

IN THE COURT OF APPEAL FIJI
[ON APPEAL FROM THE HIGH COURT OF FIJI]

CIVIL APPEAL NO. ABU 0091 of 2015
(High Court of Labasa Civil Action No. HPP 07 of 2013)

BETWEEN : JACOB JOHN STEINER JNR

Appellant

AND : ERNIE STEINER

Respondent

Coram : Calanchini, P
Jameel, JA
Kumar, JA

Counsel : Mr. J. Sloan for the Appellant
Mr. A. Nand with Mr. R. P. Singh for the Respondent

Date of Hearing : 18 August 2017

Date of Judgment : 14 September 2017

JUDGMENT

Calanchini, P

[1] I agree that the appeal should be allowed. The orders of the Court below should be set aside with costs to the Appellant of \$5000.00 in this Court and \$3000.00 in the Court below.

Jameel, JA

Introduction

[2] This is an appeal from the judgment of the High Court dated 27 November 2015 allowing the claim of the Plaintiff- Respondent, (hereinafter known as 'the Respondent'), holding that the Last Will dated 26 December 1969 was not a valid will, and revoking the Probate dated 11 August 1970, bearing No. 11062 granted in respect of the said Last Will.

The Background

[3] The Respondent instituted proceedings against the Appellant by Writ of Summons dated 11 February 2013, and filed a Statement of Claim dated 13 February 2013, seeking the following relief-

- (a) *That the court pronounce against the validity of the Will dated 26 December 1969.*
- (b) *Revocation of Probate No. 11062.*
- (c) *Cancellation of the transfer of Nukubati Island to the Appellant.*
- (d) *An order requiring the Appellant to give a full and proper account of all rent monies received.*
- (e) *An order requiring the Appellant to hand over the Certificate of Title Register Volume 53 Folio 5277 of Nukubati Island to the Respondent.*
- (f) *An order restraining the Appellant from transferring, mortgaging or dealing in any other way pending the determination of the action.*
- (g) *Such further and other relief court deemed just.*
- (h) *Costs of the action.*

The Chronological sequence and factual matrix

[4] The picturesque Island of Nukubati, located off the coast of Vanua Levu, is the subject matter of this appeal. The ownership appears to have been passed down the generations of male heirs, many of who successively had the name "Jacob Steiner". The Jacob Steiner who features in this appeal (who shall for convenience be referred to as "**Jacob Snr**") and one John Sutherland, were appointed as Executors of the Last will of a previous Jacob Steiner.

[5] Jacob Snr, became proprietor under a Will. By Certificate of Title dated 13 June 1929, this ownership was registered in Register Volume 53, Folio 277 of the Register of Titles.

- [6] Jacob Snr who died on 7 January 1970, was survived by his spouse Emma Wendt, and ten children of that marriage. He was 69 years of age at the time of his death, as evidenced by the Death Certificate. It appears that the late Jacob Snr had six sons. Philip, the oldest, was born on 23 September 1919, and was the father of the Appellant. Jacob Snr's other son Ernie Steiner ("**Ernie**"), the Respondent in this appeal, was born on 19 December 1936. The Appellant Jacob Steiner Junior ("**Jacob Jnr**") is the son of Phillip Steiner and Ernie Steiner's nephew.
- [7] It is not in dispute that Ernie Steiner left Fiji for England when he was about 24 years of age, and all but severed ties with Fiji, having returned infrequently. He does not appear to have maintained close ties with either his parents, or siblings whilst in England. In fact, there was no evidence whatsoever and indeed, he did not even join as parties to this action, his only two surviving siblings although this was a Probate action, and he claimed that he intended to administer the estate of his late father and distribute it amongst his surviving siblings. This matter went unexplained and was of no significance to the High Court, although it set aside the Last Will of Jacob Snr, and made no observation or order in respect of the other surviving children of Jacob Snr.

The Contested Last Will of Jacob John Steiner Snr

- [8] The said Jacob Snr, executed a Last Will dated 26 December 1969, naming his oldest son Philip as Trustee and Executor of his estate and devised and bequeathed all his property to his son Philip, including the Island which is the subject matter of this appeal. Jacob Jnr was a witness to this Will and testified in the High Court, to this effect.
- [9] After Jacob Snr died on 7 January 1970, on 11 August 1970, the Court granted Probate No.11062 to the executor named in the said Last will, namely Jacob Snr's son Philip, the father of the Appellant.

