IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CIVIL PETITION NO. CBV 0012 of 2023
Court of Appeal No. ABU 28 of 2020

BETWEEN: **VIJAY NAND SHARMA**

Petitioner

AND:
1. **MAHENJIT PRASAD**
2. **INDAR JIT PRASAD**
3. **REGISTRAR OF TITLES**

Respondents

Coram: **The Hon. Justice Brian Keith**
Judge of the Supreme Court

The Hon. Justice William Young
Judge of the Supreme Court

The Hon. Justice Alipate Qetaki
Judge of the Supreme Court

Counsel: **Ms S Devan for the Petitioner**
Mr I Fa for the first and second Respondents
Ms J Manneli for the third Respondent

Date of Hearing: **3 October 2024**

Date of Judgment: **30 October 2024**

JUDGMENT

Keith, J

Introduction

1. Many years ago, Fiji adopted the Torrens system for the transfer and registration of land. Under the Torrens system, the transfer of land is only completed when the transfer has been duly registered. That is when the purchaser acquires title to the land. But how does someone protect a proprietary interest or estate which they claim they have in the land before its registration takes place? One device is to lodge a caveat against the title. The effect of lodging a caveat against the title is to prevent the registration of any dealing in the land until the caveat has been removed. This case concerns such a caveat, though when the case got to the Court of Appeal, it took a very different course. The background facts are important because they explain the context in which the current dispute has arisen, and I trust that I will be forgiven for setting them out in some detail.

The background

2. *The sale of the land*. The land to which this case relates is in Waibola, a residential area close to Suva. It was owned by Ram Prasad. He died many years ago. The joint executrices and trustees of his estate were his wife, Suruj Kuar, and his daughter, Raj Mati. In due course, they decided to sell the land to the petitioner, Vijay Sharma. A sale and purchase agreement was executed. It was dated 29 April 2004. It provided for the sale of the land to Mr Sharma for $435,000. 10% of that sum, ie $43,500, was payable on the execution of the agreement, and the balance of $391,500 was to be paid on the "settlement date". The deposit of $43,500 was duly paid by Mr Sharma.[1]

3. *The first action*. Clause 4 of the agreement provided that the settlement date should be "within 90 (Ninety) days from the date of this agreement or any other date mutually agreed

[1] It was paid to the vendors' solicitors. We were told that the firm ceased to practice, and that the deposit was returned to Mr Sharma. We do not know whether Mr Sharma agrees with that, but it does not affect the outcome of this appeal.

in writing between the parties". Suruj Kuar and Raj Mati were not willing to complete the transaction, and the settlement date therefore went by without anything happening. On 25 June 2007, Mr Sharma issued proceedings in the High Court against them seeking specific performance of the agreement. By the time the action came to be tried in 2013[2], Raj Mati had been removed as one of the executrices and trustees of Ram Prasad's estate, and the action proceeded against Suruj Kuar alone. She defended the action on the basis that Raj Mati had got her to sign the agreement by misrepresenting what she was being asked to sign, and that had she known that she was signing an agreement for the sale of the land she would never have done so.

4. The action was tried by Brito-Mutunayagam J. He found for Mr Sharma. On 22 April 2014 he ordered specific performance of the agreement "upon payment" by Mr Sharma of the balance of the purchase price. Mrs Kuar applied for leave to appeal against the judgment out of time. Chandra RJA refused to grant her an extension of time to file her notice of appeal. That looked as if it was the end of the matter. It was not.

5. *The involvement of the Chief Registrar of the High Court*. Despite the order for specific performance, Mrs Kuar was not willing to complete the transaction. Accordingly, Mr Sharma applied to the High Court for an order requiring the Chief Registrar to effect the transfer of the land to him. Mrs Kuar resisted the application, but on 7 November 2017 Brito-Mutunayagam J ordered the Chief Registrar to convey the land to Mr Sharma "upon the payment" by Mr Sharma of the balance of the purchase price, less $3,000 being the legal costs incurred by Mr Sharma in making the application. Although it was not referred to in the order which was subsequently drawn up, Brito-Mutunayagam J had said in his judgment that his order was subject to the removal of a caveat on the title which had been lodged by one of Ram Prasad's sons, Sarab Jeet. That caveat was indeed removed, and is not material to any of the issues arising in the current dispute between the parties.

