appeal was subsequently heard and the orders of the High Court were set aside. The effect of those orders was that if the First Respondent wanted to pursue vacant possession then he would be required to commence eviction proceedings by way of inter-partes proceedings in accordance with the Rules of the High Court. The First Respondent did not pursue High Court proceedings because the Petitioner did not manage to return to the property. However the Court of Appeal made no orders as to what course of action, if any, Petitioner should take in relation to the eviction.

Constructive Trust

- [35] There was considerable discussion in the judgment of the High Court and also briefly in the Court of Appeal concerning the existence of a constructive trust. In both decisions the existence of a trust was negated as a result of the alleged breach of section 13(1) rendering the Deed unenforceable and null and void. However since I have regarded the Deed as not having offended section 13(1) the issue is whether such a trust was created following the execution of the Deed. As I have previously noted the extended families had relocated to land lease 10093 as licences. The occupation of land under a licence does not give rise to any proprietary right or interest in the land. As a result no equitable interest could be said to have arisen under those circumstances. As a result there was no dealing or alienation that would have required the Director's consent under section 13. It cannot be denied that had an equitable interest in land lease 10093 arisen prior to the consent required under section 13(1) it would have constituted a dealing or alienation and hence would be unenforceable and that part of the agreement would be rendered null and void.
- [36] The occupation of land lease 10093 under licence continued up until the time when Sheela Wati was granted consent to subdivide head lease 10093. In my opinion from that time, as there had been compliance with section 13(1) the petitioner acquired an equitable interest in a one quarter share of land lease 10093 that had been agreed to by Rudra Datt in the Deed. Sheela Wati breached the Deed by applying for consent for a sub division in favour of her children rather than in favour of the Petitioner and the estates of each of the brothers who had by then passed away.

Fraud

- [37] The next issue relates to fraud. The First Respondent obtained his title to land lease 14796 upon being registered as lessee pursuant to the subdivision of the head lease 10093. It was part of the land on which the Petitioner and his family had resided since re-locating from the Wailoaloa lease. Consent for the sub-division had been sought by Sheela Wati who was Sunil Datt's mother and administratrix of Rudra Datt's estate. I have no doubt that Sheela Wati and Sunil Datt were both aware of the existence of the Deed and its terms, if

for no other reason, because he was a party and a signatory to the Deed. The issue that needs to be resolved is whether Sunil Datt obtained his title to Lot 14796 by registration as a result of fraud on the part of Sheela Wati and or Sunil Datt and if so what is the effect of that fraud on Sunil Datt's title as registered lessee.

[38] Section 41 of the Land Transfer Act 1971, so far as is relevant, provides that:

"Any instrument of title ...in the register provided or made by fraud shall be void as against any person defrauded or sought to be defrauded thereby and no party privy to the fraud shall take any benefit therefrom."

As a consequence fraud constitutes an exception to the indefeasibility of title guaranteed under section 39 of the Land Transfer Act. In this case Sunil Datt became registered as lessee of land lease 14796 in the face of the unregistered interest of the petitioner and in the defence relied on the register to defeat the petitioner's unregistered interest. The petitioner's unregistered interest arose when Sheela Wati applied for consent for the subdivision of head lease 10093. As there had not been up to that point any alienation or dealing under section 13(1) of the State Lands Act, the Deed's provisions relating to the one quarter areas and subdivision had not been rendered invalid nor null and void.

[39] In this case Sheela Wati, as the administratrix of the estate of Rudra Datt and subsequently as the registered lessee of head lease 10093 on transmission by death, applied for consent for the subdivision of head land lease 10093 in favour of her children including her eldest son the First Respondent. I have no doubt that, in view of the closeness of the family relationship, Sunil Datt was aware that his title as lessee was in contravention of the Deed of Family Settlement. What is not so clear is whether Sunil Datt knew at that time that the Deed was still valid. The Respondents consistently maintained that the Deed had become null and void when the extended family members moved from Wailoaloa to Navakai. There was no evidence to indicate that either Sheela Wati or Sunil Datt had obtained any advice as to whether the Petitioner had acquired or would acquire an interest in a one quarter area as a result of the application for consent for subdivision made by Sheela Wati. On the material before the Court it is apparent that Sheela Wati had indicated by

correspondence that the Petitioner could remain on the land. This of course would support the conclusion that Rudra Datt and his wife acknowledged that the Petitioner had been given permission to reside on the land under a licence. That correspondence sent to the Petitioner pre-dated the application for consent to subdivide.