- [10] The said Last Will of Jacob Snr, was executed by the said Testator having signed by placing his thumb impression, and more will be said of that later. However, it is this Last Will and Probate that was declared invalid and set aside by the High Court, 45 years after it was issued and registered according to law, and in respect of which this appeal lies.
- [11] After obtaining Probate, the said Philip registered in his name, on 5 May 1971, the ownership of the said Island on the basis of Transmission by Death. On 29 December 1972, the title in the property was transferred to and registered in his name. Philip as owner, and as he lawfully might, leased a portion of the Island to Jaganath Nanhu Jaduram Limited for a period of 99 years.

The Last Will of Philip Steiner (Philip) and the inheritance of Nukubati Island by the Appellant

- [12] The late Philip Steiner executed a Last Will dated 21 April 1981, and named his son Jacob John Steiner Jnr, the Appellant, as Trustee and executor of his estate. He devised and bequeathed all his properties to his son Jacob Jnr, with life interest in his wife Madge.
- [13] Philip died on 4 September 1996, and his son Jacob Jnr as trustee and executor of his Will, obtained Probate No. 34883 on 19 December 1997. On 4th February 1998, Jacob Jnr registered the transmission of the said property to him by death, and became the registered owner of the said Island. Subsequently, on 23 August 2004, the said property was transferred to Jacob Jnr, and registered in the Register of Titles.
- [14] On 28 July 2005, Jacob Jnr granted a lease of another portion of the said Island to a company named Nukubati Resort Limited, for a period of 76 years and 8 months. This was the *status quo ante* when the Respondent instituted action in the High Court.

The Respondent's Statement of Claim

- [15] In his statement of claim, the Respondent stated that the late Jacob Snr, was the registered proprietor of Nukubati Island and died on 7th January 1970. After his death, his son Phillip obtained Probate No. 11062 on a forged Will and transferred and registered the title to the Island in his name. Subsequently, Phillip devised/bequeathed the Island to his son, Jacob Jnr who obtained Probate and transferred and registered the title to the Island in his name.

The Application of the Respondent under Order 76 and Order 85 of the High Court Rules 1988

- [16] The Respondent made an application supported by Affidavit dated 18 March 2013, under Order 29, Order 76 and Order 85 of the High Court Rules 1988, and sought interim relief reflecting the substantial relief claimed in the main application. The Appellant objected to the said restraining orders prayed for by the Respondent, and moved that the application for injunctions as well as the substantive action be struck out and permanently stayed, for being statute-barred. The court declined the application for interlocutory injunctions, and the Respondent was ordered to pay the Appellant costs summarily assessed at \$1500.

The Pleadings of the Appellant – the Amended Statement of Defence and the application under Order 18, rules (1) (a), (b), (c) and (d) of the High Court Rules for striking out the Plaintiff's claim

- [17] Jacob Jnr filed an Amended Statement of Defence dated 1 April 2014, objected to the Respondent's Statement of Claim, and made an application for the striking out of the Respondent's application. He averred *inter alia* that he had lived on the said Island since his birth, his father the late Philip Steiner died testate having appointed him as the sole executor and beneficiary of his estate, which included the said Island, the Respondent was his uncle, and had left Fiji to reside in England over 50 years prior to the date of the institution of this action, and used to visit Fiji only occasionally. He stated that although

the Respondent alleges that the Last Will of his father was forged because his late father did not execute a Last Will; the Respondent himself had averred that the person who allegedly created the purported Last will is not living. He claimed that the allegations of the Respondent are time – barred under the Limitation Act 1971.

The Evidence before the High Court

[18] In view of the fact that this court is unable to agree with the conclusions of the High Court on the evidence before it, the proceedings of 14 September 2015 are set out below.

“Ernie Steiner – Plaintiff- Respondent

The Plaintiff is called to give evidence.

My father died on 07.01.1970. Copy of the death certificate is tendered as P1. After my father's death, my brother obtain (sic) a probate. A copy of the probate is worked (sic) as P2. Copy of the will is shown to the witness and it is marked as P3. My father was the registered proprietor of Nukubati Island. Certificate of title is marked as P4. My brother after obtaining the probate transferred the said Island in his name. After my brother's death, his son the defendant obtained a probate. A copy of the Probate is marked as P5. The defendant lease(sic) part of the Island to Jaganath nand. A copy of the lease is tendered as P6. Jaganath Nand transferred the said land to Nukubati a company. He leased another (sic) 18 acres to the same company. A copy of the lease is marked as P7. The defendant is collecting all the rent.

I come (sic) to Fiji in 2010. I tried to find out about Nukubati Island. The defendant was living in the Island. I went to England and come (sic) back in 2012. I met Frank Shaw. He said Jacob wanted him to prepare a will but my father did not sign it.

Q: What else he told you?

A: No answer. I did not know that my father left a last will. I want to apply for letters of administration for my father's estate.

My father used to sign his name and not thumb print.