[2] We were not told why it took so long for the action to come to trial.

6. On 9 March 2018 the Chief Registrar duly executed an instrument transferring the land to Mr Sharma's nominee, Sharma Design Group Ltd.[3] The instrument referred to the purchase price of $435,000 "agreed to be paid to the Transferor by" Mr Sharma. All that remained was for the balance of the purchase price to be paid and for the transfer to be registered in the Register of Titles. In accordance with Fiji's conveyancing practice, they were due to take place simultaneously. The date fixed for that was 15 June 2018.

7. *The lodging of a new caveat*. However, neither of those things happened. That was because a new caveat on the title had been lodged.[4] It had been lodged by the first and second respondents, two of Ram Prasad's other sons, Mahenjit Prasad and Indar Jit Prasad. They claimed an interest in the land "by virtue of being the sons and beneficiaries of the proprietor [of] the land". The effect of the caveat was to prevent Mr Sharma's title to the land from being registered for the time being. Mr Sharma's solicitors had not been informed of the lodging of the caveat. They only discovered its existence shortly before 15 June 2018 when the transfer of the land was due to be registered and the balance of the purchase price was due to be paid. Their only recourse was to get the new caveat removed.

8. *The application to remove the new caveat*. On 16 August 2018 Mr Sharma applied to the third respondent, the Registrar of Titles, for the removal of the new caveat. The application was made under section 110(1) of the Land Transfer Act 1971 ("the Act"), which provides that such an application can only be made by "the caveatee or his or her agent". The Registrar of Titles was not prepared to remove the caveat, and returned the application to Mr Sharma's solicitors. She took the view that Mr Sharma was not the caveatee because he was not the registered proprietor of the land. Mr Sharma's only option then was to issue proceedings. Those proceedings are the present claim.

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[3] The sale and purchase agreement had permitted the purchaser to be Mr Sharma *or his nominee*. For convenience, I shall continue to refer to Mr Sharma as the purchaser.

[4] It is unclear when it was lodged, but looking at the caveat itself, it looks as if an unsuccessful attempt was made to lodge it on 22 December 2017, but that it was properly lodged on 21 May 2018.

The present claim

9. The claim was commenced by an originating summons filed on 20 February 2019. The defendants were the Prasad brothers on the basis that they had lodged the caveat when they had had no caveatable interest in the land, and the Registrar of Titles on the basis that she had wrongly concluded that Mr Sharma could not be treated as the caveatee. The action was brought under section 168 of the Act, which provided (so far as is material):

> "In any proceedings … in respect of any instrument … affecting any … land [subject to the provisions of this Act] …, the court may by decree or order direct the Registrar [of Titles] to cancel … any instrument of title … or otherwise do such acts as may be necessary to give effect to the judgment … of such court."

Affidavits were filed by the Prasad brothers and the Registrar of Titles in response to the summons. The Registrar of Titles maintained her stance that Mr Sharma could not be regarded as the caveatee. The only point taken by the Prasad brothers was that their mother was seeking to lodge a fresh appeal – albeit well out of time – against Brito-Mutunayagam J's original judgment and Chandra RJA's refusal to extend their mother's time for appealing against that judgment.

