

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO: ABU 0011 of 2014
(High Court HBC 45 of 2009)

BETWEEN : VIJAY KUMAR

First Appellant

AND : FIJI DEVELOPMENT BANK

Second Appellant

AND : BHAN WATI

Respondent

Coram : Calanchini P
Prematilaka JA
Amaratunga JA

Counsel : Ms S Devan for the First Appellant
Mr A Ram for the Respondent.

Date of Hearing : 4 May 2016

Date of Judgment : 14 September 2017

JUDGMENT

Calanchini P

- [1] This is an appeal from a judgment of the High Court delivered on 5 July 2013 whereby Bhan Wati (Wati) was declared to be the "*rightful beneficial owner of Lot 10 comprised in CT 34557*" (the disputed land). Vijay Kumar (Kumar) was ordered to repay the advance and obtain a discharge of Notification No 592 166 from the Fiji Development Bank (the Bank). Kumar was ordered to transfer CT 34557 to Wati free of encumbrances. The Court also made a consequential order concerning the Registrar of Titles. The Court dismissed Wati's claim against the Bank and Kumar's counterclaim against Wati. Costs were awarded to the successful parties, i.e. Wati and the Bank.
- [2] The dispute is between Kumar as registered proprietor of the disputed land and Wati who occupies the disputed land. The Bank holds a mortgage over the disputed land under a mortgage agreement between it and Kumar. The mortgage is registered. The disputed land was originally part of a much larger piece of land comprised in CT 6864 (the original land). The original land was freehold land with an area of about 68 acres. It was owned by Kumar's father (Bhagirathi) who was also Wati's father in law. Wati had married one of Kumar's brothers by the name of Shiu Prasad (Shiu).
- [3] Prior to 1970 Wati and her husband lived in the family home situated on the original land and built by Bhagirathi. After some years this arrangement no longer worked and Shiu asked his father if he could build a dwelling for his family away from the family home. The father agreed. In 1970 the local authority granted permission for Shiu to build a small dwelling on an unsurveyed piece of land. It was not pegged nor was there any reference to the area (i.e. dimensions) of the land on which the dwelling was to be erected. In June 1980 Shiu had obtained approval from the local authority to extend the dwelling house that he had erected in 1970. It appears to have been an informal arrangement and Shiu did not pay any rent to his father. It would appear that neither Shiu

nor Wati have ever paid rent in respect of the occupancy of the land on which the small house was erected.

- [4] After he had given Shiu permission to erect a dwelling Bhagirathi made a will in 1975. Bhagirathi died in August 1977. The will had not been revoked or amended. By his will Bhagirathi devised the whole of his estate to his son Kumar. The estate consisted of the land described in CT 6864. Kumar was appointed sole executor and trustee under the will. The following three clauses (clauses 3-5) of the will leave no doubt as to the testator's intentions:

- "3. *I give devise and bequeath all my property both real and personal _____ unto my trustee upon trust for my said son Vijay Kumar for his own use and benefit absolutely.*
4. *I direct my trustee to maintain and support my wife Chandra Wati and allow her to stay in any dwelling house during her life.*
5. *I direct my trustee to maintain and support my daughter Diopati and allow her to stay in my dwelling house until her marriage."*

- [5] Kumar was granted probate on 10 March 1978 and on 7 February 1979 he became registered as proprietor on CT 6864 on transmission by death as executor and trustee. Pursuant to the terms of the will he became registered as proprietor on CT 6864 on 23 June 1983.
- [6] On 3 June 1985 Kumar and Shiu signed a deed whereby Kumar agreed to transfer to Shiu seven (7) acres of land out of the land comprised in CT 6864. The land to be transferred was described or identified by reference to a plan annexed to the deed. However the plan was not drawn to scale. The consideration for the transfer was \$1.00 and the natural love and affection of Shiu for Kumar. The agreement provided that the costs of the deed, the transfer, the survey of the said 7 acres and legal costs together with disbursements were to be paid by Shiu. The transfer was to be effected as soon as the land had been surveyed at Shiu's cost. There was also a clause in the deed to the effect that any relative of Shiu's

wife was not to remain on the land for more than one week nor interfere with the neighbours in any manner whatsoever. The deed made no reference to the land on which Shiu had erected his small dwelling. It would appear from the evidence that Shiu intended to move on to his 7 acre lot once the survey had been completed and a title issued.

- [7] In December 1986 Shiu died intestate. After Shiu's death Wati continued to reside in the house. At the time of Shiu's death the survey had not been completed. The land to be transferred to Shiu pursuant to the agreement in the deed did not include the land on which he had erected his house pursuant to permission given by his father and in which Wati continued to reside after Shiu had passed away.
- [8] It would appear that Kumar had also entered into similar arrangements by deed with his other surviving brothers. It would also appear that the other brothers subsequently moved on to their respective lots of about 7 acres. Shiu had said he would not move until he was given a title for his 7 acres.
- [9] Some time between the date on which the deed had been signed and the date of Shiu's death the surveying firm of Deepak and Govind Consultants was engaged to survey the land comprised in CT 6864 for the purposes of sub division into 10 lots. The survey was based on a scheme plan that had been shown to each of Kumar's brothers including Shiu when each signed the deed. There was no objection according to the evidence given by Kumar.
- [10] The surveyors had commenced the survey prior to Shiu's death and part of the cost had been paid by Shiu. After Shiu's death another surveyor was engaged to complete the survey.
- [11] On the typed survey instruction dated 21 September 1985 and signed by Shiu (exhibit P4) there was added a handwritten notation which is dated 23 April 1987 and states:

"The second payment of \$375 plus all other expenses incurred for Mr Hari Prasad f/n Bhagirathi's title to be completely processed shall be borne by the power of attorney (executor of will) of Shiu Prasad f/n Bhagirathi, Mrs Bhanwati Shiu Prasad for the exchange of the land on which Ms Bhanwati's existing occupation is erected is forty metres wide onto the road frontage and is 100.10 metres deep.

This usage of the land shall be in force until the time that the present occupation is removed, also until the piece of land is sold to any other party."

- [12] This notation bears the signatures of Hari Prasad and Wati with the signature of Kumar as a witness. It is necessary to make some observations about this notation. The arrangement between Hari Prasad (another brother) and Wati relates to the land that had been acquired by deed by Hari Prasad part of which overlapped part of the much smaller piece of land (the disputed land) on which was erected the house that was still occupied by Wati. Wati had remained in occupation of the house after her husband's death although the other brothers had moved onto the lots they had acquired as a result of their agreements with Kumar.
- [13] The next point to note is that at the time the notation was signed Hari Prasad had not acquired any title to his lot. He may have acquired an equitable interest under the agreement with Kumar but he did not have a legal title to land that was capable of being transferred. Finally it is apparent that the notation amounts to no more than permission given by Hari Prasad for Wati to use (i.e. occupy) the land upon which the house was erected. Furthermore to the extent that the arrangement related to the overlapped part of the disputed land it was no more than an agreement for the existing occupation to continue until one or other of two events occurred. The notation dated 23 April 1987 was an arrangement whereby Wati had agreed to pay the survey costs owed by Hari Prasad in return for his agreement that she continue to use (occupy) the land upon which her dwelling stood. It would appear that this arrangement did not relate to the survey of lot 10 or the costs in relation thereto. The receipt dated 25 April 1987 being exhibit P6 (page

515 Vol.2 of the Record) is no more than confirmation of the arrangement that is described in the notation on the Survey Instruction (exhibit P4).

- [14] Some time after the payment was made to the surveyor on 25 April 1987 a new surveyor was engaged to undertake the survey which was not completed until August 1996. On 13 September 1996 Wati paid the new surveyor, Inoke Consultants, the sum of \$300 for subdivision of lots 4 and 10. Ten titles were issued for 10 lots all of which showed Kumar as the registered proprietor. The land acquired by Shiu whose interest had passed to Wati (not disputed) became known as lot 4. The disputed land became known as lot 10. In his evidence Kumar denied ever giving any instructions to Inoke Consultants to survey the land that became known as lot 10. In his evidence Inoke Bulivou admitted that he had never received any instructions from Kumar to survey the land that became known as lot 10.
- [15] The remaining evidence of note came in the form of two transfers. Both documents were signed by Kumar and Wati and were undated. Although Kumar denied that he had signed the two transfers, the learned Judge found as a fact that Kumar had signed both documents. Not only are the transfers undated but in both cases there is no consideration stated to have been paid by Wati. One transfer was for lot 4 being the land that Kumar had agreed by deed to transfer to Shiu and then to Wati. The other transfer was for lot 10 being the disputed land. It would appear that as a result of the lodging of the transfer document relating to lot 4, a title was subsequently issued in the name of Wati as registered proprietor of Lot 4. It appears not to have been in dispute that the transfer document for lot 10 was never lodged in the Titles Office. The title remained in the name of Kumar. The transfer document for lot 4 was marked as exhibit P9 at the trial and the transfer document for lot 10 was marked as exhibit P10.
- [16] The learned trial Judge having considered the evidence stated that Wati's claim was founded upon the principles of equitable trust, constructive trust, beneficial interest, proprietary estoppels and equitable estoppels (page 19 of the judgment). After referring

to a number of authorities the learned trial Judge concluded after *"having considered the principles laid down in the above judgments and on the totality of the evidence adduced and exhibits P1 to P14 and D1 - D2 I am satisfied that the Plaintiff (Wati) has established that equitable trust needed in favour of her for lot 10 comprised in certificate of title 34557."*

- [17] The learned trial Judge also concluded that Kumar had recognised Wati as the person entitled to the estate of Shiu Prasad. The Judge also concluded that the two transfer documents (P9 and P10) were genuine since the person who had prepared the documents was the surveyor Inoke. Inoke confirmed that exhibits P9 and P10 were photocopies of the original transfer documents. The Judge rejected the submission by Kumar that there was no enforceable agreement under section 59 of the Indemnity, Guarantee and Bailment Act Cap 232. Similarly the learned Judge rejected the claim by Kumar that the action brought by Wati was out of time under the Limitation Act Cap 35. Finally the learned Judge concluded that Kumar's indefeasible title is not itself relevant to Wati's claim that she had acquired an equitable interest under a constructive trust. In reaching that conclusion the trial Judge stated that he was relying on the combined effect of the handwritten notation on the survey instruction (P4) and the two transfers (P9 and P10).
- [18] In his judgment the learned Judge dismissed Wati's claim against the Bank and also dismissed Kumar's counterclaim for possession of the disputed land. The learned Judge has not discussed the issue of fraud.
- [19] Being dissatisfied with the orders made by the learned Judge Kumar filed on 15 August 2013 a notice of appeal raising 8 grounds upon which he relied for an order from this Court that the decision be wholly set aside. However that notice was not filed and served on the Respondents within the time prescribed by Rule 16 of the Court of Appeal Rules. On 1 September 2014 Kumar was granted an enlargement of time to file and serve a fresh notice of appeal within 28 days from the date of the Ruling. Kumar subsequently filed on 3 September 2014 a fresh notice of appeal this time raising 13 grounds in support of his

application for an order that the decision of the learned trial judge be set aside. The grounds of appeal are:

- “1. **THE** Learned Trial Judge erred and/or misdirected himself in law and in fact in holding that the Respondent's claim was founded on constructive trust, proprietary estoppel and equitable estoppel when the Respondent had not specifically pleaded these as causes of action as per her statement of claim filed on 3rd October 2009.
2. **THE** Learned Trial Judge erred and/or misdirected himself in law and in fact in holding that the Respondent had the locus standi to file the proceedings against the First Appellant when she failed to provide evidence of her locus in the said proceedings.
3. **THE** Learned Trial Judge erred and/or misdirected himself in law and in fact in failing to apply Section 39 and 40 of the Land Transfer Act and to the contrary denying the First Appellant's right to indefeasibility of title.
4. **THE** Learned Trial Judge erred and/or misdirected himself in law and in fact in holding that the Respondent in her claim was not disputing or contrasting the First Appellant's title to the subject land when the Respondent:
 - (i) by her pleadings claimed that she believed that she was the registered proprietor of Certificate of Title No.34557 being Lot 10 on DP 7889
 - (ii) sought a Declaration that she was the rightful beneficial owner of Lot 10 on DP 7889
 - (iii) sought an Order that the First Appellant transfer Certificate of Title No.34557 to the Respondent
5. **THE** Learned Trial Judge erred and/or misdirected himself in law and fact in failing to correctly apply the statutory test and criteria established in Section 39 of the Land Transfer Act.
6. **THE** Learned Trial Judge erred in law by failing to take into consideration that he made no findings of fraud against the First Appellant and in the circumstances, the First Appellant was entitled to rely on Section 39 and 40 of the Land Transfer Act to claim indefeasibility on title.

7. **THAT** Learned Trial Judge erred and/or misdirected himself in law and in fact in failing to distinguish or give reasons for departing from the case authorities submitted by the First Appellant including **Sturt v McInnes (1974) INZLR 729, Byeon Bak Kwon v Phul Wati, Civil Appeal No.ABU 0047 of 2007 and Amika Prasad v Santa Wati & Bisun Deo [2001] 1 FJCA 50.**
8. **THE** Learned Trial Judge erred and/or misdirected himself in law and in fact in holding that Section 59 of the Indemnity, Guarantee and Bailment Act did not apply on the basis that the Respondent was claiming an equitable interest in the subject land under constructive trust.
9. **THE** Learned Trial Judge erred and/or misdirected himself in law and in fact in holding that the First Appellant was bound by equity and the Respondent was entitled to succeed on claim for constructive trust, when he did not take into account:
 - (i) First Appellant was bequeathed an absolute interest in the subject land by his father as per his Last Will and Testament dated 19 May 1975.
 - (ii) The Respondent's husband Shiu Prasad was residing on the property and had carried out improvements to the subject land prior to the Last Will and Testament of Bhagirathi and as such by the said Will, any proprietary or possessory rights of Shiu Prasad or the Respondent to the subject land was obliterated.
 - (iii) That the said Will of Bhagirathi did not contain any provisions or directions for the First Appellant to subdivide and transfer to his siblings the land in Certificate of Title No.6864.
 - (iv) That no evidence was produced by the Respondent to establish that Bhagirathi had devised his whole estate to the First Appellant on the understanding that he will divide the land equally between his other children.
 - (v) That the first Appellant was not a party to privy to the agreement/acknowledgment whereby one Hari Prasad agreed to give up his portion of his entitlement over an area which was 40.63 meters wide on the road frontage and 100.10 meters deep to the Respondent and as such the First Appellant was not legally bound by any such agreement/acknowledgment.
 - (vi) That the Respondent had been fully aware of the ownership of certificate of title no.34557 and thereby acquiesced and/or delayed seeking any legal remedies including challenging the last Will and Testament of Bhagirathi to claim any legal or equitable interest to the said subject property.
 - (vii) There was no agreement to transfer Certificate of Title No.34557 being lot 10 to the Respondent by the First Appellant.