“Cross examination

I live in England. I left Fiji in 1960. I left before my father's death. When I inquired form my niece and came to know that my father did not execute a will. I was 27 years when I went to England. I do not know whether my father was in a position to sign. The last will has

been prepared by an Indian man and place (sic) his thumb print. Frank Shaw told me. The witness insists that the thumb print on the will is of an Indian man. I want to get Nukubati Island in my name. I did not refer this matter to the Police. My father had told Frank Shaw that after his death the Island could be given to me”.

- [19] The evidence of Shaw (p.402 of the Record of the High Court) who, apart from the Respondent, was the principal witness on whose testimony the High Court lay complete reliance, was as follows:-

“Frank Bernard Shaw

“I knew Jacob Steiner Snr. and Philip Steiner. Philip Steiner is my father- in – law. In 1969, I was working in Fiji Sugar Corporation and I was given quarters. When Jacob Steiner died Philip, Steiner came to me and asked for help and I made a will and the signature of an Indian man in the office with me. He put his thumb print. The will is shown to the witness and the witness says that he prepared it. (Doc B of Plaintiff’s bundle of documents). Jacob Steiner the defendant was not there. At the time, the will was prepared Jacob Steiner Snr was already dead.

Cross Examination

I prepared this will on 26th December... I backdated it to the year 1969. I wanted to clear my name that is why I came out with it. The Indian man who signed it was a messenger. He died.

I did not collusively acted (sic) with the Plaintiff to make up the story. I did not report this to the police to prevent something worse happening. The Indian man was little hesitant to sign the will.

Suggests that the witness is lying. Two (sic) witness denied lying in court.

Re-Examination

I was present when the thumb print was placed on the will by the Indian man.”

- [20] The evidence of witness Frank Bernard Shaw reveals that he contradicted the evidence of the Respondent because he said that it was Phillip Steiner who wanted him to prepare a Will. Further, Shaw specifically stated that when the Indian man placed his thumb print, the Appellant, Jacob Steiner Jnr was *not present*. However, even if the claim of the Respondent, and the evidence of Shaw were assumed to be true, meaning that “a” last

will was prepared in the manner described by Shaw, *after* the death of the late Jacob Snr, Jacob Jnr cannot be imputed with knowledge that the Will was not genuine. On the contrary, the evidence of Jacob Jnr is clear to the effect that his late grandfather was hospitalised at the time of his death, and that he placed his thumb print on the last Will, which was eventually admitted to Probate.

[21] The evidence of the Appellant was as follows: -

“Jacob John Steiner Jnr

I am Plaintiff's youngest brother's son. I can't remember when he left for England before the death of Jacob Steiner Snr. Jacob Steiner Snr. was sick before he died. He was hospitalised, he died in hospital. I do not know about this allegation of forgery. I witnessed the fixing of the thumb print of Jacob Steiner Snr.

Defendant's document "A" is shown to witness. This probate was granted to me. Probate and will are marked as 'D1' and "D2" respectively. Documents C and D of the Defendant's bundle are shown to the witness, the documents are marked as D3 and D4. When he came to Fiji in 2014, I was away."

The record states that there was no cross-examination.

[22] The evidence of Jacob Jnr. reveals that he was not aware of the “forgery” because he witnessed his late grandfather affix his thumb print on the Will. His evidence corroborates the contents of the Last will of Jacob Snr, namely that the late Jacob Snr did not sign in writing, but used his thumbprint instead. It was this Last Will that was admitted to Probate on 11 August 1970. It is significant that the Respondent opted not to cross-examine the Appellant when he unequivocally stated that he witnessed the late Jacob Snr affix his thumb print. The High Court did not consider it relevant to clarify, or indeed draw an adverse inference against the Respondent, or evaluate the value of Shaw's evidence despite the contradictions between the evidence of the Respondent and Shaw, and the *inter-se* contradictions in the evidence of Shaw himself. On the contrary, the High Court saw ‘no reason to disbelieve the witness Frank Bernard Shaw, nor has the defendant been able to produce any evidence to the contrary’ (para [15] of the judgment).

The Judgement of the High Court

- [23] In paragraph [5] of the judgement the Learned High Court Judge states that “The witness tendered *the will* of his father marked as P3”. The ‘witness’ referred to here is the Respondent. This observation in the judgment cuts across the case of the Respondent, which was that his late father Jacob Snr did not execute a Will, but that his brother, the late Philip, the father of Jacob Jnr. had got Shaw to prepare a document after the death of his father, purporting it to be a Will.

Paragraph [6] of the judgement states as follows: -

“The plaintiff who lives in England came back to Fiji in the year 2010 and found that the defendant was living on this Island. When he came back in the year 2012 he met the other witness Frank Shaw who informed him that the last will in question was prepared by him at the request of Jacob, and the Plaintiff’s father did not sign it”. (emphasis added).