10. The action was heard by Amaratunga J. By then, the principal argument advanced on behalf of the Prasad brothers was that section 168 was not the appropriate section to use when applying to the court for an order for the removal of a caveat. The appropriate section – indeed the only appropriate section – was said to be section 109(2) of the Act, which provided (so far as is material):

> "Any … applicant [for registration as proprietor] or registered proprietor, or any other person having any registered estate or interest in the estate or interest protected by the caveat, may, by summons, call upon the caveator to attend before the court to show cause why the caveat should not be removed, … and the court may make such order … as to the court seems just …"

They also relied on (a) their mother's proposed fresh appeal from Brito-Mutunayagam J's original judgment, and (b) the fact that the instrument of transfer which the Chief Registrar had executed referred to the purchase price of $435,000 as having been "agreed to be paid" rather than "having been paid". What they were getting at by this latter argument is, at first sight, difficult to see. As for the Registrar of Titles, she maintained her position that Mr Sharma could not be regarded as the caveatee.

11. Amaratunga J's judgment was given on 24 March 2020. He found for Mr Sharma. He took the view that section 109(2) did not create an exclusive remedy for a litigant seeking an order from the court for the removal of a caveat. Indeed, he thought that Mr Sharma could not have availed himself of section 109(2) as section 109(2) could only be invoked by someone whose interest in the land had been registered, and Mr Sharma's interest had not. It was entirely appropriate therefore for Mr Sharma to bring his claim under section 168 of the Act. As for Suruj Kuar's proposed fresh appeal against Brito-Mutunayagam J's original judgment, Amaratunga J took the view that this did not create a caveatable interest. Although he did not say so in so many words, he presumably thought that Suruj Kuar's route to delay the transfer of the land to Mr Sharma until her fresh appeal had been disposed of was by applying for a stay of the order for specific performance – something which she never did. Amaratunga J did not address the argument about the wording of the instrument of transfer which the Chief Registrar had executed – perhaps because the relevance of that was not sufficiently explained to him.

12. Amaratunga J did not deal with the argument advanced by the Registrar of Titles that Mr Sharma could not be regarded as a caveatee for the purposes of section 110 (1). I can understand why. Section 110 related to applications *to the Registrar* for the removal of a caveat, and by the time of the hearing before Amaratunga J, things had moved on. He was concerned with how Mr Sharma could apply *to the court* for the removal of the caveat. In other words, even if section 110 had not permitted Mr Sharma to request *the Registrar* to remove the caveat, the current issue was whether the procedure by which Mr Sharma had asked *the court* to remove the caveat had been the appropriate one. Amaratunga J concluded that it had been.

13. In any event, Amaratunga J did not think that the Prasad brothers had a caveatable interest in the land at all. He thought that their claim to a caveatable interest in the land "by virtue of being the sons and beneficiaries of the proprietor [of] the land" was misconceived. Amaratunga J noted the assertion made by the Registrar of Titles that when the caveat had been lodged by the Prasad brothers she had not been informed of Brito-Mutunayagam J's order of 7 November 2017 requiring the Chief Registrar to convey the land to Mr Sharma. Amaratunga J said that the Registrar of Titles had conceded that if she had been informed of that, she would not have permitted the caveat to be lodged. That amounted to a concession by the Registrar of Titles that the Prasad brothers had not had a caveatable interest in the land.

14. These, then, were the reasons which Amaratunga J gave for ordering the Registrar of Titles to remove the caveat lodged by the Prasad brothers. The consequence was that Mr Sharma proceeded to have the transfer of the land to him registered by the Registrar of Titles. That took place on 2 April 2020.

The appeal to the Court of Appeal

15. The Prasad brothers appealed to the Court of Appeal. They no longer sought to rely on the proposed fresh appeal against Brito-Mutunayagam J's original order which their mother had been trying to bring.[5] They relied on the other two arguments which they had advanced to Amaratunga J – namely the one concerning the procedure which Mr Sharma had adopted to have the caveat removed, and the argument based on the wording of the instrument of transfer which the Chief Registrar had executed.