- (viii) *That even if a finding was made that an agreement existed between the First Appellant and his Deceased brother, Shiu Prasad to transfer lot 10 of Certificate of Title 34557, the said agreement at best was an incomplete or imperfect gift which was void in law and could not be enforced.*
 - (ix) *The Respondent sought to rely and enforce a transfer which was in an unregistrable form and which could not be enforced in law.*
10. ***THE*** *Learned Trial Judge erred and/or misdirected himself in law and in fact in dismissing the First Appellant's counterclaim for vacant possession of the land contained in Certificate of Title No.34557.*
 11. ***THE*** *Learned Trial Judge erred and/or misdirected himself in law and in fact in ordered that the First Appellant transfer Certificate of Title to the Respondent free of any encumbrances without taking into account the Second Appellant's interest in the said land as mortgagee.*
 12. ***THE*** *Learned Trial Judge erred and/or misdirected himself in law and in fact in granting the Orders or reliefs to the First Appellant without any proper assessment and determination of the actual the reliefs/orders that ought to have been afforded to the Respondent in proportion to the detriment suffered by the Respondent in reasonable reliance on the promise.*
 13. ***THE*** *Learned Trial Judge's decision is wrong and erroneous and tantamount to a wrongful exercise of discretion having regard to all the facts and circumstances of the case and evidence on the whole."*

[20] On 12 September 2014 Wati filed a document with the title "*Respondent's notice and cross appeal* ". It would appear that it was not the intention of Wati's legal counsel to file and serve both a cross appeal under section 12 of the Court of Appeal Act and a Respondent 's Notice under Rule 19 of the Court of Appeal Rules. If it was the intention to appeal under section 12 of the Act then the time limit of 42 days under Rule 16 of the Rules has long since passed since the judgment had been delivered in July 2013. If it was the intention to proceed by way of a Respondent's notice then the notice had been served in compliance with the 21 days prescribed by Rule 19(4).

- [21] In the notice Wati seeks an order from this Court that the judgment of the Court below be varied by a further finding that Kumar was fraudulent on the ground that the learned trial Judge erred in law and in fact in omitting to make a finding of fraud as against Kumar and otherwise that the judgment be affirmed. Under those circumstances it is proper to regard Wati as having filed a timely Respondent's notice.
- [22] The second Appellant has not filed any documents in the present appeal proceedings.
- [23] The issues raised by Kumar's grounds of appeal need to be considered in the context of the relief sought by Wati in the Statement of Claim and the orders made by the learned High Court Judge. Two of the remedies sought by Wati were (1) a declaration that Wati is "*the rightful beneficial owner*" of the disputed land and (2) an order that Kumar transfer title to the disputed land to Wati free from encumbrances. Relief sought by Wati against the Bank can be put to one side for the present. The learned trial Judge granted both remedies to Wati.
- [24] It is not disputed that Bhagirathi permitted Shiu with his wife Wati, to occupy a dwelling on a small portion of land on his property (CT 6864). It appears also not to be disputed that the deceased father, until his death, resided in the family home located on the original land and that Kumar also lived in the family home. It is quite clear to me that it would have been open to Bhagirathi to request Shiu to leave the land altogether and support himself elsewhere. There was no evidence to suggest that Shiu acquired an equitable interest in the land upon which he had erected a two room dwelling. Furthermore Kumar could have requested Shiu to vacate the disputed land at any time and allow him to remove the dwelling materials or compensate him for those materials. In my opinion Wati's position was no stronger than that of her deceased husband. There was evidence that Shiu would move on to lot 4 when he had received a title to that land.
- [25] The terms of the will made by Bhagirathi are clear. The real property was devised to Kumar with a direction that he look after the testator's wife and daughter. Otherwise the

whole of the land was for "*his own use and benefit absolutely.*" There was no evidence at the trial to support the existence of a secret trust. The Appellant was entitled to be registered first as executor and trustee (transmission) and then as the sole beneficiary under the devise in the will. As such he was then entitled to be registered as sole proprietor on the title of each of the ten lots before effecting transfers to his brothers in accordance with the agreements entered into by deed with each of them. Those agreements between Kumar and his brothers, including Shiu created for each of them an equitable interest in their respective lots. There was no agreement between Kumar and Shiu for Kumar to transfer lot 10 to Shiu or to Wati. The only agreement between Kumar and Shiu was in relation to Lot 4. Kumar subsequently signed the transfer for lot 4 whereby Wati became registered as proprietor of lot 4. For whatever reason Kumar might have signed the second transfer for lot 10, it was not pursuant to any agreement between Kumar and Shiu or between Kumar and Wati. In my opinion Wati's entitlement was to take over her husband's interest in lot 4. Neither Shiu nor Wati acquired an equitable interest in lot 10. At the most it may be said that Shiu and then Wati had been given licence or permission to remain in occupation of the house on the disputed land. It follows that Kumar's registered title is not subject to any unregistered encumbrance such as is claimed on behalf of Wati.

[26] Although raised by Wati in the pleadings in the Court below it seems that the issue of fraud does not arise in this case. As noted earlier Kumar was entitled to become registered as sole proprietor of the original land under his father's will. He was subsequently entitled to become registered as sole proprietor of each lot after subdivision.

[27] For all the above reasons I would allow the appeal and dismiss the cross appeal with no orders as to costs

Summary of facts

- [28] One Bhagirathi had become the proprietor of the land known as Tavumaca (part of) depicted as Lot 1 in Deposit Plan No. 1315 which was 68 acres, 03 roods and 23 perches in extent by virtue of the Certificate of Title bearing No.6864 dated 05.09.1944. His siblings including the 01st Appellant and the Plaintiff's husband, Shiu Prasad who was one of the six sons, were living with the father and later moved on to different parts of the said land.
- [29] In the latter part of the year 1970, Shiu Prasad had made an application to the Taveuni Rural Local Authority for permission to put up a 02 roomed dwelling at a cost of \$200.00 (P1) upon a certain area of the said land whilst his father was still alive and had built a house thereon. The evidence of the Respondent is that Bhagirathi had given that piece of land to Shiu Prasad to put up a house on the basis and understanding that once the entire land is subdivided that part of the land would be given to Shiu Prasad. The 01st Appellant stated in evidence that Shiu Prasad had asked for 2 chains to build a house and the arrangement was for him to build and live there.
- [30] In the meantime Bhagirathi, prior to his demise in August 1977, had executed a Last Will in May 1975 bequeathing the entire land to the 01st Appellant who had obtained a probate for the said estate in March 1978. According to the Respondent after the father's death other sons had started quarrelling with the 01st Appellant (who admitted the same in his evidence) over their share of it and the 01st Appellant's position at the trial is that he, however, agreed to subdivide the land among his brothers as a gesture of goodwill and on the basis that they would move out of where they were living to the allotted lots. However, the 01st Appellant's Statement of Defence states that he agreed to subdivide the land as a measure of goodwill only on the condition that costs involved would be borne by the brothers and that would not make any other demands on him. Nevertheless, it is

common ground that the 01st Appellant had obtained a consideration amounting to \$3000.00 from the Respondent in return for the transfer of a 07 acre parcel of land despite the deed of agreement to sell (D1) having stated that the said transfer would be for a sum of one dollar and natural love and affection.

- [31] While the Last Will of Bhagirathi (D2) does not stipulate any requirement as to the distribution of the land among all sons, the 01st Appellant's agreement (D1) with Shiu Prasad to transfer 07 acres out of Lot 1 in DP1315 does not impose any condition that Shiu Prasad or his heirs should move out of the area they are living once a specific lot is allotted but only that the Respondent's relatives should not remain on the plot of land given to Shiu Prasad for more than a week after the transfer or interfere with neighbours.
- [32] Shiu Prasad had made another application in June 1980 to the same local authority seeking permission to build an extension to the existing house at the cost of \$500.00 (P3) and accordingly carried out the extension as permitted. The Respondent claims that she along with her children and grandchildren numbering 16 presently live in the said house of 07 rooms. The 01st Appellant does not seem to have raised any objection to the local authority in this regard despite his having obtained the probate in 1978. In fact, the 01st Appellant had not challenged the possession or occupation of or improvements being made on the area of land by Shiu Prasad and his family at any stage even after obtaining the probate until 2005.
- [33] In June 1985 the 01st Appellant, claiming to be the registered proprietor had entered into an agreement with Shiu Prasad (D1) to transfer a seven acre portion of the said land in consideration of one dollar and natural love and affection. The transferee had to pay the costs regarding the agreement, transfer deed, survey, legal cost of new title etc. The transfer was to be effected as soon as the land was surveyed. The 01st Appellant claims to have signed similar agreements with his other brothers as well. The sketch attached to the agreement shows that the area of land to be transferred was outside the area already occupied by Shiu Prasad. There was no condition in D1 that once the transfer was

completed Shiu Prasad or the heirs should leave the house and area of land they were already in occupation.

- [34] Following the said agreement, in September 1985, Shiu Prasad had authorised Deepak and Govind Consultants Ltd to survey the said Lot 1 in DP 1315 comprised in CT 6864 at a cost of \$750 (P4). However, Shiu Prasad had passed away in December 1986 leaving the Respondent and the children.
- [35] After the demise of Shiu Prasad, a handwritten tripartite agreement (admitted by the 01st Appellant) among another brother named Hari Prasad, the 01st Appellant and the Respondent, recorded as a special note beneath Survey Instructions (P4), had been entered into on 23/04/1987 to the following effect:

"The second payment of \$375 plus all other expenses incurred for Mr. Hari Prasad f/n Bhagirathi's title to be completely processed shall be borne by the Power of Attorney (Executor of will) of Shiu Prasad f/n Bhagirathi, Mrs. Bhan Wati Prasad – for the exchange of land on which Mrs. Bhan Wati's existing occupation is erected. This land is 40.63 wide onto the road frontage and is 100.10 meters deep.

This usage of the land shall be in force up till the time that the present occupation is removed, also until this piece of land is sold to any other party."

- [36] The Registrar of Titles has registered under 'Transmission by Death' on 07 February 1979 the 01st Appellant as Executor and Trustee thus conferring title on him for the entire land and then registered under a 'Transfer' the 01st Appellant on 23 June 1983 as the proprietor in respect of the entire land. Thus, by the time the above agreement had been signed the 01st Appellant had title to the entire undivided land and therefore, in as much as Hari Prasad agreed to part with a portion of what was to be his lot, it is the 01st Appellant as the title holder to the entire land who could really annex 40.63 meters wide and 100.10 meters long strip of land to the existing area of land where the Respondent's family has been in occupation. Thus, the 01st Appellant was bound by the said agreement not merely as a witness but as the existing title holder to the entire land. Following the

subdivision and the Request for New CT bearing No. 517756 on 20.11.2002 the 01st Appellant appears to have been registered as the title holder to Lots 1 to 10 on Deposit Plan No. 7889. The 01st Appellant had obtained CT No. 34557 in respect of Lot 10 on the same day i.e. 20 November 2002. The Registrar of Titles had issued an 'Easement Certificate' in respect of the said lots on 22.12.2003.

- [37] Two days after the said agreement i.e. on 25 April 1987, the Respondent had paid Deepak and Govind Consultants Ltd a sum of \$760.00 (P6) as what was due from Shiu Prasad. However the surveyors had not completed the survey and it had been then entrusted to Inoke Consultants who had completed the survey and made the subdivided final plan dated 14/08/1996 (P5) where the 01st Appellant had admittedly placed his signature as the registered proprietor. The Respondent in September 1996 had paid the surveyor Inoke Bulivou \$300.00 (P7) as being her share of the cost for the subdivisions of Lot 4 and 10 of CT 6864 for which the surveyor had issued a receipt to the Plaintiff and confirmed the same. DP 7889 appearing on CT 34557 is almost the same as P5.
- [38] On 07/02/2001 the Respondent has paid another \$200.00 (P8) to Inoke Bulivou as transfer fees and obtained a receipt and the surveyor confirms that too. According to the Respondent this payment had been made for the transfer of two lots namely Lots 4 and 10. Subsequently, two Transfer Forms (Transfer of Land in Fee Simple marked P9 & P10) in respect of Lots 4 and 10 respectively had been allegedly signed by the 01st Appellant and admittedly signed by the Respondent as well in order to transfer those two lots to the Respondent and the originals of the same had been taken away by the 01st Appellant and photocopies had been kept with the Respondent.
- [39] Surveyor Inoke Bulivou had confirmed in his evidence unchallenged on this point, that he prepared the said Transfer Forms upon instruction of the 01st Appellant and had identified the signatures of the 01st Appellant and the Respondent appearing on the said documents as being genuine and he had described the said documents as true photocopies. He had also signed on both of them and confirmed in evidence that he witnessed the 01st

Appellant putting his signature on P9 and P10 and further said that he accepted the survey fees on the understanding that the intention of the 01st Appellant was to transfer both Lots 4 and 10 to the Respondent. Though, the 01st Appellant had challenged his signature on both Transfer Forms the Learned High Court Judge had accepted both documents. I do not see any reason to discredit the evidence of the Respondent and Inoke Bulivou on P9 and P10. I also think that the 01st Appellant's denial of his signature on P9 and P10 is devoid of any credibility.