- [24] If the Will had been prepared at the request of Jacob, then that must mean Jacob Snr, whereas it was the evidence of Shaw that it was Philip who had asked him to prepare a Will after the death of the late Jacob Snr. The High Court did not consider this contradiction.
- [25] Further, by referring to the fact that the testator had not signed the Will, the learned High Court Judge appears to have presumed that unless the testator signs it in writing, it will not amount to a valid execution of a Will, or reflect *animus testandi*. The significance of this aspect will be referred to below in considering this and the relevance to this case of the Wills Act of 1972.

- [26] In paragraph [9] of the judgment the learned High Court Judge states as follows: -

“The defendant in evidence in chief stated that Jacob Steiner Snr was sick before his death and died in the hospital. It is his evidence that he does not agree with the evidence that the last will in question is a forgery and he witnessed the last will but when he was questioned by learned counsel for the plaintiff whether he was present when it was signed the witness answered in the negative. In evidence in chief he admitted that he subscribed his signature to the

last will as a witness and when he was questioned as to the place where he signed the will, his answer was that he could not remember and at that time he was very young." (emphasis added).

These findings of the High Court are not borne out by the record of the High Court.

[27] In paragraph [11] of the judgement, the learned High Court Judge states as follows: -

"On a careful consideration of the totality of the evidence adduced by the parties the court has no reason to disbelieve the witness Frank Bernard Shaw, nor has the defendant been able to adduce evidence to the contrary. Therefore, the court holds that he last will in question is not an act and deed of Jacob John Steiner Snr." (emphasis added)

[28] In paragraph [15] of the judgement, the learned High Court Judge states as follows: -

"When the defendant was questioned by his own lawyer whether he know anything about the allegation that the thumbprint found on the last will in question belonged to an Indian man working at Fiji Sugar Corporation he said that he did not know. If he signed the last will in the presence of the testator and the other witness he should know who signed the will. When questioned by the learned Counsel for the plaintiff, the defendant said that he was not present when the will was signed. The will in question in my view is not a will executed in compliance with the provisions of section 6 of the Wills Act." (Emphasis added).

[29] The finding of the court in paragraph [15] of the judgement that, when Jacob Jnr was questioned by his counsel as to whether he knew anything about the allegation that the thumbprint on the last Will belonged to an Indian man, he replied that he 'did not know', is a wrong finding of fact. In fact, this is not contained in the record of the court but appears only in the judgment. The finding of the High Court that Jacob Jnr testified that he was not present when the Will was executed, is also an erroneous finding of fact, which is an error of law. On the contrary, Jacob Jnr's unequivocal evidence was that he witnessed his grandfather place his thumbprint on the impugned Will.

[30] In the light of this evidence, it is of concern that the High Court did not consider it prudent or even relevant from an evidentiary point of view to probe into whether it was safe to act on the extremely belated, and contradictory evidence of the Respondent and

his witness, as against the evidence of the Appellant, whose evidence was reflected in the contents of the Will that had been admitted to Probate.

[31] When the fact of *existence* of a will is itself challenged, then inquiry into compliance with the provisions relating to execution, is superfluous. Thus, the finding of the High Court based on non-compliance with section 6 of the Wills Act is an error of law.

[32] By considering the question of compliance with section 6 of the Wills Act, the Court has permitted the Respondent to approbate and reprobate. This is reflected by the court holding in paragraph [11] of the judgement that the impugned last will 'is not the act and deed of Jacob John Steiner Snr, and then proceeding to make order that 'the last will dated 26th December 1969 is not a document valid in law'.

The Orders of the High Court

[33] The High Court made the following orders:-

1. *The last Will dated 26th December 1969 is not a document valid in law.*
2. *The Probate No. 11062 is accordingly revoked.*
3. *The Transfer of Nukubati Island in the name of the defendant is cancelled.*
4. *The defendant shall give a full and proper account of all monies received as rent to the plaintiff.*
5. *The defendant shall hand over the certificate of title to the plaintiff forthwith.*
6. *The defendant shall pay the plaintiff \$3000 as costa (summarily assessed) of this action.*

[5] Grounds of Appeal pleaded

[34] The Appellant urged that the court erred in law and pleaded the following grounds of appeal: -

1. *Failure to consider and apply the Limitation Act and or the equitable doctrine of laches in respect of the prayer for the revocation of the Probate granted on 11 August 1970.*