16. The Court of Appeal's judgment is dated 26 May 2023. It regarded the first of these arguments as of academic interest only. That was because it did not matter whether section 109(2) was the only mechanism by which the court could be asked to remove a caveat, or

[5] We were told that the proposed fresh appeal has not yet been disposed of, but since the Prasad brothers no longer rely on it, nothing further needs to be said about it.

whether Mr Sharma had been forced to use section 168 because he could not use section 109(2). That was because the Court of Appeal agreed with Amaratunga J that the Prasad brothers had not had an interest which was capable of being protected by a caveat against the title. There has been no respondents' notice seeking to challenge that conclusion.

17. I turn, then, to the argument based on the wording of the instrument of transfer which the Chief Registrar had executed. To repeat, the instrument of transfer referred to the purchase price of $435,000 as having been "agreed to be paid" rather than "having been paid", even though Brito-Mutunagayam J's original order had ordered specific performance of the sale and purchase agreement "upon payment" of the balance of the purchase price. The argument advanced on behalf of the Prasad brothers to the Court of Appeal was that the balance of the purchase price, ie $391,500, had to be paid by the time the Chief Registrar purported to convey the land to Mr Sharma, and it had not been. The caveat therefore had to remain in place to ensure that the balance of the purchase price would be paid.

18. A few moments thought shows that this argument is fatally flawed. If, as both Amaratunga J and the Court of Appeal found – in my view correctly – that the Prasad brothers did not have a caveatable interest in the land, the fact that the existence of the caveat provided a measure of protection against the non-payment of the balance of the purchase price is completely beside the point. If the Prasad brothers could not lawfully have lodged the caveat in the first place, there could be no defence to a claim to have it removed.

19. It is not possible to tell from the judgment of Basnayake JA (who gave the leading judgment with which the other two members of the court agreed) whether he saw this flaw in the Prasad brothers' argument. But he got round it in a radical way. Rather than considering whether the caveat should be removed, he focused on whether it had been appropriate for an order for specific performance to have been made in the first place. He noted that an order for specific performance of an agreement can only be made if the party applying for such an order is himself ready, willing and able to perform his side of the bargain. Mr Sharma's obligation was to pay the balance of the purchase price, and Basnayake JA questioned whether Mr Sharma had indeed been ready, willing and able to do that. Since

(a) the evidence was that Mr Sharma was having to fund his purchase of the land with a loan from a bank, (b) there was no evidence that any sums had in fact been lent to Mr Sharma, and (c) the balance of the purchase price had not been paid by the time the Chief Registrar executed the instrument of transfer, Basnayake JA concluded that Mr Sharma had not been ready, willing and able to perform his side of the bargain. The two orders made by Brito-Mutunayagam J had been made on the basis that the balance of the purchase price would be paid by Mr Sharma. He had not done that by the time the Chief Registrar had executed the instrument of transfer, and there was no evidence that he would do so. Basnayake JA concluded that Mr Sharma "had been blatantly violating the court orders and attempted to get the property free". That was the basis on which the Court of Appeal allowed the Prasad brothers' appeal, and ordered, among other things, the Chief Registrar to "cancel" the transfer of the land to Mr Sharma.

The current appeal

20. Mr Sharma applied for leave to appeal to the Supreme Court. Pending the hearing of that application, he applied for a stay of the judgment of the Court of Appeal. On 30 November 2023 Temo P made no order on the application for a stay, but he purported to give Mr Sharma leave to appeal. I say "purported" to do that, because it is doubtful whether he had power to do so. Rule 11 of the Supreme Court Rules provides that a single judge of the Supreme Court may exercise any power vested in the Supreme Court "not involving the decision of an appeal". Whether a decision to grant leave to appeal involves "the decision of an appeal" is very much a moot point. However, since the issue was not argued before us, I do not think that we should decide the point ourselves. Instead, I think that we should determine for ourselves whether leave to appeal should be given.