[40] As pointed out above, consequent to the subdivision of the land described as Lot 1 of DP 1315 comprised in CT6864, the 01st Appellant claims to have obtained certificates of title in respect of all separate lots in his name and thereafter Lot 4 in DP 7889 had been transferred in the Respondent's name on 16/04/2004 for a consideration of \$3000 by virtue of CT34551, though in terms of the agreement with Shiu Prasad the 01st Appellant had agreed to transfer a 07 acre freehold land out of Lot 1 in DP 1315 for a sum of one dollar and natural love and affection. However, he had got himself registered as the proprietor of Lot 10 in CT 34557 (P12) on 20/11/2002 which he had failed to transfer in the Respondent's name. The subdivided plan (P5) shows that Lot 4 is agricultural land while Lot 10 is described as residential and subsisting farming land.

[41] The 01st Appellant had then initiated proceedings under High Court Civil Action No. HBC 72 of 2005 in December 2005 in terms of section 169 of the Land Transfer Act Cap 131 to evict the Respondent from Lot 10 but in April 2007 had withdrawn the same subject *inter alia* to summarily assessed costs of \$300.00 (P11) which the 01st Appellant had not admittedly paid to the Respondent. The 01st Appellant seems to maintain that he did not instructed his lawyers to withdraw. However, he does not seem to have taken any action against the lawyers for withdrawing the case without his instructions or knowledge, if the withdrawal was to his detriment.

- [42] It appears that while the said case was pending i.e. even before it was withdrawn the 01st Appellant had mortgaged Lot 10 in DP7889 to the 02nd Appellant and obtained an advance of \$15,000.00 in July 2006 (P13).

Pleadings

- [43] The Respondent had filed the instant action in October 2009 against both Appellants seeking *inter alia* a declaration that she is the rightful beneficial owner of Lot 10 comprised in CT34557, an order to compel the 01st Appellant to repay the advance and obtain a discharge of the Notification No. 592166 from the 02nd Appellant, an order to compel the 01st Appellant to transfer CT34557 to the Respondent free of encumbrances, an order to empower the Registrar of Titles to transfer and register the said Lot 10 in the name of the Respondent in case the 01st Appellant fails to execute the transfer within one month of the order of court to do so as prayed for in the statement of claim and damages.
- [44] The 01st Appellant *inter alia* had taken up the position in his statement of defence that the Respondent does not have any legal, equitable or beneficial interest in Lot 10 along with a few other defences in the alternative and therefore her claim should be dismissed and also had counter claimed vacant possession of the said land comprised in CT 34557.
- [45] The 02nd Appellant in its statement of defence had admitted the mortgage of the said Lot 10 to it by the 1st Appellant, pleaded ignorance of the Respondent's allegations, and prayed for a dismissal of the Respondent's claim.
- [46] In her reply to the 01st Appellant's statement of defence the Respondent *inter alia* has stated that Transfer Forms for Lot 4 and Lot 10 were brought by the 01st Appellant himself for her signature but had dishonestly avoided registering Lot 10 in her name.

Trial

- [47] The trial had commenced without a pre-trial conference and therefore no agreed facts had been recorded. It should be mentioned for the purpose of record that the lack of a pre-trial conference and recording of agreed facts, particularly given the nature of this case have not been helpful to this Court sitting in appeal and such dispensation should therefore not be effected lightly and be avoided by the High Court. I am of the view and emphasise once again that every endeavour should be made to engage in a pre-trial conference and record facts agreed among parties before the trial commences which would help both the trial court as well as the appellate courts. It would help the original court to focus on the real issues among the parties and determine them according to evidence and applicable law. It would obviate the need for the appellate courts to waste time on finding out the common grounds among the parties but could focus on the actual matters of disputed facts and law involved in the appeal.
- [48] The Respondent along with 07 other witnesses had been summoned to give evidence for and on behalf of the Respondent and in the course of the trial 14 exhibits from P1-P14 had been marked.
- [49] The 1st Appellant had not called any other witnesses but had chosen to give evidence himself and marked 02 exhibits namely D1 and D2 as part of his testimony.

Judgment

- [50] Upon the conclusion of the trial that had lasted for 05 days, the Learned High Court Judge had delivered the Judgment on 05 July 2013 reported as **Wati v Kumar** [2013] FJHC 321 and granted the Respondent the first 04 reliefs as prayed for by her and enumerated above while rejecting both her claim against the 02nd Appellant and the 01st Appellant's counter claim against the Respondent. Both the Respondent and the 01st Appellant had been ordered to pay summarily assessed costs to either party.

Appeal

- [51] Hon. Justice William Calanchini, President of the Court of Appeal in Civil Appeal No. ABU 11 of 2014 reported as **Kumar v Wati** [2014] FJCA 139 had granted an enlargement of time on 01 September 2014 to enable the 01st Appellant to file and serve a notice of appeal out of time on condition that the 01st Appellant pays to the Respondent a sum of \$1800.00 being the costs of the application summarily assessed within 21 days under section 13 of the Court of Appeal Act Cap 12 and Rule 27 of the Court of Appeal Rules. It is not known whether the order for cost had been satisfied.
- [52] While the Notice of Appeal dated 15.08.2013 contains 08 grounds of appeal the Notice of Appeal dated 01.09.2014 sets out 13 grounds of appeal.
- [53] The Respondent also had filed what is termed as “Respondent’s Notice and Cross Appeal” dated 09.09.2014. The ground of appeal urged therein is that the Learned Trial Judge erred in law and in fact in omitting to make a finding of fraud against the 01st Appellant and the Respondent had urged this Court to arrive at a definite finding of fraud against the 01st Appellant.

Consideration of the merits of the Appeal

- [54] The written submissions of the 01st Appellant dated 03.12.2015 have been arranged under different grounds of appeal as set out in the Notice of Appeal dated 01.09.2014 but in some instances several grounds have been grouped together. The Respondent’s written submissions dated 29.01.2016 had followed the same order in reply. The Respondent’s further written submissions dated 13.04.2016 are verbatim of her earlier submissions except the first paragraph which contains the full decision of a case instead of the pages attached to her earlier submissions from a law journal where the said decision is referred to.

Ground 1

[55] The Learned High Court Judge has said that the Respondent's claim is founded upon the principles of equitable trust, constructive trust, beneficial interest, proprietary estoppel and equitable estoppel and concluded that he is satisfied on the totality of evidence and exhibits that the Respondent had established that an equitable trust had been created in her favour for Lot 10 comprised in CT 34557. The complaint of the 01st Appellant is that the Respondent had not pleaded that she had an equitable interest in the said Lot 10 based on a constructive trust or proprietary estoppel but her action had been based on fraud and that she had not sought any declarations for a constructive trust or a proprietary estoppel.

[56] **McPhilemy v Times Newspapers Ltd**¹ [1999] 3 All ER 775 at 792-793 Lord Woolf MR held

".... Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify issues and the extent of the dispute between the parties. What is important is that pleadings should make clear the general nature of the case of the pleader" (emphasis mine)

[57] It is well established that the rules of pleadings generally require that all material facts relied on but not the evidence by which they are to be proved or statements of law, must be stated in a summary form. Order 18 Rule 6 of the High Court Rules states that pleadings must contain a statement in a summary form subject to rules 9, 10 and 11.

[58] Taken in its totality it is clear that the facts pleaded by the Respondent in her statement of claim indicate that the reliefs sought are based on equitable principles. The Respondent had pleaded *inter alia* that her husband Shiu Prasad had been living in his own house on an area measuring approximately 100.10 meters long and 26.43 meters wide of the original land called Lot 1 in DP 1315 comprised in CT 6864 since 1970. The 01st

¹[1999] EWCA Civ 1464; [1999] EMLR 751

Appellant had not raised any opposition to Shiu Prasad's improvements in 1980 to the existing house on the said area though by February 1979 he had been registered as executor and trustee for the entire land. Shiu Prasad and upon his death the Respondent with her family had enjoyed continuous possession and occupation of the said area of land as their own unchallenged even after the 01st Appellant became the registered proprietor of the said Lot 1 in DP 1315 in 1983. In fact, in 1987 the 01st Appellant had agreed to annex 40.63 meters wide and 100.10 meters long strip of land to the existing area of land where Respondent's family has been in occupation in 1987 and assured the Respondent of the usage of the amalgamated land until the house thereon is removed or the said land itself is sold to another. This amalgamated land would later become Lot 10 in DP 7889.

- [59] The Respondent had pleaded the existence of two undated transfers executed in her favour, one for Lot 4 and one for Lot 10 in DP 7889 initiated by the 01st Appellant himself where the 01st Appellant had lodged for registration only the transfer for Lot 4 but had registered Lot 10 in his own name when Lot 10 included an area of 100.10 meters long and 40.63 meters wide adjacent to the area of land occupied and possessed by the Respondent's family which was annexed to it from Lot 9 belonging to Hari Prasad in consideration of her having paid the survey fees on behalf of Hari Prasad following the agreement where the 01st Appellant was a co-signatory. There were other facts pleaded by the Respondent as narrated above in detail which in my opinion taken together clearly raise the issue of an equitable claim.

Beneficial interest

- [60] Beneficial interest could be described as an interest in the economic benefit of property or generally it could be any interest of value, worth, or use in property one does not own. **Black's Law Dictionary** defines beneficial interest as profit, benefit or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control and it defines an equitable interest as an interest held by virtue of an

equitable title (a title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title) or claimed on equitable grounds, such as the interest held by a trust beneficiary. Therefore a beneficial interest in property is an equitable interest. Thus, persons having such beneficial or equitable interests are called beneficial or equitable owners of the trust property.

- [61] The legal ownership is separate from the beneficial ownership and the legal owner will not necessarily or need to be the same as the beneficial owner. The legal owner is said to hold the beneficial or equitable interest in the property on trust for the beneficial owner.
- [62] When one carefully analyses the Respondent's pleadings it could not be said that her action is based on fraud though fraud had been alleged as she had to presumably overcome section 39 of Land Transfer Act on the defence of indefeasibility of the 1st Appellant's title for Lot 10 upon registration. On the other hand it is clear from the Respondent's averments in the statement of claim and the first relief in the prayer that she was claiming a beneficial or equitable ownership in Lot 10 where the Court could grant such relief on recognising any applicable legal grounds such as resulting trust, constructive trust or proprietary estoppel as the case may be.
- [63] Therefore, I reject the contention of the 01st Appellant that the Respondent had not pleaded that she had an equitable interest in the said Lot 10 and the High Court could not have held with her on the basis of an "equitable trust" in her favour. However, I think going by the judgment and the decisions cited therein what the Learned Judge had actually meant by 'equitable trust' was a constructive trust. I also hold that want of specific reference to a constructive trust or proprietary estoppel or not having prayed for declarations for a constructive trust or proprietary estoppel in the statement of claim is not a bar for the court to impose an implied trust - either resulting or a constructive trust - on the parties, and also uphold the operation of the doctrine of proprietary estoppel. Therefore, I am of the view that the trial Judge was entitled to arrive at the finding that

the Respondent had established an equitable or beneficial interest in Lot 10. Accordingly I reject this ground of appeal.

I may also add that in all the circumstances enumerated above such unregistered equitable interests in the Respondent in Lot 10 have overridden all subsequent registered interests by the 01st Appellant, for such overriding interests by their very nature do not lend themselves to protection through registration under the Land Transfer Act, the exact nature of which will be known only when declared by a court of law. The 01st Appellant would be bound by such equitable interest in Lot 10 whether he had known them or not.

Ground 9 and 10

- [64] The thrust of the argument here is that the Learned High Court Judge had erred in law in his conclusion that a constructive trust had been established in favour of the Respondent.
- [65] However, it is clear from the judgment that the Learned High Court Judge had intended that the Respondent had established an equitable interest in Lot 10 not only on the basis of an equitable trust meaning a constructive trust but also on the basis of proprietary estoppel.

Constructive Trust

- [66] A constructive trust is imposed by the law as an 'equitable remedy'. This generally occurs due to some wrongdoing, where the wrongdoer has acquired legal title to some property and cannot in good conscience be allowed to benefit from it. A constructive trust arises where equity regards it as against conscience to allow a person to deal with property as if it were his own or where it would confer 'a manifest and unfair advantage' or it would be unjust to allow the apparent owner of property to deny a claimant's beneficial interest or that others have a claim to that property. In **Hussey v. Palmer** [1972] 3 All ER 744; [1972] 1 WLR 1286 Lord Denning defined a constructive trust as

'a trust imposed by law whenever justice and good conscience require it.... It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution'. Constructive trusts contain a remedial element as well (vide **Muschinski v Dodds** [1985] 160 CLR 583).

[67] In **Gissing v. Gissing**² [1971] AC 886 at 902; Lord Diplock said

"A resulting, implied or constructive trust—and it is unnecessary for present purposes to distinguish between these three classes of trust—is created by a transaction between the trustee and the cestui qui trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui qui trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui qui trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land..."

Common intention

[68] It is said that at the heart of this doctrine is the existence of a common intention (see **Ogilvie v Ryan** [1976] 2 NSWLR 504) relied on by the claimant to his or her detriment. Common intention could be shown either by way an express agreement or in the absence of such an agreement, an act (such as direct contribution of money towards the purchase of the property) by the claimant from which the court may infer a common intention giving rise to an interest under a constructive trust (**Lloyds Bank plc v. Rosset** [1991] 1 AC 107). **Stack v. Dowden** [2007] 2 AC 432; [2007] 2 WLR 831 and **Jones v. Kernott** [2009] EWHC 1713 (Ch); [2010] 1 All ER 947 have enlarged the circumstances in which a common intention may be established.