2. *Acting in excess of jurisdiction by making orders in excess of jurisdiction as follows-*
 - (a) *ordering an accounting of rents to be made to the Respondent,*
 - (b) *ordering an accounting of rents to be made by the Appellant to the Respondent for periods during which the Appellant was not the recipient of the said rents, and the Respondent is not the appropriate person to receive the said accounting,*
 - (c) *ordering the cancellation of Nukubati Island to the Respondent,*
 - (d) *ordering the certificate of title to be given to the Respondent when he is not a fit and proper person to receive same,*
3. *Failure to consider and apply the provisions of the Land Transfer Act regarding indefeasibility of title in respect of the transfer to the Appellant under the Will of Philip Steiner,*
 - (b) *Failure to consider and apply the principles of estate administration.*
 - (c) *Erred in law in awarding costs to the Respondent when the judgment was based on matters other than those pleaded.*

[6] Issues for Determination by this Court

A. The Limitation Act

- [35] The first ground of appeal is the failure to consider the applicability of section 10 of the Limitation Act, which was taken up as a preliminary objection.

Section 10 of the Limitation Act states as follows:-

"10. Subject to the provisions of subsection (1) of section 9, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued, and no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of six years from the date on which the interest became due". (emphasis added).

- [36] Rules 7 and 11 of Order 18 of the High Court Rules require the claimant to plead and particularize any statute of limitation or fraud. In paragraph 2 of his Statement of Claim, the Respondent alleges that the Will of Jacob Steiner Senior was a 'forged will'. In paragraph 12 of the Statement of Claim the Respondent pleads that the defendant 'knew' that the Will dated 26 December 1969 was forged and made after the death of the

deceased and that he took out Probate. These averments taken as a whole, demonstrate that the allegation of fraud has been sufficiently set out in the pleadings. Therefore, the High Court was entitled to inquire into the allegation of fraud. However, on a consideration of the evidence both oral and documentary, and the reasons set out in this judgement, this court is of the view that the allegation of fraud was not established, nor did the High Court arrive at such a finding. As a result, the extended limitation period under section 15 of the Limitation Act had no application.

B. The Wills Act of 1972

[37] The Appellant in his Statement of Defence pleaded that this be considered as a preliminary point of law. However, the High Court did not consider this at all, and made no finding on it. Since the Respondent claims a right to the estate of his father the late Jacob Snr, his right would have accrued upon the death of his father. Since his father died on 7 January 1970, he would be out of time after 7 January 1982. The exception to the time limit in section 10 is the fraud exception in section 15 of the Act. There was no finding that the Respondent's claim could be maintained under section 15 of the Limitation Act. Therefore, the High Court could not have entertained the application of the Respondent.

[38] Although the finding of the High Court under the Wills Act was not necessary in view of the conclusion arrived at by the court, that is, that it had "no reason to disbelieve the evidence" of Shaw that the Will was prepared after the death of Jacob Snr, nevertheless because the court has determined that the Will of Jacob Snr in respect of which Probate was issued to Philip, is not valid in law, it is necessary to set out the law relating to the validity of Wills.

Section 6 of the Wills Act states as follows: -

"6. Subject to the provisions of Part V, a will is not valid unless it is in writing and executed in the following manner: -

(a) it is signed by the testator or by some person in his presence and by his direction in such place on the document as to be apparent on the face of the

will that the testator intended by such signature to give effect to the writing as his will;

(b) such signature is made or acknowledged by the testator in the presence of at least two witnesses present at the same time; and

(b) the witnesses attest and subscribe the will in the presence of the testator, but no form of attestation is necessary”.

The requirement of section 6 is that the witnesses must attest and subscribe the will in the presence of the testator. If a will-maker signs a document as his or her will in the presence of witnesses, it is not necessary that the witnesses know that the document is a will.

[39] Section 6(a) of the Wills Act states that a will must be in writing and signed by the testator or by some person in his presence and by his direction. The signing therefore can be done by the testator himself, or even by someone in his presence and on his direction. In other words, if the testator is incapable of signing by himself, he may direct someone (who is called an *amanuensis*) to do so on his behalf provided this is attested to. What is important is that the signature must be such that it gives effect to the writing (document) as his will. In other words, his intention to execute the will must be apparent, which is ensured by the presence of the witnesses.

[40] Section 6(b) requires that “such signature”, meaning the signature of the testator must be made by the testator, or acknowledged by the testator, in the presence of at least two witnesses present at the same time. Thus, under section 6(b), the testator must place his signature, or the person who places a signature on behalf of the testator, must do so in the presence of the two witnesses.