21. Although there are a number of grounds of appeal, they come down to two points. The first is that the Court of Appeal decided the appeal on a basis which had not been argued in the High Court, and which had not been advanced by the Prasad brothers. I have a good deal of sympathy with this argument. The contention advanced on behalf of the Prasad brothers that the caveat was needed to protect them in the event of Mr Sharma failing to pay the balance of the purchase price was expressed in a very oblique way in the written

submissions provided to Amaratunga J. I rather doubt whether I would have been able to see where the argument was going if I had only had the written submissions to rely on. We do not know how those written submissions were expanded in oral argument, if at all, but I am not surprised that Amaratunga J did not deal with the point. It would have been entirely understandable if he had not appreciated the point which was being made.

22. Having said that, I prefer to focus on the principal point taken on Mr Sharma's behalf, which is that Mr Sharma had been ready, willing and able to pay the balance of the purchase price by the time his obligation to pay it arose, even if that meant that the purchase price would be paid after the Chief Registrar had executed the instrument of transfer. So when did Mr Sharma's obligation to pay the balance of the purchase price arise? It will be recalled that his obligation to pay it arose on the settlement date, which was defined in the sale and purchase agreement as being "within 90 (Ninety) days from the date of this agreement or any other date mutually agreed in writing between the parties". Since the vendors were not willing to complete the transaction, the 90 days passed by and no subsequent date was mutually agreed in writing between the parties. A new settlement date could only come into being once effect had been given to the order for specific performance of the agreement. Effect could not be given to the order for specific performance until the new caveat had been removed. The caveat was removed by Amaratunga J's judgment of 24 March 2020, and a new settlement date had therefore to be fixed.

23. The Court of Appeal wanted to know whether the balance of the purchase price had been paid by whenever this new settlement date was. No evidence had been filed about that. It therefore adjourned the hearing until later in the session for Mr Sharma's solicitors to file evidence on the topic. The evidence which was then filed showed that a new settlement date had been agreed between Mr Sharma's solicitors and the Chief Registrar of 2 April 2020, ie 9 days after the order for the removal of the caveat. The evidence also showed that on that date, the balance of the purchase price had indeed been paid by Mr Sharma's solicitors to the Chief Registrar, less the sum of $3,000 which Brito-Mutunayagam J had

ordered to be deducted from the purchase price for Mr Sharma's legal costs and other proper debts and disbursements.[6]

24. In these circumstances, on what basis did the Court of Appeal conclude that Mr Sharma had not been ready, willing and able to pay the balance of the purchase price? The answer is that it read the language of the Chief Registrar's instrument of transfer – "the Chief Registrar … shall convey to [Mr Sharma the land] … upon the payment … [of] the balance [of the purchase price]" – as requiring Mr Sharma to have paid the balance of the purchase price *by the date of the instrument of transfer*. As he had not done so, he could not be regarded as having been ready, willing and able to keep to his side of the bargain.

25. This approach was wrong. It ignored both conveyancing practice in Fiji and Fiji's adoption of the Torrens system for the transfer and registration of land, as well as the provision in the sale and purchase agreement about the settlement date. Under the Torrens system, a transfer of land is only completed when the transfer has been registered in the Register of Titles. Accordingly, the "conveyance" to Mr Sharma of the land would only be completed once effect had been given to the Chief Registrar's instrument of transfer by its registration with the Registrar of Titles. Once that had happened, Mr Sharma's title to the land was indefeasible.[7] My understanding of Fiji's conveyancing practice reflects that. The payment of the balance of the purchase price and the registration of the transfer of the land to the purchaser take place simultaneously. As Jitoko J (as he then was) said in *Jivaratnam and Singh v Prasad* [2023] FJSC 11 at para 45:

> "The Date of Settlement recognized under Fiji's conveyancing practice and where it involves the bank and mortgage transactions, is … where 'all parties meet at the Titles Office to "settle" by checking that all utilities affecting the property are cleared, the Vendor has the keys and title to the property and in

[6] Those debts and disbursements were (a) the sum of $43,000 being the capital gains tax payable by Suruj Kuar and Raj Mati to the Fiji Revenue and Customs Service on the transaction, (b) the sum of $18,344 being the outstanding income tax payable by Ram Prasad for 1996, and (c) sums totaling $31,841.40 payable to Lami Town Council for unpaid rates and rubbish collection in respect of the land.