²[1970] 3 WLR 255;[1970] 2 All ER 780;[1970] UKHL 3

[69] In **Gissing's** case (supra) the House of Lords held that a common intention has to be inferred from the parties' conduct as to how the beneficial interest is to be held. The relevant intention is that which a reasonable person would draw from the parties' words or conduct. The court must determine what inferences can reasonably be drawn in each case. In **Grant v Edward**³ [1986] 2 All ER 426 it was held "*Mrs Grant was entitled to half of the beneficial interest under a constructive trust. There was a common intention that she was to have a share in the property. She had acted to her detriment by making substantial contributions to the house hold expenses which she would not have done unless she had believed that she would have an interest in the house.*" In **Nisha v Munif** [1999] 45 FLR 246 a mother and son shared the family home of which the son was the registered owner. The mother claimed that she had contributed to the home by donating building materials and furnishings and by helping with the mortgage. She claimed a half share in the property. The High Court of Fiji held that in the circumstances of the case it was clear that the parties had intended to share the property equally. Accordingly a constructive trust to that effect was imposed on the son. Shameem J. said "*the defendant cannot now, in all conscience, insist that the plaintiff live elsewhere, nor can he deny, her beneficial interest in the property.*"

[70] In **Sami v Wati** Civil Action HBC No. 35 of 2005 decided on 07 June 2010; [2010] FJHC 279 Calanchini J (which Master Amartunga quoted with approval in **Prasad v Wati** Civil Action No. HBC 315 of 2010 decided on 12 August 2011; [2011] FJHC 442) said

"Where there is no express declaration of a trust, it is necessary to determine whether there existed a common intention of the parties concerning the equitable ownership of the land.

However that presumption may be rebutted. For instance, if the evidence established that there was an agreement, arrangement or understanding between the Plaintiff and the deceased as to the beneficial ownership of the land, then the Court would give effect to that common intention by

³ [1986] 3 WLR 114; [1986] 1 Ch 638; [1986] 3 WLR 114; [1986] EWCA Civ 4; [1986] Fam Law 300; [1987] 1 FLR 87

means of a constructive trust or by means of a proprietary estoppel if the Plaintiff had suffered detriment.

Proprietary estoppel enables an equitable interest to be granted to a person who has been induced to suffer detriment upon reliance on a representation that the Plaintiff would acquire ownership of the land as a result. Under the remedy the court may award one of a number of rights ranging from freehold title through to merely equitable compensation in money.

"A recent development in the law that applies to cases such as the present is an approach based on avoiding unconscionability if the First Defendant were permitted to deny the Plaintiff an equitable interest in the land. This approach looks for an agreement between the parties and then examines the entire course of dealings between the parties. The aim is to reach a fair result and to supply the parties with a common intention if that is necessary."

- [71] A further survey of legal literature shows that common intention could now be established by (1) express or overt statement, agreement, promise, assurance, arrangement or understanding, before or after the acquisition between the parties (e.g. *Rosset* and *Grant*) but it does not matter that the express assurance in whatever form occurs after the legal owner has acquired the property (see *Clough v. Killey* [1996] 72 P & CR D 22; [1996] NPC 38) (2) inferred common intention by way of a direct contribution to the purchase money such as lump-sum or mortgage payments (e.g. *Rosset* and *Burns v. Burns* [1984] Ch 317) (3) inferred common intention from the parties' entire course of conduct (e.g. *Gissing*, *Hammond v. Mitchell* [1992] 1 WLR 1127, *Chan v. Leung* [2003] 1 FLR 23, *Stack*, *Kernott*, *Geary v. Rankine* [2012] EWCA Civ 555) where evidence of common intention can come from a wide-ranging of factors which are not exhaustive (4) imputed common intention which is an intention the parties would have had, had they thought about it. In *Kernott* the majority of judges determined that there may be circumstances when it is permissible to impute a common intention to the parties, at least as to the quantification of shares when the parties are already co-owners and the same view of was taken in *Geary* as well. Thus, where it is possible the parties are deemed to have a common intention to share the property in such

proportions as is fair in all the circumstances. However, the Court of Appeal in *Geary* indicated that the imputation is relevant only to quantification, not acquisition.

Detrimental reliance

[72] With regard to the detrimental reliance which is the second limb of establishing a constructive trust, Lord Denning in *Greasley v. Cooke* [1980] 2 All ER 710 suggested that if there is evidence of 'detriment', there should be a presumption of reliance. Consequently, in the absence of evidence to the contrary adduced by the legal owner, the court is entitled to assume that the claimant did, indeed, rely on the assurance made. This is so even if the evidence suggests that the claimant had been motivated partly by other reasons such as love and affection for the legal owner (see *Chun v. Ho* [2002] EWCA Civ 1075). 'Detriment' may take many forms. For example, it may be financial or any other conduct. Giving up of existing accommodation, doing extraordinary work of the property, spending one's life savings and sacrificing other opportunities are some examples of 'detriment' which does not have to be detrimental in the sense of being harmful. Further, detriment need not necessarily be made in relation to the property in which the claimant acquires an interest either. Payments or conduct is evidence upon which a common intention can be established and they also can be the detriment consequent on the said intention.

[73] When the facts of the case are assessed against the principles of law expressed above it becomes clear that Shiu Prasad had borne expenses in order to put up a house on the specific area of land allotted to him by Bhagirathi with whom he and the Respondent had lived for 5-6 years on some kind of understanding, if not an informal agreement or meeting of minds that that area would be his one day. According to the Respondent, Bhagirathi had in fact told them that that area of land would be given to them if the entire land is subdivided. If not for some form of assurance by Bhagirathi, as spoken to by the Respondent, it is highly unlikely that Shiu Prasad would have spent that amount of money to build a permanent dwelling. The same understanding seems to have continued

even after Bhagirathi's death. The 01st Appellant despite having being registered as executor and trustee of the entire land in 1979 had not protested against Shiu Prasad's continued possession and occupation of the same area of land and his further improvements of the property by way of the extension of the house on the land in 1980. Thus, Shiu Prasad's occupation and improvement to the land he was residing were not challenged by Bhagirathi or the 01st Appellant.

- [74] The written agreement recorded on the Survey Instructions – P4 where the 01st Appellant was also a party which sought to deliver the Respondent a part of land to be allotted to Hari Prasad's, now depicted as Lot 9 in the subdivided plan (P5) in return for her paying the survey fees on his behalf, adjacent to her area of land, would have further assured the Respondent of the amalgamated land now called Lot 10 becoming her own. It is significant that the area mentioned in P4 had been demarcated in such a way as to tally with two of the existing boundaries of the Respondent's land and to create one rectangular shape block bordering the road in P5. In my view this agreement negates the position of the 01st Appellant that the Respondent was to move out of Lot 10 once Lot 4 was transferred to her. In any event the 01st Appellant's agreement with Shiu Prasad marked D1 does not make any reference to such an eventuality.

- [75] Both Hement Prasad and James Verkent Swamy had testified that they obtained permission from the Respondent and not from the 01st Appellant to supply water and electricity over Lot 10 as part of the village water and electrification project. The 01st Appellant had raised no objection. Along with these witnesses Vidya Nani and Rajendra Prasad have helped Shiu Prasad in the extension of his house where the latter had told them that he had got the block of land on which the house stood from Bhagirathi. Praveen Kumar, aged 42, a son of Shiu Prasad had said that he had been living in the house since birth and thought that Lot 10 belonged to his mother and shocked to hear the 1st Appellant having mortgaged it to the 02nd Appellant. From this evidence it is clear that nothing had happened in the village to even suggest that anyone else other than the Respondent had or would have any claim to Lot 10.

[76] The surveyor Inoke is very clear that he charged survey fees as mentioned in P7 from the Respondent for both Lot 4 and 10 and charged transfer fees in P8 from the Respondent and prepared both transfer forms – P9 and P10 with the clear understanding that the 01st Appellant intended to transfer both Lot 4 and Lot 10 to the Respondent. Despite the 01st Appellant's feeble challenge to P9 and P10 the High Court Judge had accepted both documents and I am not inclined to disturb his finding of fact on that score as his decision is based on good grounds. The 01st Appellant challenged the Respondent's entitlement to Lot 10 for the first time in 2005 but withdrew the case subject to cost in 2007. P9 and P10 clearly demonstrate the common intention between the Respondent and the 01st Appellant.

[77] Therefore, when the parties' entire course of conduct across the long time span is analysed objectively I conclude that one could infer a common intention which may mean, at the most that Lot 10 would be transferred to her and at the least that she would be entitled to the usage of Lot 10 until the house is removed and the land is sold to a third party. I am also of the view that there is sufficient evidence of detriment suffered by the Respondent as a result of relying on the inferred common intention. **Chalmers v Pardoe** [1963] 3 All E R 552 at 555B the Privy Council held

"There can be no doubt on the authorities that where an owner of land has invited or expressly encouraged another to expend money on part of his land on the faith of an assurance or promise that that part of the land will be made over to the person so expending his money a court of equity will prima facie require the owner by appropriate conveyance to fulfil his obligation..."

[78] In these and other surrounding circumstances as set out above in detail it is unconscionable and unjust to allow the 1st Appellant to deal with, retain and benefit from Lot 10. I am of the view that the High Court Judge's conclusion that the Respondent had acquired a beneficial interest in Lot 10 and that such interest should be protected by upholding a constructive trust in her favour against the 01st Appellant is justified and

should be affirmed. Therefore, I conclude that the Respondent should be declared the beneficial owner of Lot 10 arising from the constructive trust she had established while the legal title for the time being continue to be held by the 01st Appellant. Thus, I affirm granting of the relief under prayer (a) of the Statement of Claim.

- [79] In addition, on the facts and circumstances of this case if the court fails to uphold the Respondent's claim the 01st Appellant would be unjustly enriched as well by acquiring Lot 10 with all its improvements done since 1970 by Shiu Prasad's family. In Canada, for example, the constructive trust is based on the doctrine of unjust enrichment rather than intention. A 'remedial' constructive trust there will arise in circumstances where the legal owner has been enriched by some benefit, not necessarily financial, conferred on him by the claimant, providing there is no 'juristic' reason for this, such as a contractual obligation or a gift (see, for e.g. Sorochan v. Sorochan [1986] 117 DLR (3rd) 257). Lord Browne- Wilkinson in Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669; [1996] 2 All ER 961, 997, HL described remedial constructive trust as a '*judicial remedy giving rise to an enforceable obligation; the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court*'. The evidence goes to show fraudulent conduct on the part of the 01st Appellant and how he had gained unjust enrichment at the expense of the Respondent. Therefore, I believe that alternatively a remedial constructive trust also has arisen in favour of the Respondent on the basis of the 01st Appellant's unjust enrichment and on this ground also the Respondent should be declared the beneficial owner of Lot 10. Accordingly the 01st Appellant fails on this ground of appeal.

Proprietary estoppel

- [80] Proprietary estoppel is the name given to a set of principles whereby an owner of land may be held to have conferred some right or privilege connected with the land on another person, despite the absence of a deed, registered disposition, written contract or valid will. Thus, the doctrine of 'proprietary estoppel' provides another means by which a

person may become entitled to a proprietary right despite the absence of express intention and appropriate formalities. In summary, proprietary estoppel is another remedy developed by equity and, like a common intention constructive trust, applies where someone has acted to his detriment upon the belief, encouraged by the actions or representations of the owner of land, that he has (or will have) some right in that land. A claim by way of proprietary estoppel is not in itself a remedy. However, where a claimant can demonstrate an entitlement by way of estoppel, an appropriate remedy will be awarded by court. The classic statement of the doctrine of proprietary estoppel is found in Lord Kingsdown's dissenting speech in **Ramsden v. Dyson** [1866] LR 1 HL 129 at 170

"If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of the land, with the knowledge of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the land lord to give effect too such promise or expectation."

- [81] The scope of the above dictum has been considerably extended since then. The factors required to establish a proprietary estoppel at present are an assurance, reliance and detriment in circumstances in which it would be unconscionable to deny a remedy to the claimant (vide **Taylor Fashions Ltd. v. Liverpool Victoria Trustees Co Ltd.**[1981] 1 All ER 897; [1982] QB 133n and **Lim Teng Huan v. Ang Swee Chuan** [1992] 1 WLR 113). The proper approach here is to adopt a holistic approach to establishing a proprietary estoppel and look at the matter in the round as opposed to consider each of the above elements in watertight compartments (see **Thorner v. Majors** [2009] WLR 776). Unconscionability is at the heart of proprietary estoppel which is available to cure absence of formality when, but only when, it would be unconscionable for the defendant to rely on the lack of formality to defeat the claimant (see **Hopper v. Hopper** [2008] EWCA Civ 1417). Whilst the general doctrine of estoppel is only capable of acting as a shield to protect against a person asserting his rights, proprietary estoppel may be relied on as a sword and can found an action.

[82] Though, throughout the impugned judgment, the High Court Judge has referred to several decisions on proprietary estoppel, he had not in the end come to a definite finding of the existence of proprietary estoppel in this instance. Neither had he rejected proprietary estoppel. It looks as if he was arguing for a case of proprietary estoppel to be applied to the facts of this case but for some inexplicable reason had omitted to say so in the end.

[83] In **Denny v Jensen** [1977] NZLR 635 at 638 the Court identified four conditions for proprietary estoppel to apply and said "*There must be expenditure, a mistaken belief, conscious silence on the part of the owner of the land and no bar to the equity*". Megarry J in **In re Vandervell's Trust (No. 2)** [1974] CH 269 at 131 describes the essential elements as follows:

"... the person to be estopped (I shall call him O, to represent the owner of the property in question), must know not merely that the person doing the acts (which I shall call) was incurring the expenditure in the mistaken belief that A already owned or would obtain a sufficient interest in the property to justify the expenditure, but also that he, O, was entitled to object to the expenditure. Knowing this, O nevertheless stood by without enlightening A. The equity is based on unconscionable behaviour by O; it must be shown by strong and cogent evidence that he knew of A's mistake, and nevertheless dishonestly remained willfully passive in order to profit by the mistake"

[84] In **Denny** at page 639, Justice White very aptly summarized the doctrine as follows:-

*"In Snell's Principles of Equity (27 Ed) 565 it is stated that proprietary estoppel is" ... capable of operating positively so far as to confer a right of action". It is "one of the qualifications" to the general rule that a person who spends money on improving the property of another has no claim to reimbursement or to any proprietary interest in that property. In **Plimmer v Willington City Corporation** (1884) 9 App Cas 699; NZPCC 250 it was stated by the Privy Council that "... the equity arising from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated" (ibid, 713, 29). After referring to the cases, including **Ramsden v Dyson** (1866) LR 1 HL 129, the opinion of the Privy*

Council continued, " In fact, the court must look at the circumstances in each case to decide in what way the equity can be satisfied" (9 App Cas 699), 714; NZPCC 250, 260). In Chalmers v Pardoe [1963] 1 WLR 677; [1963] 3 All ER 552 (PC) a person expending money was held entitled to a charge on the same principle. The principle was again applied by the Court of Appeal in Inwards v Baker [1965]2 QB 29; [1965] 1 All ER 446. There a son had built on land owned by his father who died leaving his estate to others. Lord Denning MR, with whom Danckwerts and Salmon LJ agreed, said that all that was necessary:

"... that the licensee should, at the request or with the encouragement of the landlord, have spent the money in expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do". (ibid, 37, 449).