[41] The law requires the witnesses to witness the fact of the testator expressing his intention to devise and bequeath his property. This intention is signified by the symbolic act of placing his signature. Though the provision refers to a ‘signature’, a mark that the will-maker intends to take effect as his signature will be sufficient to satisfy the requirements

of the law. The following have been regarded as adequate in this regard; a mark - **Re Mc Namee** (1912) 31 NZLR 1007 (SC) ; **Re Brandon** [1926] NZLR 892 (SC), or initials - **In bonis Savory** (1851) 15Jur 1042, a thumbprint -**In bonis Finn** [1935] All E R 419, [1935] 105 LFP 36 (P,D and Admity), a seal bearing the will-maker's initials-**In bonis Emerson** (1882)9LRIr 443, (although not a mere sealing)- **Wright v Wakeford** (1811) 17 Ves 454,34 ER 176, [1803-13] All ER 589 (CC), and a stamped signature- **Jenkins v Gaisford and Thring** (1863) 3 Sw & Tr 93, 164 ER 1208, (cited in Nevill's Law of Trusts, Wills and Administration, by Dr. N Richardson, 10 ed. 2010)

Therefore, the fact that the Will that was admitted to Probate was signed with a thumb print and was not signed in writing, is of no significance in respect of its validity. Accordingly, the finding that the Will dated 26 December 1969 was not the act and deed of Jacob Steiner Snr is an error of law.

C. The Land Transfer Act – and the Fraud Exception

- [42] The impugned judgement of the High Court invalidating the transfer of the properties to Philip Steiner and the Appellant, were both done without due regard to the provisions of, and the principles underlying the protective principle of indefeasibility of title, contained in the Land Transfer Act. The public policy underlying it appears to be certainty, devoid of the burden on the part of a transferee to 'engage in minute and careful inquiry into the preceding title'. The early case of **Fels v Knowles** [1906] 26 NZLR 604 (p.620) enunciated the cardinal principle that, "the Register is everything".
- [43] The Respondent submitted that since the issue of indefeasibility of title was not pleaded, there was no reason for the High Court to take it up. He relied on the case of **Sitamma and Muniappa Ready v Rajesh Kumar** [2010] ABU 6/07, 19 July 2010). However, this court observes that in that case the court held that when a 'point' is not taken in the lower court in respect of a matter in which evidence could have been given, it cannot be taken later. Similarly, the position of the Respondent that, had the 'defence' of indefeasibility been taken in the lower court, he 'may have tendered the relevant

evidence,” is misconceived. This is so because indefeasibility of title under the Land Transfer Act is a statutory protection, and not a defence, and can be displaced only on the basis of fraud of the registered owner which must be done in accordance with the law relating to fraud. It is evident that the High Court did not consider the relevance of the Land Transfer Act to the matters that arose for its determination. However, in view of the impact of its judgement on the statutory protections guaranteed to a registered owner, it is important for this court to consider it in some detail.

[44] The High Court’s judgment has the drastic effect of obliterating, not only the legal effect of a Will that was, as is clear from a consideration of the evidence that was before the relevant court, a document whose genuineness was unequivocally and without challenge, admitted to Probate; but also has the radical effect of cancelling the registration of the Island in the name of Jacob Jnr, which is contained in the Register maintained by the Registrar of Titles, under the Land Transfer Act. In other words, the High Court failed to give effect to the statutory bar contained in section 38 of the Land Transfer Act, without first arriving at a finding that the appellant’s title is void under section 41 of the Land Transfer Act. This is an error of law. In any event, section 41 of the Land Transfer Act covers a situation in which the instrument of title or entry in the register is procured or made by fraud, on which matter the High Court did not make a finding.

[45] It was in **Gibbs v Messer** [1891] AC 248 that the general principles of the Torrens system of registration were first exhaustively reviewed by a superior court.

[46] In **Boyd v Mayor of Wellington** [1924] N.Z.L.R. 1174B court held that: -

“...any person who can without fraud, as defined by their Lordships, procure himself to be registered as a proprietor of land under the Land Transfer Act has an indefeasible title, although he is not purchaser for value from a registered proprietor, or in fact a purchaser at all”

Breskvar v Wall (1971) 126 CLR 376, at paragraph 15, it was held that:-
“that the ‘the Torrens system ... is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies not historical derivative. It is the title which

registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void. The affirmation by the Privy Council in **Frazer v Walker** [1967] 1 A.C. 569 of the decision of the Supreme Court of New Zealand in **Boyd v Mayor of Wellington** [1924] N.Z.L.R. at p.1223, now places that conclusion beyond question”

This statement confirms that, in the context of Torrens title land, the question of priorities is properly couched in the terminology of ‘registered’ and ‘unregistered interests

The practical significance of registration is ‘to provide third parties with the information necessary to comprehend the extent or state of the registered title to the land in question’: **Westfield Management Ltd v Perpetual Trustee Co Ltd** (2007) 233 CLR 528, at 531; 239 ALR 75, at 77.