[7] That is explained at greater length in the judgment of Young J which I have had the opportunity to read in draft and with which I agree.

exchange the lodgment of the Transfer at the Registrar of Titles counter, the Vendor is paid the price agreed on the Transfer'."

The settlement date in this case was 2 April 2020, and that was the date on which Mr Sharma paid the balance of the purchase price [8] He was therefore ready, willing and able on the settlement date to keep to his side of the bargain.

26. Basnayake JA's strong criticism of Mr Sharma – that he had been "blatantly violating the court orders and attempting to get the property free" – was completely inappropriate. If anyone is to be criticized, it should be the Prasad brothers and their solicitors for causing a caveat to be lodged against the title in circumstances which were wholly unjustified, and was on the face of it an attempt to frustrate the orderly transfer of the land to Mr Sharma.

27. There are two other things which need to be said about Basnayake JA's approach. First, the argument that Mr Sharma had not been ready, willing and able to keep to his side of the bargain – and that therefore an order for specific performance should not have been made – had not been advanced on behalf of the Prasad brothers. They had simply argued that the caveat should not have been removed until the balance of the purchase price had been paid. Secondly, by concluding that Mr Sharma had not been ready, willing and able to keep to his side of the bargain by failing to pay the balance of the purchase price by what the Court of Appeal wrongly thought was the relevant date, the Court of Appeal was saying that the order for specific performance should not have been made – even though the Court of Appeal was not considering an appeal from the order for specific performance, but an appeal from the order removing the caveat. The result was that there were two extant but wholly contradictory orders or judgments of the court: the order of the High Court of 22 April 2014 ordering specific performance of the sale and purchase agreement, and the judgment of the Court of Appeal of 26 May 2023 that the order of specific performance should not have been made.

[8] I image that these days settlement will usually take place electronically, but since in this case the Chief Registrar stood in the shoes of the vendor it may well have taken place "over the counter" at the office of the Registrar of Titles.

Postscript

28. I wish to add one thing about the parties' written submissions. They both contained many pages on the test to be applied by the Supreme Court for the granting of leave to appeal. That is not uncommon in Fiji. Practitioners invariably include in their written submissions to the Supreme Court a lengthy analysis of the various authorities on the nature of the test to be applied. I would discourage that. Litigants and their advisers should proceed on the assumption that judges who sit in the Supreme Court are aware of the test, and do not need to be reminded of it. The written submissions should instead focus on the issues raised in the proposed appeal. The irony in the present case is that leave to appeal had purportedly been given, so not only was it unnecessary for the written submissions to deal with the test for leave. It was in this case completely inappropriate if Temo P's order of 30 November 2023 was to be taken at face value.. That particularly applies to the written submissions filed on behalf of the Prasad brothers. They focused exclusively on why the issues raised in the case meant that the threshold for the grant of leave to appeal had not been met.

Conclusion

29. For these reasons, I would grant Mr Sharma leave to appeal on the basis that the appeal raises a far-reaching question of law, namely whether a purchaser of land is required to pay the balance of the purchase price prior to the registration of his title in the light of Fiji's adoption of the Torrens system for the transfer and registration of land and conveyancing practice in Fiji. In accordance with the Supreme Court's usual practice, I would treat the hearing of the application for leave to appeal as the hearing of the appeal. I would allow Mr Sharma's appeal. I would set aside the order of the Court of Appeal in its entirety. I would restore the order of Amaratunga J. I would declare that title to the land was transferred to Mr Sharma, and his title was registered, on 2 April 2020, and I would order the Prasad brothers to pay to Mr Sharma his costs of both the appeal to the Court of Appeal and the appeal to the Supreme Court summarily assessed at $10,000.