[40] For whatever reason the Respondents, in particular Sunil Datt, did not give evidence at the trial and as a result were not cross-examined as to what they understood to be the status of the Deed and the basis for that belief prior to and following the application by Sheela Wati for consent to subdivide and the position of the Petitioner in relation to the Deed at the relevant time. Assertions in the defence are not evidence. Moreover, nor could the Petitioner have testified on what was the understanding of Sheela Wati and Sunil Datt in relation to those matters. The only extrinsic evidence was the letter from Sheela Wati's solicitor sent to Raj Datt prior to her application for consent and her letter dated 7 August 1997 applying for consent both of which did no more than appear to accept that the Petitioner occupied the land as a licensee. It would appear that Sheela Wati and then Sunil Datt have both regarded the Petitioner as occupying the land on lease 10093 under licence. However this raises a contradiction. If it was accepted by Sheela Wati and Sunil Datt that Raj Datt occupied the land as a licensee there was no breach of section 13(1). There is authority for the proposition that granting a licence to enable a person to occupy and farm land does not itself constitute a dealing with or alienation of the lease under section 13(1) of the State Lands Act. See: The Privy Council decision in **Kulamma v. Mandan** [1968] UKPC 2; [1968] A.C. 1062

[41] As a result there was no legal basis for the First Respondent to conclude that the Deed was null and void. Whether Sheela Wati and Sunil Datt genuinely believed that the Deed was null and void from when the extended families moved into land lease 10093 is relevant to the issue of fraud. Whether Sheela Wati genuinely believed that the Deed was null and void when she applied for consent for subdivision of lease 10093 is also relevant as is whether Sunil Datt on becoming registered as lessee of lease 14796 still genuinely believed that the Deed was null and void. The onus was on the Petitioner to prove that on all relevant

occasions Sheela Wati and Sunil Datt had acted dishonestly in securing the subdivided titles for Suni Datt and his siblings.

- [42] In **Assets Company Limited v. Mere Roiki and Others** [1905] AC 176 the Privy Council; considered the issue of fraud in the context of the New Zealand legislation dealing with Torrens System land. The New Zealand legislation for the present purposes is similar in terms to the legislation in Fiji. At page 210 their Lordships noted:

“by fraud in (this Act) is meant actual fraud, that is dishonesty of some sort ...”

In **Waimitia Sawmilling Co. Ltd v. Waiono Timber Co. Ltd** [1926] AC 101 at 106 the Privy Council said:

“If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear. The act must be dishonest and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest.”

- [43] In my judgment the evidence of the Petitioner given at the trial and the documents admitted into evidence do not establish fraud under section 41 of the Land Transfer Act on the part of the First Respondent to the required standard. It follows that the evidence does not support the claim by the Petitioner that the remaining Respondents had obtained registration of their subdivided shares of lease 10093 as a result of fraud by anyone of them.

Damages

- [44] As for the claim for damages I am satisfied that when Sheela Wati applied for consent for subdivision of lease 10093 on 7 August 1997 the Petitioner acquired an equitable interest in a one quarter share of the land lease 10093. As a result his subsequent eviction by the First Respondent denied the Petitioner of the use of land he had previously occupied under licence. The eviction order allowed by summary judgment was set aside and Sunil Datt took no steps to pursue his claim by way of writ of summons, pleadings and evidence.

Instead the Petitioner was denied the use of the land following his eviction, his dwelling was demolished and the material removed from the land and his belongings left on the side of the road. The Petitioner is entitled to compensation for these wrongs.