- [85] The Respondent's evidence is that Shiu Prasad had built the house on an area of land allotted to him upon the representation by Bhagirathi that one day when the whole land is subdivided the area where the house is built would be given to him. The 1st Appellant who had obtained probate for Bhagirathi's estate in March 1978 did not object to Shiu Prasad's taking an extension to the existing house. Shiu Prasad had spent a considerable sum of money on both occasions. The Respondent had paid survey fees for the subdivision of the land in respect of Lot 4 and on the agreement with the 1st Appellant and Hari Prasad to obtain part of Hari Prasad's land to expand the area of land where she lived to make present Lot 10, she had also paid survey fees for Lot 10 as well. In addition she had paid transfer fees for both said lots on the understanding that both lots would be transferred to her. There appears to be clear encouragement, if not active participation by the 01st Appellant directly and indirectly to these events that happened across a considerable period of time. Until 2005 the Respondent had no idea that the 01st Appellant was challenging her right to stay on Lot 10. It is clear that the tripartite agreement in P4 entered into in 1987 and the subsequent undated Transfer of Land in Fee Simple for Lot 10, both signed by the 01st Appellant and the Respondent would have created a legitimate expectation in the Respondent that she has or will have rights in Lot 10 and on both occasions she had spent money and acted to her detriment based on such expectation arising from the 01st Appellant's conduct and she had thus raised an equity in

Lot 10 which should be satisfied by the 01st Appellant or failing that by way of an award of a remedy by the court. I shall now consider each of the elements of proprietary estoppel in detail.

Assurance

- [86] Assurance must be about, or relate to, some reasonably identified land. However, it does not matter if the exact scope of the land is uncertain, or even if over time some land is sold and other purchased, provided that it is reasonably clear which land the assurance relates to at the time the claim of estoppel falls to be considered (vide *Thorner*). Similarly, the form of assurance is irrelevant and it may be given orally, arise from conduct, or even be in the form of a written instrument that is not itself enforceable as a contract to transfer an interest in land (as in *Flowermix Ltd. v. Site Developments (Ferndown) Ltd* [2000] All ER (D) 522 and *Lim Teng Huan v. Ang Swee Chuan* [1992] 1 WLR113 where a written but unenforceable agreement was held to constitute the requisite assurance and was indirectly given effect through the intervention of proprietary estoppel). It could even be by ‘wilful silence’ where an estoppel may be established if a landowner, knowing the true position, stands by while the claimant does something on the landowner’s land in the mistaken belief that the land belongs to her (see *Ramsden*).

Reliance

- [87] In *Greasley v. Cooke* [1980] 3 All ER 710 it was held that if clear assurances have been made and detriment has been suffered, it is permissible to assume that reliance has occurred. In *Wavling v. Jones* [1995] 69 P & CR 170; [1993] EGCS 153 the Court of Appeal looked only for a ‘sufficient link’ between the assurance made and the detriment suffered by the plaintiff, the existence of which would throw the burden of proof onto the defendant to show that there had, in fact, been no reliance.

Detriment

- [88] The detriment may be that the claimant has spent money on the land or advanced money to the landowner in reliance on the assurance (see **Kinane v. Alimany Mackie-Conteh** [2005] EWCA Civ 45; [2004] EWHC 998 (Ch), or has physically improved the land in some way, or has devoted time and care to the needs of the landowner (see **Campbell v. Griffin** [2001] EWCA Civ 990, or has forsaken some other opportunity (see **Ottey v. Grundy** [2003] WTLR 1253, **Lloyd v. Dugdale** [2011] EWCA Civ 1754), or has positioned his entire life on the faith that the land might be his one day (see **Suggitt v. Suggitt** [2011] EWHC 903 (Ch). As shown in **Campbell** and **Jennings v. Rice** [2002] EWCA Civ 159; [2003] 1 FCR 501 it is not necessary that the detriment be related to land at all, or the land in dispute.

Unconscionability

- [89] Oliver J in ***Taylor Fashions*** regarded unconscionability as the very essence of a claim of property estoppel which, however, operates within the parameters proved by assurance, reliance and detriment. In the great majority of cases, the simple fact that the landowner is seeking to retreat an assurance given and relied upon will be unconscionable as normally it is the promisor's knowledge of the detriment being suffered in reliance of his promise which makes it unconscionable for him to go back on it (see **Gillett v. Holt** [2001] Ch 210; [2000] 2 All ER 780).
- [90] Firstly, I am of the view that the tripartite agreement signed on 23.04.1987 when the 01st Appellant was the sole registered proprietor of the entire land gives a clear assurance or expectation to the Respondent that she will have the usage of the piece of land in issue till the present occupation is removed, also until the said piece of land is sold to any other party. Secondly, the written but undated and unenforceable Transfer of Land in Fee Simple (P9) in respect of Lot 10 and the 01st Appellant's conduct before and after the signing of the said document (P9) itself, in my view constitute sufficient assurance or

expectation in the Respondent that Lot 10 would be transferred to her. The direct evidence reveals and it could be even reasonably assumed from all the attendant circumstances that in both instances aforesaid the Respondent had acted on those assurances or expectations to her detriment and therefore, in my view, it would be unconscionable if the 01st Appellant were to go back on his actions, representations and assurances. Therefore, I am firmly of the view that those assurances or expectations should be given effect through the intervention of proprietary estoppel.

[91] In **Inwards v Baker** [1965] 1 AER; (1965) 2 QB 29 a father permitted his son to build a bungalow on his land instead of buying a (smaller) bungalow elsewhere; the son did so, expending £300. Following the father's death, his trustees sought possession of the son's bungalow. The son's reliance had given rise to equity, ensuring that under proprietary estoppel, the father (and his successors with notice) would be estopped from denying the son's occupation. An interest capable of creating such equity need not be proprietary in nature; an expectation to occupy was enough. An injunction was awarded, preventing the trustees from obtaining possession. (emphasis mine)

[92] The 1st Appellant has cited **Odd v Ford and Another** [1988-1989] 167 CLR 316 and argued that the Respondent had been guilty of acquiescence and gross laches and therefore not entitled to any equitable relief. I disagree. The Respondent at no time even remotely conceded Lot 10 to be belonging to anyone else other than her. The action filed by the 1st Appellant against the Respondent was withdrawn in 2007 and the Respondent had filed the instant action in 2009 having filed a caveat in the same year. There is no acquiescence or laches on her part capable of defeating equity. Delay alone does not amount to laches. In any event the 01st Appellant who had admittedly not paid even the cost of the earlier action to the Respondent is not before court in this action with clean hands and cannot be heard to complain of acquiescence and laches on the part of the Respondent.

- [93] As stated in *Yaxley* at the high level of generality there is much common ground between the doctrine of proprietary estoppel and constructive trusts. However, a claim based on proprietary estoppel does not necessarily require a common agreement. When it comes to the nature of remedies available under both, while resulting and constructive trusts will provide a successful claimant with a beneficial interest in the land as equitable co-owner and the question is the extent of the share to be awarded by the court, proprietary estoppel is a much more flexible creature and the courts have a discretion as to the nature of the remedy that they can award ranging from the award of the fee simple (see Pascoe v. Turner [1979] 1 WLR 431) to nothing at all (see Sledmore v. Dalby [1996] 72 P & CR 196). Therefore, in my view these facts taken in conjunction with other relevant evidence present a strong case for the doctrine of proprietary estoppel to be applied though the High Court Judge had stopped just short of doing so.
- [94] Since I have held that the Respondent has established proprietary estoppel the court can satisfy equity in any manner appropriate and award the Respondent such remedy as the court deems appropriate. In doing so, the court may not award more than the Respondent was assured (see Orgee v. Orgee [1997] EGCS 152) and is expected to do the minimum to achieve justice between the parties (see Wormall v. Wormall [2004] EWCA Civ 1643). The precise nature of the remedy awarded should be tailored to remove the unconscionability suffered by the claimant (see *Jennings*). Further, the remedy could be based on the claimant's expectation ('expectation-based') where he or she gets what was promised or secondly, it could be based on the detriment suffered by the claimant ('reliance-based') where a remedy commensurate or proportionate with the detrimental reliance is awarded (see *Jennings* and Commonwealth of Australia v. Verwayen [1990] 170 CLR at p. 414 for the concept of 'proportionality' between the remedy and the detriment) or thirdly, the remedy could be a mixture of both provided the unconscionability is remedied.

[95] I shall now examine a sample of the remedies that had been awarded upon the satisfaction of requirements of proprietary estoppel. In Dillwyn v. Llewellyn [1862] 4 de GF & J 517 and *Pascoe* the claimant was awarded the fee simple in the land. In Re Basham [1986] 2 WLR 1498 the daughter-in-law was awarded the house promised to her. Mr. Yaxley received a long lease of one of the flats he had renovated in *Yaxley*. In Bibby v. Stirling [1998] 76 P & CR D 36 and Sweet v. Sommer [2005] EWCA Civ 227 an award of an easement appears to have been granted. Voyce v. Voyce [1991] 62 P & CR 291 is a case where there was a complete readjustment of the parties' right over the property. In *Inwards* and Matharu v. Matharu [1994] 2 FLR 597 the claimant was granted a licence to use or occupy the land for life. In Parker v. Parker [2003] EWHC 1846 (Ch); [2003] All ER (D) 421 (Jul) a licence was awarded as a result of estoppel. Instead of proprietary interest in the land compensation was awarded in Wayling v. Jones [1995] 69 P & CR 170; [1993] EGCS 153 because the land had been disposed of previously. In *Campbell* the claimant was awarded a charge to the value of GBP 35,000.00 over the property and was not permitted to remain in the property. Similarly in *Jennings* instead of ordering the transfer of the house, the part-time gardener was awarded GBP 200,000.00 which is less than half the value of the house promised. In *Gillet* Mr. Gillett was awarded the freehold of the farmhouse and some land along with GBP 100,000.00 as compensation for his exclusion from the farm business. In Holman v. Howes [2007] EWCA Civ 877 in order to satisfy equity it was ordered that there should be no order for sale of the property without the ex-wife's consent. In Powell v. Benney [2007] EWCA Civ 128 it was held that to transfer the properties to P would be out of all proportions to the detriment suffered and the award of GBP 20,000.00 was upheld. In Henry v. Henry [2010] UKPC 3 the Privy Council awarded half of the registered proprietor's share of the plot of land to the claimant. In *Sledmore*, Mr. Dalby was successful in the estoppel claim but got no award at all on the basis of 'proportionality' principle as he had already got his remedy.

- [96] It is clear from evidence that the Respondent's family has occupied and physically improved the land concerned since 1970 *inter alia* by building a house during Bhagirathi's life time and improved it later in 1980 at considerable expense while the 01st Appellant as the Executor and Trustee remained in wilful silence, thus raising the expectation as to the present and future proprietary rights of the Respondent's family in the land (part of present Lot 10). The agreement recorded in P4 in 1987 when the 01st Appellant was the sole registered proprietor of the entire land expressly assured the Respondent the right of usage of the parcel of land which later became Lot 10. The 01st Appellant went further and signed and got the Respondent also to sign Transfer of Land in Fee Simple (P9) for Lot 10, most probably in 2001, which amounts to nothing short of an express representation and promise that Lot 10 would be transferred to the Respondent in due course. The actual transfer of Lot 4 using a similar document (P10) signed simultaneously would have left the Respondent in no doubt that the 01st Appellant would do the same with regard to Lot 10 as well. Therefore, the Respondent has obviously positioned her entire life on the faith that Lot 10 would be her. Further the Respondent appears to have paid \$760 to Deepak & Govind Limited in 1987 and according to Inoke Bulivou's unchallenged evidence the Respondent had paid him \$1740 altogether between 1996 and 2001 as survey and transfer fees for Lots 4 and 10 though P7 and P8 account for only \$500. Although the Respondent had spoken to another payment of \$500.00 for Lot 10 to the 01st Appellant her overall evidence on such a payment is vague, confused, contradictory and lacks in sufficient clarity to be relied upon. Therefore, I disregard her evidence on such payment on Lot 10. However, according to her evidence she had lost some receipts for the above payments during a hurricane.
- [97] The Respondent lives with her children and grandchildren numbering 16 on Lot 10 bordering the access road, the extent of which is only 6391 square meters (0.6391 hectares). Their uninterrupted occupation is more than 45 years old. Though the Respondent also has Lot 4 which is an agricultural land, it was transferred to her by the 01st Appellant for valuable consideration and not as a gift. Comparatively, the 01st Appellant has got Lot 7 of 10.64 hectares which is more than three times larger than Lot

4 and more than 16 times bigger than Lot 10. Lot 7 also has the widest road frontage and extends to the opposite side of the land as one well shaped block of land.

- [98] Considering all the circumstances of the case I am satisfied that all the ingredients of proprietary estoppel have been established and of the view that as the remedy the Respondent should be entitled to the fee simple in Lot 10 based on proprietary estoppel. This is what was promised to the Respondent by the 01st Appellant and it constitutes the minimum to achieve justice between them. I have come to this conclusion considering both the Respondent's expectation and the detriment suffered by her in order to remedy the unconscionability in this case.
- [99] Accordingly I affirm the trial judge's award of reliefs set out in paragraphs (b) , (c) and (d) of the Statement of Claim to the Respondent and I do so based on proprietary estoppel. Accordingly, this ground of appeal is also rejected.