- [47] The principle of indefeasibility of registered title was upheld in **Attorney General v Kumar** [1985] 31 FLR 23. In this case, the court rejected the Appellant’s submission that the Respondent was not a bona fide purchaser for value and was guilty of fraud, and therefore not entitled to the protection of indefeasibility of title. The court observed as follows: -

“This submission overlooks the entire philosophy underlying the Land Transfer system: which can be taken as notice to the world of the identity and extent of interest of the person who is certified to be the owner. Gibbs v Messer (1891) AC 248. It is recognised that innocent persons may suffer through error or other cause, but this must take second place to the merit of certainty, leaving injured parties to be compensated – in Fiji from the Consolidated Fund pursuant to Part XXII of the Act.”

In upholding the title of a third party, the court at page 30, paragraph C held as follows: -

In cases of fraud of course enquiry can be had into the right of the registered proprietor to hold- but saving that exception and the correction of clerical errors- the Act recognises that once registered the proprietor’s position is guaranteed, regardless of earlier blemishes.” (emphasis added).

The court proceeded to quote with favour dicta from **Boyd v Mayor of Wellington** (supra) as follows: -

The effect of registration is to validate the purchaser’s title notwithstanding defects in the vendor’s registered title. The common law rule of Non dat qui non

habet is wholly abolished in favour of purchasers of registered titles in good faith”.

- [48] That in principle there is no reason in law to distinguish between a purchaser for value and any other person has been placed beyond doubt. In **Subramani v Dharam Sheela** [1982] 28 FLR 82, the Appellants sought to argue that the protection of indefensibility of title contained in section 39 of the Land Transfer Act should always be interpreted to mean only a “purchaser for value”.

In rejecting this argument, the court at paragraphs C and D at p 85, held as follows: -

“In our opinion, this argument is untenable. The whole issue depends on what is referred to as ‘indefeasibility of title’ of the registered proprietor. Section 39 of the Land Transfer Act provides that a registered proprietor, except in the case of fraud, holds the land free from encumbrances except those registered against the title; but sub section 39(b) provides an exception to this in the following terms:

(b) so far as regards any portion of land that may by wrong description or parcels or of boundaries be erroneously included in the instrument of title of the registered proprietor not being a purchaser or mortgagee for value or deriving title from a purchaser or mortgagee for value.

It is in our opinion clear that the restriction of the definition of registered proprietor to purchaser for value applies on in the case specified, that is to say an erroneous description of the land concerned. There is nothing in subsection (b) to indicate that ‘registered proprietor’ in any other circumstances is to be interpreted only as ‘purchaser for value’.

This Court is in agreement that there is no ground on which to draw a difference between a *bonafide* purchaser for value, and a volunteer under a Will. Accordingly, Jacob Jnr’s title is protected under the provisions of the Land Transfer Act.

The Degree and Nature of the fraud required to be proved to impeach registered title

- [49] The Privy Council in **Assets Company Limited v Mere Roihi and Others** [1905] A.C.176 cited with approval **Fels v Knowles** (supra) in regard to the degree of fraud required to impeach registered title obtained *bone fide*. In that case, the provisions of the Land Transfer Acts of 1870 and 1885, of New Zealand, which are similar to the Land Transfer Act of Fiji, were considered. In respect of the allegation of fraud for the

purposes of impeaching registered title, Lord Lindley delivering judgement, held as follows: -

"....by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort; now what is called constructive or equitable fraud, an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further it appears to their Lordships that the fraud must be proved in order to invalidate title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Lands Act, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out if he had been more vigilant and had had he made further inquiries which he omitted to make, does not of itself, prove fraud on his part. But if be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon". (per Lord Lindsley. 210) (emphasis added).

Thus, if the designed object of transfer is 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. It is not however necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances. The act must be dishonest and the dishonesty must not be assumed solely by reason of knowledge of an unregistered interest. (emphasis added)

[50] In **Prasad v Wati** [1998] FJCA 13; the Court of Appeal followed the precedent in **Assets Company Limited v Mere Roihi and Others** (supra), in respect of the allegation of fraud for the purpose of impeaching registered title.

[51] On a consideration of the evidence and the relevant law, this court holds that the conduct of Jacob Jnr was not fraudulent. The argument of the Respondent that the statutory protection of indefeasibility does not apply to a volunteer under a Will is rejected as having no legal basis.