[45] The evidence to support the quantum of damages claimed was in the form of oral testimony given by the Petitioner and his son at the trial together with receipts admitted into evidence as exhibits. Upon an examination of the documentary evidence the receipts to which the Petitioner referred in his testimony related to expenses and disbursements arising as a result of the litigation between the parties. The receipts were itemized in lists that were also admitted into evidence. Apart from a list of materials and items (exhibit 8) that were “missing” after Sunil Datt had organized the dismantling of the Petitioner’s and his family’s residences (3 houses) there was no evidence that indicated what value could be attached to the material and items. The evidence given by the Petitioner was to the effect that after the demolition of his and his families houses they lived in a tent on the side of the road with what was left of their belongings. After one month some belongings were placed in storage at a neighbour’s house and the Petitioner with his families moved to another location and then returned to Navakai but in a different location.

[46] It appears that the Petitioner was not cross-examined in relation to the claim for the materials and items that were taken away following the demolition of the houses. There was evidence from a police officer that Sunil Datt had been charged with larceny. The matter was dismissed. The copy of the charge sheet relating to larceny was not exhibited, only an extract from the Court Register relating to the order dismissing the charge. As a result there was no evidence before the Court as to the value of the items that were not returned to the Petitioner. More specific information about the demolition and the removal of property was provided by the Petitioner’s son Raveen Datt. This witness sought to produce copy quotations for materials from KK Hardware, Vinod Patel and a contractor Aiyaz Ali. Objection to their admission into evidence was raised by counsel for the First Respondent on the basis that the receipts had not been disclosed/listed in the Petitioner’s affidavit of documents. The learned Judge allowed the objection and the receipts were excluded. As a result there was no documentary evidence to assist the Court in assessing

the quantum of the claims of damages. However it is still open to this Court to determine what it considers appropriate under the circumstances.

- [47] The Court must attempt to do the best it can with the limited information at its disposal. It would be manifestly unfair to the Petitioner if the Court were to consider the task too difficult. In the interests of justice the Petitioner is to be compensated for his loss and his subsequent displacement. Under the circumstances and in the absence of any material to assist the Court I would order that Sunil Datt pay to the Petitioner (as his son having been substituted for the Petitioner by order of the Court upon the death of Raj Datt) the sum of \$20,000 within 60 days from the date of this judgment.

Rights in personam

- [48] In the absence of sufficient evidence of fraud on the part of the First Respondent or on the part of his mother Sheela Wati before him the First Respondent's title to land lease 14796 may be defeated by the "rights in personam" exception to indefeasibility. In **Wati v Kumar** (supra) Keith J at para 45 acknowledged that section 39 of the Land Transfer Act did not defeat the creation of a beneficial interest in equity. Keith J continued in paragraph 45:

"In brief the 'rights in personam exception' arises where (a) the registered proprietor knew of the factor which gave rise to someone else having an equitable interest in the land and (b) he proceeded to register his title to the land despite that in circumstances in which it would be unconscionable for him to retain his registered interest in the land."

- [49] Considering the facts that were not disputed and the totality of the evidence adduced at the trial by the Petitioner I have concluded that Sheela Wati and Sunil Datt were aware of the facts that gave rise to the Petitioner's equitable interest in a one quarter share of lease 10093. They were aware of the existence of the Deed and its terms. They were aware of the arrangements that existed upon relocation. Upon the death of Rudra Datt they had indicated that they had no objection to the Petitioner continuing to reside on the property. That remained the position until August 2002 when, having acquired a title to land lease 14796 following subdivision, Sunil Datt wrote to Raj Datt giving notice that the Petitioner

was to vacate the quarter acre that he occupied and upon which (you) “have built your residence.” It is in that context that I have concluded that it would be unconscionable for Sunil Datt to retain the legal title to all the land in lease 14796. In my opinion Sunil Datt’s title to land lease 14796 is not indefeasible.