Ground 2

- [100] The 1st Appellant has challenged the *locus standi* of the Respondent to file the instant action on the basis that she was trying to enforce a purported agreement signed on 23rd April 1987 without producing a power of attorney, letters of administration or probate for the estate of Shiu Prasad.
- [101] Firstly, the 1st Appellant himself was a party to the said tripartite agreement and therefore having acquiesced in it he is now estopped from contesting the was entered into Shiu Prasad was not among the living and that is why the 01st Appellant and Hari Prasad got the Respondent, the widow to agree to pay the survey fees on behalf of Hari Prasad and to give her in return an area of land from Hari Prasad's Lot 9. The 1st Appellant who claims to have initiated the survey and the subdivision was in the thick of this arrangement. Both he and Hari Prasad had no issue of the Respondent's status at that time. The 01st Appellant does not appear to have been concerned with legal niceties

of the Respondent's status at the time he willingly and admittedly became a party to the said agreement. By his conduct the 01st Appellant had accepted the Respondent's status to be concerned and deal with Lot 10. I think it is too late in the day for the 01st Appellant to raise such a technical objection at the stage of litigation.

- [102] In any event the Respondent in the instant action was not attempting to give effect to the said agreement but rather she was using that as another piece of evidence to establish her beneficial ownership in Lot 10. If not, her action would have been one based on principles of contract for specific performance. The two transfers executed by the 01st Respondent marked P9 and P10 in respect of Lot 4 and Lot 10 unequivocally demonstrate that the 01st Appellant had considered the Respondent for all purposes as having required legal status in so far as the said lots were concerned. Therefore a power of attorney, letters of administration or probate for the estate of Shiu Prasad is not essential for her to institute and maintain the present action where she sought to be declared the beneficial owner of Lot 10. I therefore reject this ground of appeal.

Ground 3, 4, 5, 6 & 7

Indefeasibility of his title & Fraud

- [103] The 01st Appellant's complaint here is mostly based on section 39 and 40 of the Land Transfer Act Cap 131 based on indefeasibility of his title to Lot 10. Neither section 39 nor section 40 uses the term 'indefeasible title' in the sense that it cannot be defeated, revoked or lost. Section 40 rather contemplates a title which is paramount which means a title that is superior to another title or claim on the same property. Thus, the term 'indefeasibility of his title' may be somewhat inapt in the context of sections 39 and 40 of Land Transfer Act. Be that as it may, in terms of CT 34557 (P12) the 01st Appellant is the registered proprietor of Lot 10 in DP 7889 since 2002. The Respondent does not challenge that *per se*.

- [104] Lord Browne-Wilkinson in **British American Cattle Co v Caribe Farm Industries Ltd** [1998] 1 WLR 152 in the Privy Council described the indefeasibility of title under Torrens System as follows:

'Although the details of the Torrens system vary from jurisdiction to jurisdiction, it is the common aim of all systems to ensure that someone dealing with the registered proprietor of title to the land in good faith and for value will obtain an absolute and indefeasible title, whether or not the title of the registered proprietor from whom he acquires was liable to be defeated by title paramount or some other cause' (emphasis mine)

- [105] In my view, if the above dictum in **British American Cattle Co** is to be adopted the 01st Appellant cannot be said to be 'someone dealing with the registered proprietor of title to the land in good faith and for value', for he derives the title to Lot 10 from the Last Will of his father. He had paid no value for the land. Therefore, the 01st Appellant could not be held to have acquired an absolute and indefeasible title over Lot 10. Therefore there is a serious question mark as to whether the 01st Appellant is entitled to rely on the doctrine of indefeasibility of title in this case.
- [106] On the other hand section 39 of Land Transfer Act which confers upon a registered proprietor a paramount title (i.e. a title that is superior to another title or claim on the same property) and guarantees his title is also subject to certain qualifications set out in the section itself. Firstly, the paramount nature of a registered title is guaranteed against a competing estate or interest derived from the Crown or otherwise when such estate or interest might be held to be paramount or to have priority except for the Act. Clearly, an equitable interest as claimed by the Respondent in Lot 10 is not an interest which might be held to be paramount or to have priority under the Act or otherwise. Thus, the interest claimed by the Respondent in Lot 10 seems to be outside the purview of section 39 and the protection granted thereby does not seem to adversely affect such an equitable interest. Secondly, the paramount nature of a registered title is subject to the provisions of the Act, or an estate or interest therein. Thirdly, it is subject to fraud. Fourthly, it is subject to such encumbrances as are notified on the register. Fifthly, it is subject to other

encumbrances set out under section 39(1) (a), (b) and (c). Thus, the presence of any one of the above instances could pose a challenge to the paramount nature of the registered title and affect the guarantee given to such registered title. Section 39(2) appears to protect a registered title against a rival prescriptive title. Therefore, once again there is a serious doubt whether the 01st Appellant's registered title in Lot 10 is capable of taking refuge in section 39(1) of the Land Transfer Act against the equitable interest claimed by the Respondent. If not, he is not entitled to rely on the fraud exception in section 39 as the registered proprietor of Lot 10 based on CT 34557 (P12) against the Respondent.

[107] I also doubt very much whether section 40 of the Land Transfer Act is applicable to the 01st Appellant's case in as much as, in my view, the 01st Appellant cannot be interpreted as a *'person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest in land'*. Section 40 seems to be concerned with or protecting a purchaser. The 01st Appellant as executor and trustee acquired title to the entire land in 1979 consequent to death and last will of Bhagirathi by transmission as defined in section 2 of Land Transfer Act. Then the land was registered in his own name in 1983 as a transfer. In 2002 the 01st Appellant obtained new CT 34557 on Lot 1 to Lot 10. Thus, none of these transactions was from a previous proprietor but simply by operation of law. In other words, the 01st Appellant is not a purchaser so as to be entitled to the protection afforded by section 40. In my view, while section 39 deals with the 'title paramount' of the registered proprietor, section 40 is concerned with protecting any other who is subsequently contracting or dealing with or taking or proposing to take a transfer from such registered proprietor. Therefore, I am convinced that section 40 of Land Transfer Act would not constitute a defence as far as the 01st Appellant is concerned.

[108] Anything in section 37 and 38 of Land Transfer Act does not change the above said position. Be that as it may, a challenge could be mounted based on 'fraud' which is an exception to the registered proprietor's paramount title under both section 39 and 40. Both sections seem to embody the principle *'certainty is the father of right and the*

mother of justice'. I shall now proceed to consider the question of fraud in relation to the 01st Appellant's defence on the assumption that the Respondent should prove fraud in order to overcome the 01st Appellant's paramount title to Lot 10.

[109] The trial judge had considered the defence of indefeasibility of the 01st Appellant's title in the impugned judgment and had stated that he had considered the judgments cited by the 01st Appellant. Then he had specifically recorded fraud as an exception to indefeasibility of his title but gone onto say that the Respondent was not challenging the legal title of the 01st Appellant but claiming an equitable ownership in Lot 10. The trial Judge seems to have believed that 'fraud' may not come into the equation in as much as the Respondent's challenge is not to the 01st Appellant's legal ownership. However, the relief (c) and (d) in the prayer seeking an order directing the 01st Appellant or him failing to do so, the Registrar of Titles to transfer CT 34557 (i.e. Lot 10 in DP 7889) to the Respondent does affect his registered title protected by section 39 and 40 of the Land Transfer Act (indefeasibility of title) and therefore the exception of 'fraud' becomes a crucial issue to be considered. Probably, due to this reason, as admitted even by the Respondent the Learned High Court Judge had not made a determination on the issue of fraud though referring to the details of allegation of fraud by the Respondent in the introductory part of the judgment. Neither has he ruled out 'fraud' in the judgment. However, the trial judge had specifically ruled out fraud or negligence on the part of the 02nd Appellant having considered the matter in detail. It seems that the Learned Judge had for whatever reason failed to reach a conclusion on the defence of indefeasibility of title *vis-à-vis* the allegation of fraud by the Respondent.

[110] In my view, the omission on the part of the High court Judge in not ruling on the defence of indefeasibility of title raised by the 01st Appellant in the light of fraud as an exception should not *ipso facto* be a ground to allow the appeal if this Court on a consideration of material before it could satisfy itself on a somewhat higher degree than a balance of probability that fraud had in fact been pleaded and proved.

- [111] My view is reinforced by the fact that in any event the Respondent's notice filed in terms of section 19 (2) of the Court of Appeal Act prays that this Court affirms the decision of the High Court on arriving at a finding of fraud against the 01st Appellant. Further, I am of the view that this Court should grant leave in terms of section 19(3) of the Court of Appeal Act for the Respondent to support the decision of the High Court on the ground of 'fraud' though not relied on by that court. The Respondent seems to have acted on the belief that the award of reliefs in (c) and (d) in the prayer cannot be sustained unless 'fraud' is upheld by this Court in the light of section 39 and 40 of the Land Transfer Act.
- [112] It is clear from the statement of claim that the Respondent had clearly alleged fraud at length and in sufficient detail on the part of both Appellants.
- [113] The indefeasibility of title of the registered proprietor under sections 39 & 40 of Land Transfer Act Cap 131 subject to 'fraud' has been upheld consistently by a long line of cases [see for e.g. **Rup Wati and Shiu Charan v Estate of Shiu Charan** Civil Appeal No. ABU 0027 of 2012 decided on 05 December 2013; [2103] FJCA 132, **Star Amusement Limited v Prasad** Civil Petition No. CBV 0005 of 2012 decided on 23 August 2013; [2013] FJSC 8 and **Shiu Ajitva Charan v Rup Wati & Another** Civil Appeal No. CBV 0007 of 2014 decided on 17 December 2014.
- [114] In **Prasad v Mohammed** Civil Action No. HBC 272 of 1999L decided on 03 June 2005; [2005] FJHC 124, His Lordship Justice Gates (as His Lordship then was) stated concisely the principles in relation to fraud and indefeasibility of title as follows;

"[13] In Fiji under the Torrens system of land registration, the register is everything: Subramani & Ano v Dharam Sheela & 3 Others [1982] 28 Fiji LR 82. Except in the case of fraud the title to land is that as registered with the Register of Titles under the Land Transfer Act [see sections 39, 40, 41, and 42]: Fels v Knowles [1906] 26 NZLR 604; Assets Co Ltd v Mere Roihi [1905] AC 176. PC. In Frazer v Walker [1967] AC 569 at p.580 Lord Wilberforce delivering the judgment of the Board said:

*"It is to be noticed that each of these sections excepts the case of fraud, section 62 employing the words "except in case of fraud." And section 63 using the words "as against the person registered as proprietor of that land through fraud." The uncertain ambit of these expressions has been limited by judicial decision to actual fraud by the registered proprietor or his agent: *Assets Co Ltd v Mere Roihi*. It is these sections which, together with those next referred to, confer upon the registered proprietor what has come to be called "indefeasibility of title." The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration."*

*[14] Actual fraud or moral turpitude must therefore be shown on the part of the plaintiff as registered proprietor or of his agents *Wicks v. Bennet* [1921] HCA 57; [1921] 30 CLR 80; *Butler v Fairclough* [1917] HCA 9; [1917] 23 CLR 78 at p.97"*

- [115] Sections 42 and 43 of Real Property Act, 1900 in New South Wales in Australia are identical to sections 39 and 40 of Land Transfer Act in Fiji. Fraud for the purposes of the said Act has been defined by the Privy Council in *Assets Company Ltd v Mere Roihi*⁴ [1905] AC 176 at 210 where it was said:

"...by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not 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..."

"[T]he fraud which must be proved in order to invalidate the title of the registered proprietor for value ... must be brought home to the person whose registered title is impeached or to his agents." (emphasis mine)

- [116] Fraud is relevant in two situations. A previously registered proprietor seeks to set aside a transaction imputed by fraud or a holder of an unregistered instrument seeks to set aside a later registered instrument in favour of another on the ground that the other has been guilty of fraud. The general principle is that unless the fraud can be brought home to the

⁴(1904-05) NZPCC 275

registered proprietor, registration will confer indefeasibility. The Respondent's case falls into the second category.

- [117] There is no statutory definition of fraud in the Real Property Act in NSW or Land Transfer Act in Fiji. Fraud, wrote Sir Rupert Cross, is "*one of those irritating words that seems more technical than it really is*".⁵ According to Lord MacNaghten in **Reddaway v Banham** [1896] AC 199 at 221

"Fraud is infinite in variety. Sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it."

- [118] **Black's Law Dictionary** Seventh Edition at page 670 defines **fraud** as '*A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment or a misrepresentation made recklessly without belief in its truth to induce another person to act*'. **Actual fraud** (also termed *fraud in fact*, *positive fraud* and *moral fraud*) is defined at page 671 as '*a concealment or false representation through a statement or conduct that injures another who relies on it in acting*'. **Constructive fraud** (also named *legal fraud*, *fraud in contemplation of law* and *equitable fraud*) is defined at page 671 as '*unintentional deception or misrepresentation that causes injury to another*'.

- [119] Fraud has been judicially defined as actual dishonesty, which can be attached to the registered proprietor's title. Sometimes fraud is said to be "moral turpitude" (vide **Butler v Fairclough** [1917] 23 CLR 604 at 630) (*emphasis mine*). In the context of granting rescission of a contract it was held in **Derry v. Peek** (1889) 14 App Cas 337, HL that a fraud is proven when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, careless of whether it is true or false. The fraudulent party need not have acted with a corrupt motive (see **Polhill v. Walter** [1832] 3 B & Ad 114), but the false statement must have been made with the intent that it should

⁵"The Theft Bill I: Theft and Deception" [1966] Crim LR 415 at 416

be acted on (see **Peek v. Gurney** [1873] LR 6 HL 377 and it must have been actually acted on by the other party (see **Smith v. Chadwick** [1884] 9 App Cas 187,HL).