- [52] In Star Amusement Ltd v Navin Prasad and Other [2013] FJSC8, Marsoof J. reiterated that the cardinal principle of the Land Transfer Act is that the Register is absolute and conclusive, except in cases of actual fraud which has to be brought home to the registered proprietor.
- [53] The Appellant in this appeal relied on the cases of Frazer v Walker [1967] 1 AC 569. In respect of the principle of indefeasibility of title. The court in that case held that:
- “registration once effected must attract the consequences which the Act attaches to registration whether it was regular or otherwise. As will appear from the following paragraphs, the inhibiting effect of certain sections (e.g.; ss. 62 and 63) and the probative effect of others (e.g.; s. 75) in no way depend on any fact other than registration as proprietor. It is in fact the registration and not the antecedents which vests or divests title.”*
- [54] At the hearing of this appeal, Mr. Sloan, Counsel for the Appellant presented to the Court and relied on the judgment in Bogdanovic v Koteff [(1988)] 12 NSWLR 472 which followed and applied Frazer v Walker [1967] 1 AC 569 and Breskar v Wall (1971) 126 CLR 376, and upheld the principle that the indefeasibility provisions in section 42 of the Real Property Act 1900 apply to the registered proprietor, and includes one who takes as a volunteer so that he takes free of prior equities of which he has no notice. On the evidence presented to the High Court, there is no reason to disapply this principle to the claim of the Appellant in this case. Accordingly, the protection of indefeasibility will apply to the title of both Philip and the Appellant.
- [55] For the reasons set out above, this court is unable to agree with the factual conclusion arrived at by the High Court, and therefore the registered title of both Philip Steiner who took under the last will of Jacob Snr, and that of the Appellant who took under the title of the late Philip Steiner are indefeasible, and the High Court erred when it cancelled the transfer of the Island to the Appellant.
- [56] Accordingly, the High Court erred in failing to consider the effect of the clearly mandatory provisions of section 38 of the Land Transfer Act, and the implications of its order of cancellation on the registered title of the Appellant. The High Court has been

unmindful of the landmark decision of the Supreme Court in Star Amusement v Navin Prasad and Others (supra) which considered a series of authorities and succinctly set out the principles of indefeasibility of title, which is the central principle of the Land Transfer Act.

Conclusion

- [57] The failure of the High Court to make a determination of the applicability of section 10 of the Limitation Act was an error of law. This court holds that the claim of the Respondent is barred under the provisions of section 10 of the Limitation Act, and that it does not come under the exception contained in section 15 of the Limitation Act.
- [58] By accepting the evidence of Shaw and holding that the will was invalid in law, and having revoked the Probate No. 11062, what ought to have flowed was the appointment of an administrator to administer the estate of Jacob Snr in accordance with the rules of intestacy. Instead, the High Court cancelled the Appellant's registered title which had been registered on 23 August 2004, which it had no power to do. By failing to distinguish between Probate No.11062 (which was the subject of the impugned last Will), and Probate No. 34883, under which the Respondent obtained title to the Island, the court erred in law and failed to uphold and accord to the Appellant's title, the statutory protection of indefeasibility.
- [59] Having accepted the evidence of the Respondent's witness Shaw, the court must necessarily have accepted that Jacob Jnr was not present when the impugned Will was prepared by Shaw, and was thus not a party to the alleged 'fraud'. If there was fraud, then it was perpetrated by Shaw, whose uncorroborated evidence the court accepted. In view of the fact that the High Court accepted that the Last Will dated 26 December 1969 was prepared *after* the death of the purported executor, there was no legal basis to determine the 'validity' of same, and therefore the finding that the last Will dated 26 December 1969 was not the act and deed of Jacob Steiner Snr, is an erroneous finding.

- [60] In the absence of a finding of fraud on the part of the Appellant, the High Court erred in entertaining the application of the Respondent, and proceeding to determine whether the impugned Will was in compliance with section 6 of the Wills Act.
- [61] The High Court erred in law when it failed to draw the correct inferences from the evidence before it, and failed to take cognisance of the *inter se* and other contradictions in the evidence led on behalf of the Respondent.
- [62] The doctrine of 'equitable tracing' relied on by the Respondent is not relevant in view of the provisions of the Land Transfer Act, and the absence of a finding of fraud on the part of both Philip Steiner, as well as on the part of the Appellant.

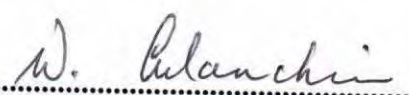
Kumar, JA

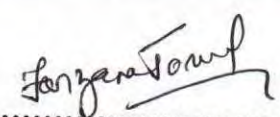
- [63] I agree with the reasoning and conclusion of her Ladyship Madam F. Jameel's judgment.


The Orders of the Court are:

1. *The appeal is allowed.*
2. *The orders made by the High Court on 27 November 2015 are set aside.*
3. *The Respondent is ordered to pay to the Appellant costs of \$3000.00 in the Court below and \$5000.00 in this Court.*




.....
Hon. Mr. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL


.....
Hon. Madam Justice Farzana Jameel
JUSTICE OF APPEAL


.....
Hon. Mr. Justice Kamal Kumar
JUSTICE OF APPEAL