Claims against the Fifth Respondent

[50] In paragraph 36 of the Petitioner’s Statement of Claim it is alleged that “the 5th Defendant’s servants and agents caused biasness, fraud in dealing which enriched the 1st to 4th Defendants.” There are a number of allegations that relate to the actions of the Lands Department in the performance of their duties under the State Lands Act. Those allegations do not in themselves give rise to any acts of dishonesty or allow dishonesty to be inferred. It may be argued that they constitute allegations of breach of duty. However breach of duty is a cause of action that has not been pleaded and as a result was not addressed by the trial Judge.

[51] The evidence adduced at the trial indicates that the applications required to be lodged with the Lands Department were considered and assessed on the material that was included in the application. It was not necessarily the concern of the Lands Department as to what private arrangements were being made from time to time within the extended families.

[52] The Court of Appeal dismissed the Petitioner’s claims against the Fifth Respondent. In my opinion there is no issue that would satisfy the requirements of section 7(3) in so far as the Petition seeks leave to appeal the decision of the Court of Appeal dismissing the claims against the Fifth Respondent.

Conclusion

[53] I would grant the Petitioner leave to appeal the decision of the Court of Appeal dismissing the Petitioner’s appeal against the High Court Judgment dismissing the Petitioner’s claims against the first four Respondents. I would do so on the basis that the Petitioner raises far reaching questions of law involving the principles that govern the existence of a

constructive trust and whether the indefeasible title of a lessee of State land can be defeated, in the absence of fraud, by the existence of a principle in equity known as "*rights in personam*". I would treat the application for leave to appeal as the hearing of the appeal. I would allow the appeal against the Judgment of the Court of Appeal delivered in favour of the first four Respondents. I would set aside the orders of the Court of Appeal and the High Court. I would refuse leave to appeal in respect of the fifth Respondent. I would also order that the first Respondent allow the Petitioner and his family a licence to occupy the one quarter acre of land to which reference was made in his eviction letter dated 27/8/02 to the Petitioner. The Respondents are ordered to give up to the Petitioner a one quarter share of the land comprised in the sub-subdivided leases consistent with the equitable interest acquired under the Deed, for which prior consent would be required for the petitioner. I would order the first Respondent to pay to the Petitioner the sum of \$20,000.00 within 60 days from the date of this judgment as compensation for the non-return of the various items and building materials belonging to the Petitioner and his family. The Respondents are ordered to pay the costs of this appeal fixed in the sum of \$10,000.00 (including disbursements) within 60 days from the date of this judgment.

Jitoko, J

[54] I have had the advantage of reading the draft judgment of Calanchini J. I agree with it for the reasons given therein, the conclusions and Orders.

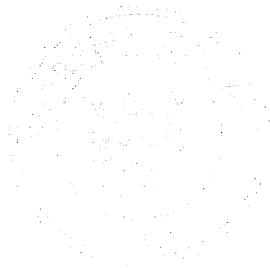
Orders

1. *Enlargement of time granted.*
2. *Leave to appeal is granted as against the first Four Respondents.*
3. *Appeal allowed as against the first Four Respondents.*
4. *Leave to appeal is refused as against the Fifth Respondent.*

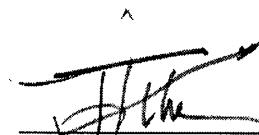
5. *The First Respondent is to allow the Petitioner and his family a licence to occupy the one quarter acre that was occupied by the Petitioner and his family prior to eviction.*
6. *The First Four Respondents are ordered to give up to the Petitioner a one quarter share of the land comprised in the sub-divided leases, consistent with the equitable interest acquired under the Deed, for which prior consent would be required for this Petitioner.*
7. *The First Respondent is to pay \$20,000.00 to the Petitioner for his loss of building materials and items within 60 days from the date of this judgment.*
8. *The Respondents are ordered to pay the costs of this appeal fixed at \$10,000.00 (including disbursements) within 60 days from the date of this judgment.*



The Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court



The Hon. Mr. Justice William Calanchini
Judge of the Supreme Court



The Hon. Mr. Justice Filimone Jitoko
Judge of the Supreme Court