- [120] Equitable fraud is constructive fraud when the registered proprietor should have realised that the transaction was fraudulent. **Bahr v Nicolay (No 2)** [1988] 164 CLR 604, Mason CJ and Dawson J suggested that not all species of equitable fraud were outside the concept of fraud under the Real Property Act. This approach was endorsed by the Court of Appeal in **Victoria in Russo v Bendigo Bank Ltd** [1999] 3 VR 376 at 382-385, and by the Court of Appeal in NSW in **Grgic v ANZ Banking Group Ltd** (1994) 33 NSWLR 202 where, at 221, Powell JA said:

"Those species of 'equitable fraud' which are regarded as falling within the concept of 'fraud' for the purposes of s. 42 of the Act are those ... in which there has been an element of dishonesty or moral turpitude on the part of the registered proprietor of the subject interest or on the part of his or its agent."
(emphasis mine)

- [121] Generally fraud must occur in the lead up to registration and must be shown to have been practised against the person who seeks relief. Mason CJ and Dawson J in **Bahr v Nicolay (No 2)** (supra) have suggested that post-registration conduct by the registered proprietor may be considered on the issue of whether there is fraud by the registered proprietor. This approach has been endorsed by Wood J in **Snowlong Pty Ltd v Choe** [1991] 23 NSWLR 198 at 212.

- [122] In **Loke Yew v Port Swettenham Rubber** (1913) AC 491 it was held as follows. As clearly stated in the legislation, fraud is an exception to indefeasibility. A registered proprietor who has acted fraudulently will not enjoy the protection given by the legislation (indefeasibility). Where a party promises that an unregistered interest will be preserved (in order to induce another party to agree to a transaction) and then goes back on that promise, that party will be guilty of fraud. It follows that the Defendant does not enjoy indefeasibility. In this case the plaintiff won, and the Defendant was ordered to

transfer the relevant land to the Plaintiff (as opposed to a rectification of the register). In **Pascoe v. Turner** [1979] 1 WLR 431, a woman who had been promised that the house in which she was living and which belonged to her former partner 'was hers' established reliance by spending 'a quarter of her modest capital' – a few hundred pounds - on maintaining and improving the property and the court ordered the legal owner of the house to convey the fee simple to the claimant.

- [123] The evidence of the Respondent reveals that Bhagirathi had expected the 01st Appellant to divide Lot 1 in DP 1315 comprised in CT 6864 among all his sons upon his death and on that understanding he had devised the entire land to the 01st Appellant. However, the Last Will (D2) does not have such an express wish. The 01st Appellant having obtained probate in March 1978 had not carried out any such distribution of the land but had got the title transferred in his name over the entire land and the brothers had started quarrelling with him over it. Most probably due to constant clashes and not due to love and affection as claimed by him the 01st Appellant in 1985 had agreed to divide the land among the brothers on the basis that each son bears cost of survey in respect of his lot. The first survey had commenced in 1985 and the instructions to the surveyors had been given under the hand of Shiu Prasad. The matter had dragged on and the first set of surveyors had not completed despite the Respondent having paid their fess (P6) and the second surveyor Inoke had completed the subdivision in 1996. Before that by way of a tripartite agreement in 1987 the 01st Appellant and Hari Prasad had agreed to allocate part of Hari Prasad's lot (later designated as Lot 9) in the extent of 6391 square meters (01 ½ acres) to the Respondent in lieu of her spending for the survey fees of Hari Prasad. This area of land was demarcated adjacent to where the Respondent was living with her family and was part of what was due to Hari Prasad. The amalgamated land became Lot 10 in the subdivided plan (P5) where the Respondent was assured usage until the house thereon is removed and also the land itself is sold.
- [124] The Respondent had been made to believe that she was paying survey fees in P7 for both Lot 4 and Lot 10 and the 01st Appellant was going to transfer both lots to her and Inoke

confirms that in his evidence. Then it had taken several years till 2001 where the 01st Appellant had started the process of transferring respective subdivided lots to his brothers. The Respondent had again been made to believe that the transfer fees she was paying (P8) in 2001 was for both lots. On the instructions of the 01st Appellant Inoke had prepared transfer documents (P9 & P10) to transfer Lot 4 and Lot 10 to the Respondent and the originals had been taken away by the 01st Appellant leaving photocopies with the Respondent to give effect to the intended transfers. The Respondent had paid transfer fees as well (P8). The 01st Appellant had in fact transferred Lot 4 to the Respondent but on a consideration of \$3000.00 contrary to the consideration of \$01.00 mentioned in the Agreement to Transfer – D1. Thus events thus far would have convinced the Respondent, an illiterate lady that she was going to be registered as the proprietor of both lots.

- [125] But without the Respondent's knowledge the things had changed. The 01st Appellant had transferred Lot 4, an agricultural land in her name but not Lot 10, a more valuable residential and subsisting farming land which he had transferred in his own name (P12) in 2002. She got to know of this only in 2005 when the 01st Appellant filed action to evict her from Lot 10 completely ignoring the agreement in 1987 and promise to transfer the land most probably in 2001.
- [126] In the first place the conduct of the 01st Appellant had throughout the timeline been dishonest and deceptive. His position that he did not sign on the transfer documents cannot be believed as he had obviously used one of them to transfer Lot 4 to the Respondent. According to the Respondent and the surveyor both P9 & P10 had been prepared by Inoke and signed by the 01st Appellant and the Respondent. Inoke's services had been requested by the 01st Appellant himself whose signature had been witnessed by Inoke and there is no reason to disbelieve the surveyor's evidence.
- [127] By getting Lot 10 transferred in his own name discarding the transfer document (P10) which was to be used to transfer Lot 10 in the name of the Respondent, the 01st appellant had clearly acted fraudulently and perpetrated fraud on the Respondent.

- [128] The 01st Appellant also knew that an area of 40.63 meters wide and 100.10 meters long out of Lot 10 had been originally part of 07 acres given to Hari Prasad and later annexed to Lot 10 in view of the tripartite agreement. Hari Prasad's Lot 9 became reduced by the said area of land as it was made part of Lot 10. Still the 01st Appellant got the entire Lot 10 registered in his name without any regard to Hari Prasad's rights leave aside the Respondent's rights. For the sake of argument even if one forgets the Respondent's entitlement to the said area of land, the 01st Appellant could not have deprived Hari Prasad of that area. This conduct amounts at the least to deceitful and unconscionable conduct on the part of the 01st Appellant.
- [129] After depriving the Respondent of registered proprietorship in Lot 10 the 01st Appellant filed action to evict her and made her suffer in litigation only to withdraw the case inexplicably subject to cost which he had failed to settle to the Respondent. Had he succeeded the Respondent would have lost not only the land but all improvements in Lot 10 which Shiu Prasad had made on the land at considerable expense including putting up of the dwelling.
- [130] However, even before the said action was withdrawn the 01st Appellant had mortgaged Lot 1 as security for a loan to the 02nd Appellant and it transpired in evidence that the 01st Appellant had to settle the loan fully in seven years but even at the end of that period he had settled only \$9000.00 out of the loaned amount of \$15,000.00. The 01st Appellant had admitted that the 02nd Appellant could realise the security to recover the loan. There appears to be some merits in the Respondent's suggestion that the 01st Appellant had deliberately delayed the repayment with the ulterior motive that it will lead to the 02nd Defendant taking possession of the land resulting in the eviction of the Respondent. This 'sharp' conduct of the 01st Appellant is tainted with dishonesty.
- [131] The 01st Appellant also argues that P4, the tripartite agreement had conferred on the Respondent only the usage of the strip of land described therein taken from adjoining Lot

9 and therefore she cannot claim ownership of any sort to that part of the land. However, if the 01st Appellant had any intention of adhering to and respecting the said agreement he should not have filed action to evict the Respondent from the whole of Lot 10 as the said agreement assured the usage of not only the said strip of land but the whole of Lot 10 comprising of the two strips of land amalgamated to be Lot 10 to the Respondent until the house therein was removed and that part of land was sold to any other party. The 01st Appellant's civil action to evict the Respondent from Lot 10 speaks of a contrary evil intention and ulterior motive on his part. This is yet another piece of evidence that demonstrates the 01st Appellant dishonesty and moral turpitude.

[132] Therefore in considering all the above circumstances I am inclined to hold that the only inescapable conclusion is that the 01st Appellant has been guilty of fraud as stipulated in section 39 and 40 of the Land Transfer Act and therefore has forfeited his right to claim indefeasible title to Lot 10. I am conscious of **Shiu Ajitva Charan v Rup Wati & Another** (supra) and several other decisions on the burden of upholding fraud and have not upheld fraud in this case lightly. I think cumulatively, the facts and circumstances of the case and evidence have passed the threshold of burden of proof on fraud. There is more than mere constructive or equitable fraud on the part of the 01st Appellant who, in my view, is guilty of actual fraud which need not amount to a criminal fraud carrying criminal penalties such as fines and imprisonment in order to deny him the protection afforded under section 39 and 40 of the Land Transfer Act.

[133] Section 41 of the Land Transfer Act states *inter alia* that any instrument of title procured or made by fraud shall be void as against any person defrauded and no party involved or privy to such fraud shall take any benefit therefrom. This is based on the well-established maxim that equity will not permit a statute to be used as an instrument of fraud. Section 41 reinforces the exception of 'fraud' expressed in sections 39 and 40. Thus, when fraud is made out the paramount nature of the title attached to a registered instrument is negated. Therefore, I reject this ground of appeal as well.

Ground 8

- [134] It is argued that the Learned High Court Judge had misdirected in law in holding that section 59 of the Indemnity, Guarantee and Bailment Act did not apply as the Respondent was claiming an equitable interest in the subject matter of the action.
- [135] On the argument based on section 59 of the Indemnity, Guarantee and Bailment Act the Learned High Court Judge had held that the said section was not a bar for the Respondent to succeed as the Respondent was claiming an equitable interest in the subject matter of the action.
- [136] The principles of common law and equity were applied in Fiji Islands as part of the laws of England by section 35 of the Supreme Court Ordinance 1875 subject to section 37 which restricted the application of common law and equity and stipulated that they were to apply “only in so far as the circumstances of the Colony and its inhabitants and the limits of the colonial jurisdiction permit”. The Independence Order and Constitution and Fiji 1970 (U.K.), Existing Laws Decree 1987, section 168 of the Constitution of the Sovereign Republic of Fiji 1990 and section 173 of the Constitution of the Republic of Fiji 2013 saved the application of the principles of common law and equity except where a local statute bars such application. For e.g. in terms of Native Lands Act Cap.133 as regards native land the doctrine of equity may not apply if they are inconsistent with any such custom or regulation made by Fijian Affairs Board.
- [137] Among a long line of cases, in **Devi v Singh** [1985] 31 FLR 109 the Court of Appeal of Fiji admitted that the courts in the island have the power to hold or infer the existence of a constructive trust in appropriate circumstances. **Paul Nagaya v James Subaiava** [1969] 15 FLR 212, **Sheila Maharaj v Jai Chand** [1986] 1 AC 898, **Jamanadas Sports (Fiji) Ltd v Stinson Pearce Ltd** Civil Appeal No. 40 OF 1992 decided on 24 May 1994 ; [1994] FJCA 20 and **Sami v Wati** (supra) are just a few examples where principles of equity have been applied in Fiji. A survey of legal literature would reveal that there is a

long line of cases where the equitable doctrines including constructive trust and proprietary estoppel have been applied as part of the legal system and legal jurisprudence of Fiji Islands.

- [138] In the light of the above position it has to be examined whether section 59 of the Indemnity, Guarantee and Bailment Act restricts the application of the principles of equity and thereby shuts out holding a constructive trust in appropriate circumstances. I do not think that there is anything in section 59 which could be reasonably construed as having such an effect. Therefore I hold that the High Court Judge was correct in holding that section 59 of the Indemnity, Guarantee and Bailment Act is not a bar to uphold a constructive trust in favour of the Respondent. If at all, Indemnity, Guarantee and Bailment Act is concerned with legal title but the 01st Appellant's legal title in Lot 10 is not disputed by the Respondent but she claims a beneficial interest in Lot 10 and therefore a declaration that she be declared the beneficial owner of it. The court has allowed her claim on the basis of a constructive trust for which Indemnity, Guarantee and Bailment Act is not a bar. As pointed out above the High Court Judge's finding is supported on the basis of proprietary estoppel as well. I accordingly reject this ground of appeal.

Ground 11, 12 & 13

- [139] The main thrust of the argument of the 01st Appellant here is that the Learned High Court Judge was wrong to have directed the 01st Appellant to transfer CT 34557 concerning Lot 10 free of any encumbrances without taking into account the 02nd Appellant's interest in the land as mortgagee. The 02nd Appellant was absent and unrepresented at the hearing of the appeal.
- [140] The 01st Appellant could not have been oblivious to the fact that the High Court Judge had also ordered the 01st Appellant to obtain a discharge of the Notification No. 592166 from the 02nd Appellant. The 01st Appellant had said in evidence that he could pay off the

loan at any time. It is obvious that once the 01st Appellant complies with that direction the 02nd Appellant would not have any interest in Lot 10 and the transfer of CT 34557 in the Respondent's name would not adversely affect the 02nd Appellant at all.

[141] In the 12th ground of appeal the 01st Appellant argues that the reliefs granted by the Learned High Court Judge are disproportionate to the detriment suffered by the Respondent "in reasonable reliance on the promise". (emphasis mine)

[142] This ground of appeal begs the question whether the 01st Appellant now admits that there had been a promise he had given to the Respondent with regard to Lot 10 which is against his stand at the trial. What he seems to suggest is that this Court instead of the transfer of title to the Respondent perhaps should consider alternate relief. The 01st Appellant has not suggested any such alternate relief which in his view is proportionate to the detriment suffered by the Respondent. This argument reminds me of a drowning man clutching at a straw. To me, the only remedy commensurate with the detriment suffered by the Respondent as a result of relying on the promises made by the 01st Appellant is the transfer of Lot 10 to her. Thus, these grounds of appeal are also rejected.

[143] In the light of my decision to uphold fraud on the part of the 01st Appellant he cannot be any longer allowed to hold the title to Lot 10 but it should necessarily be vested in the Respondent. Secondly, the High Court Judge had not granted any relief not prayed for by the Respondent and in fact rejected some of them. I do not propose to vary the reliefs granted by the High Court Judge as they seem to meet the ends of justice in all the circumstances of the case.