Young, J

30. I agree entirely with the judgment of Keith J and with the orders he proposes. I do, however, wish to add some additional comments of my own.

31. Central to the operation of a Torrens system is paramountcy of registered title against unregistered interests, a paramountcy that is usually referred to as indefeasibility of title. Sections 37-42 of the Land Transfer Act 1971 provide for indefeasibility of title and specify the very limited exceptions to it, the most important of which is fraud.

32. The criticisms made of Mr Sharma by the Court of Appeal were not justified on the facts, therefore unfair, and ought not to have been made. The transfer to his company was pursuant to a court order and he/his company paid everything that was required to be paid on settlement. No allegation of fraud against him could be responsibly made. The other limited exceptions to indefeasibility of title are set out in ss 39(1) and 42(1). None of them have any application to the present dispute.

33. The controlling provisions, shorn of references to irrelevant exceptions, provide:

> **38**. No instrument of title registered under the provisions of this Act shall be impeached or defeasible by reason or on account of any informality or in any application or document or in any proceedings previous to the registration of the instrument of title.
>
> **39**.- (1) Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, *the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall*, except in case of fraud, *hold the same subject to such encumbrances as may be notified on the folium of the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever* ....
>
> ...
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> **42**.-(1) No action for possession, or other action for the recovery of any land subject to the provisions of this Act, or any estate or interest therein, shall lie or be sustained against the proprietor in respect of the estate or interest of which he is registered, ...

> (2) … the production of the register or of a certified copy thereof shall be held in every court of law or equity to be an absolute bar and estoppel to any such action against the registered proprietor of the land, estate or interest the subject of the action, any rule of law or equity to the contrary notwithstanding.

34. Generally expressed statutory provisions such as s 168 do not authorise courts or officials to make orders that cut across a title that is otherwise indefeasible. This was made clear by the Privy Council in *Frazer v* Walker which held that sections that were broadly similar to s 168 did not authorise orders that were inconsistent with an indefeasible title (such as that held by Mr Sharma's company).[9]

35. This means it was not open to the Court of Appeal to cancel the registration of the transfer to Mr Sharma' company. This aspect of the case was not addressed by the Court of Appeal in its judgment.

36. In circumstances where a court removes a caveat to permit registration of say, as here, a transfer, a caveator wishing to appeal is well-advised to seek a stay that leaves the caveat in place pending appeal. Where, as here, a stay is not sought, registration of the transfer will almost inevitably result in the transferee obtaining an indefeasible title rendering the appeal moot, which I consider to be the position of the Prasads' appeal once the transfer to Mr Sharma's company was registered

37. In short, I see the judgment of the Court of Appeal as wrong:

    a. for all the reasons given by Keith J; and also

    b. as inconsistent with ss 38, 39 and 42 of the Land Transfer Act under which Mr Sharma's company obtained indefeasible title to the land.

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9 *Frazer v Walker* [1967] 1 AC 569 at 581 and 585-86.

Qetaki, J

38. I have carefully considered the judgment of Keith, J in draft and I agree with it, the reasoning and proposed orders. I also concur with the additional comments of Young, J in agreement with the judgment.

Orders:

(1) Leave to appeal against the order of the Court of Appeal of 26 May 2023 granted;
(2) The petitioner's appeal allowed;
(3) The order of the Court of Appeal of 26 May 2023 set aside;
(4) The order of Amaratunga J of 25 March 2020 restored;
(5) It is declared that title to the land to which this action relates was transferred to the petitioner, and his title was registered, on 2 April 2020;
(6) The first and second respondents must pay to the petitioner his costs of the appeal to the Court of Appeal and the appeal to the Supreme Court summarily assessed at $10,000.

The Hon. Justice Brian Keith
Judge of the Supreme Court

SUPREME COURT FIJI

The Hon. Justice William Young
Judge of the Supreme Court

The Hon. Justice Alipate Qetaki
Judge of the Supreme Court