[144] Therefore, I would propose that the appeal be dismissed and the judgment of the High Court be affirmed. In all circumstances of the case and the questions of law involved, I would make no orders as to costs.

[145] I had the opportunity of reading the judgment of Prematilaka JA. The facts of the case are stated in the said judgment and I would be guilty of repetition if I propose to deal with the facts here. I will deal with the facts very briefly, when there is a necessity.

[146] The Plaintiff-Respondent (the Plaintiff) instituted the action in the court below against the 1st Defendant - 1st Appellant (1st Defendant) and 2nd Defendant - 2nd Appellant (2nd Defendant) seeking inter alia following orders;

- (a) A Declaration that the Plaintiff is the rightful beneficial owner of Lot 10 comprised in CT 34557.
- (b) An order that the 1st Defendant do repay the advance and obtain a discharge of the Notification No 592166 from the 2nd Defendant.
- (c) An order that the 1st Defendant do transfer the C.T. 34557 to the Plaintiff free of encumbrances.
- (d) An order that if the 1st Defendant fails within one month of the making of the order to execute the transfer to the Plaintiff. Then the Registrar of Titles shall be empowered to execute a transfer and do all things necessary to register the title of C.T 34557 to the Plaintiff.
- (e) ...
- (f) ... (orders relating to injunction)
- (g) Damages.....'

[147] In the court below the Plaintiff obtained the declaration that she was the beneficial owner of Lot 10 of DP 7889 comprised in CT 34557 and the 1st Defendant was ordered to repay the advances to the 2nd Defendant and obtain the discharge of the charge placed by the 2nd Defendant on the memorials of the title. The registrar was ordered to execute a transfer and do all things necessary to register the title of CT 34557 to the Plaintiff.

[148] Though the Plaintiff has pleaded fraud on the part of the 1st and 2nd Defendants in the court below the issue of **fraud was not dealt as regard to 1st Defendant** and no finding relating to fraud was made in that respect as regard to the 1st Defendant, though fraud by 2nd Defendant was rejected in the decision of the court below.

[149] So, in brief there was no positive determination of 'fraud' against the both Defendants, in the decision of the court below. The 1st Defendant is the last registered proprietor of CT 34557 and the 2nd Defendant is the registered mortgagee of the said property. So the registered interests of the 1st and 2nd Defendants are indefeasible in law under Torrens System, in the absence of finding of fraud against any of them in court below.

[150] The Plaintiff is also claiming beneficial interest for land comprised in CT 34577.

[151] The Privy Council held the indefeasibility under Torrens System as follows in *British American Cattle Co v Caribe Farm Industries Ltd* [1998] 1 WLR 152 held, (per Lord Browne-Wilkinson)

'Although the details of the Torrens system vary from jurisdiction to jurisdiction, it is the common aim of all systems to ensure that someone dealing with the registered proprietor of title to the land in good faith and for value will obtain an absolute and indefeasible title, whether or not the title of the registered proprietor from whom he acquires was liable to be defeated by title paramount or some other cause'

[152] The Plaintiff is the sister-in-law the 1st Defendant and she and her late husband had come to the land belonged to late father-in-law in 1970 and he had allowed them to build a house in an undefined portion of land out of a property of around 68 acres. At the time of death of the father in law, of the Plaintiff, the entire property was bequeathed to the 1st Defendant in his last will. The 1st Defendant obtained the Probate for the estate and became the trustee of the estate and this was recorded in the memorials of the title to said property, on 3rd February, 1972. The entire property (CT 6864) was 68 acres 3 roods and 23 perch (68 A 3R 23 P). This entire land was transferred in the name of the 1st Defendant **23rd June, 1983** as the sole beneficiary under the last will.

[153] There was no evidence of any caveat placed by the Plaintiff or her husband at any time on the said property comprised in CT 6864.

- [154] If there was any equitable right that the Plaintiff and or her late husband had on the said property by allowing them to build a house on the said land will not pass to the 1st Defendant. Though he was fully aware of their presence in the property that will not defeat his title to entire land. (See Sections 39 and 40 of the Land Transfer Act (LTA) (Cap 131).
- [155] The ratio of a recent NZ Court of Appeal case of Harvey V Beveridge (2014) 29 FRNZ 539 (Per White J) also supports the above position.
- [156] The Plaintiff's evidence in the court below does not support equitable interest, to the land in dispute.
- [157] There was no evidence that late father in law had stated or indicated to Plaintiff or her late husband, a parcel of land from CT 6864 would be given to them. The Plaintiff and her late husband had come to the property on their own accord and obtained permission to stay from late father. Irrespective of the time period of their stay, their position was no better than a licensee.
- [158] The Plaintiff in her statement of claim as well as in the evidence before the court below did not dispute the transfer of the title of the entire land of around 68 acres to the 1st Defendant, in pursuant to the last will. So, the 1st Defendant had obtained indefeasible title to entire property of approximately 68 acres, though the Plaintiff and her family including her late husband were living in the said property of an undefined portion at that time.
- [159] First, there was no evidence of equitable interest accrued to the Plaintiff and or her late husband prior to 1st Defendant obtaining ownership of around 68 acres. Even if there was such an interest it would not defeat the title of the 1st Defendant for the said land.
- [160] In the evidence the 1st Defendant stated that his late father had allowed late Shiu Prasad (husband of the Plaintiff) to build a house. He had come to the land on his own accord

and requested from the late father to stay, and he had allowed it. So the position cannot be more than a licensee of late father. This position is reinforced by bequeathing the entire land to the 1st Defendant, by late father when he was fully aware of the occupation of his son and daughter in law (the Plaintiff).

- [161] It should also be noted that there was no change of position on the part of the Plaintiff and her late husband to their detriment, in expectation of transfer of land they lived. The evidence support that father-in-law of the Plaintiff had helped them to stay, without giving any assurance for permanent occupation and there was no evidence of substantial contribution for construction of the structure. So there is no need for equity to intervene. This position was reinstated in NZ Court of Appeal in recent case of Harvey V Beveridge (2014) 29 FRNZ 539. It was held (Per White J)

'Fourth, the absence of any significant contributions made by Mr Beveridge to the Unit during Dr Byrd's lifetime also explains why Mr Beveridge does not claim in estoppel for a remedy based on his reliance on Dr Byrd's expressed intention and his alteration of position by reason of a contribution to the value of the Unit. As the Associate Judge recognised, any such claim would have been weak given an absence of significant contribution.' (a footnote deleted)

- [162] After obtaining title for more than 68 Acres in CT 6864, 1st Defendant had decided to subdivide the entire land and some lots were transferred to his brothers. The Plaintiff obtained the portion allocated for her late husband (late Shiu Prasad) who was also one of the brothers of 1st Defendant.
- [163] The subdivision of the entire land of 68 A 3R and 23 P did not affect the 1st Defendant's indefeasibility to the title to the said subdivisions, until they were transferred.
- [164] The subdivided land was again registered in the name of the 1st Defendant as CT 34554 on 20th November, 2002. Then some of the subdivided lots were transferred to his siblings and also to Plaintiff, as agreed between the siblings.

[165] The Plaintiff's claim is regarding CT 34557 which is Lot 10 of the subdivision contained in the said CT 34554(Lot 10 of DP 7899).

[166] Sections 39, 40, and 41 of the Land Transfer Act (LTA)(Cap 131) state as follows;

*'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 except-*

(a) the estate or interest of a proprietor claiming the same land, estate or interest under a prior instrument of title registered under the provisions of this Act; and

(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; and

(c) any reservations, exceptions, conditions and powers contained in the original grant.

(2) Subject to the provisions of Part XIII, no estate or interest in any land subject to the provisions of this Act shall be acquired by possession or user adversely to or in derogation of the title of any person registered as the proprietor of any estate or interest in such land under the provisions of this Act.'

Purchaser not affected by notice

*40. Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest in land subject to the provisions of this Act shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such proprietor or in any previous proprietor of such estate or interest is or was registered, onto see to the application of the purchase money or any part thereof, or shall be affected by notice, **direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding**, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.*

Instrument etc, void for fraud

41. Any instrument of title or entry, alteration, removal or cancellation in the register procured or made by fraud shall be void as against any person defrauded or sought to be defrauded thereby and no party or privy to the fraud shall take any benefit therefrom". (emphasis added)

- [167] The Plaintiff had claimed fraud in order to obtain the transfer of Lot 10 in DP7899, comprised in CT 34557 (Lot 10 in subdivided CT 34554, registered in the name of 1st Defendant).
- [168] The sections 39, 40 and 41 of the LTA contain the word 'fraud', yet there is no definition of fraud in the said Act. In Stuart v Kindston (1923)32 CLR 309 at 359 Starke J stated '*No definition of fraud can be attempted, so various are its forms and methods*'
- [169] The 'fraud' under LTA is different from common law concept and it is not confined to deceit or fraudulent misrepresentation (see Latec Investment Ltd v Hotel Terrigal Pty Ltd (1965) 113 CLR 265 at 273 per Kitto J). So, it has a wider meaning than the common law definition, but narrower than equitable fraud⁶. So, claim for equity needs to be separated from claim for fraud.
- [170] The 'fraud' is an exception to the indefeasibility under LTA and it needs to be construed in the circumstances of the case. **Section 40 of the LTA expressly state that knowledge of any interest in a land by a party is not sufficient to consider** as fraud against the said party to defeat his title under LTA. So the fact the Plaintiff and her husband lived on the said property with the licence of late father did not impeach the title to the entire land, derived from the last will of the late father or subsequent subdivision of the same.

⁶ Hinde McMorland & Sim Land Law in New Zealand/Commentary/Chapter 9 Title by Registration/3 THE LIMITS OF INDEFEASIBILITY/(2) EXCEPTIONS MADE BY THE LAND TRANSFER ACT ITSELF: 1 FRAUD 9.018 The nature of Fraud

[171] Late husband of Plaintiff, obtained the permission from the local authority to build a house in 1970(P1). At that time the owner of the entire land was his late father (late Bhagiranthi) and he died in 1977 bequeathing the entire property to the 1st Defendant.

[172] On 17.6.1980 an application was made to the local authority for 'extension' of one 'sitting room' (14' X18') and one 'bedroom' (8'X14') worth \$500 on the disputed portion. At that time the executor and trustee of the estate including the entire land of 68 acres, was the 1st Defendant. In my judgment, this extension did not create an equitable interest for the Plaintiff. This was substantiated by the subsequent conduct of 1st Defendant and late Shiu Prasad, which indicate that no claim was made by late Shiu Prasad other than farm land which was subsequently transferred for a consideration.

[173] On 3rd June, 1985 an agreement was entered between the 1st Defendant and the late Shiu Prasad (late husband of the Plaintiff) to transfer a 7 acres of land from 68 acres (D1), but this agreement did not include the portion of land they were living at that time. This was a formal agreement prepared by a solicitor annexing a sketch plan. This agreement was also stamped for revenue purpose. Before the subdivision was completed said Shiu Prasad died, but the 1st Defendant transferred 7.668 acres to Plaintiff for a consideration. This was a farm land promised to be transferred when the Plaintiff's husband was alive marked in the court below as 'D1'. It should be noted that before subdivision started the siblings executed individual agreements with the 1st Defendant, for the intended land parcels after subdivision. Though the Plaintiff was living on the said land no agreement was entered at that time regarding where they were living.

[174] There was no evidence of such an agreement similar to 3rd June, 1985 (document marked D1) between the Plaintiff or her late husband and 1st Defendant regarding land comprised in CT 34557, or the place where they were living. The documentary evidence that Plaintiff relied was a document marked as 'P4' in the court below, which was a 'survey instruction' at the time of second survey, which I will be dealing later in this judgment, later in more detail.

- [175] First Defendant in his oral evidence said that the Plaintiff and her husband were to move to this land which he agreed to transfer while the husband of the Plaintiff was living. This can be accepted as there was no evidence to show that the 1st Defendant had even attempted to define and or demarcate, the land late Shiu Prasad, Plaintiff and their family were living. It should also be noteworthy there was not even a request to transfer land they were living even at the time of first survey.
- [176] It should also be borne in mind that subdivision of the land comprised in CT 6864 was initially entrusted to surveyors Deepak & Govind Co. and there was no evidence of any special instructions to demarcate area where late Shiu Prasad's family resided. Plaintiff's husband died in 1987 and subdivision was also not completed and it was handed over to surveyor Inoke and this second survey was conducted after the demise of the husband of the Plaintiff.
- [177] At this second survey for subdivision, by surveyor Inoke, Plaintiff had shown her resentment and had obstructed the placing of pegs/markings of subdivision, on the land she occupied and this was the origin of 'special notes' to the said survey or instructions on document marked 'P4'. So, the document 'P4' came in to being as the Plaintiff was unwilling to move from the residence at the last minute when the second survey was done.
- [178] Intended land to be transferred to the Plaintiff's late husband, was included in document marked 'D1' before the first survey by Deepak & Govind, but this was when her husband was alive. So, sudden change of mind by the Plaintiff after demise of her husband, and the impasse for subdivision was resolved by allowing Plaintiff to stay on the land stated in document marked 'P4', until she is removed or said land is sold.
- [179] On the evidence (document marked 'P4') there was a consensus that Plaintiff would be granted '**usage**' of an area of 40.63m wide and 100m long piece of land in exchange of payment of survey fees for one brother of the 1st Defendant named Hari Prasad. This is

the 'tri-partied agreement' referred to in the judgment of Premathilaka JA. With respect I do not agree document marked 'P4' can be elevated to 'tri parted agreement', it is nevertheless an admitted fact as to the intention of the parties regarding 'usage' of the area Plaintiff had claimed at that time, before subdivision.

- [180] It should also be clear that occupation of the Plaintiff became conditional usage in terms of said document marked 'P4' after the subdivision. For this conditional usage of the land she had paid some additional survey fees, too.
- [181] The document marked 'P4' was special notes to 'survey instructions' to the surveyor Inoke. The said document was signed by three parties, but the **1st Defendant signed it as a witness**. So there were only two parties and they were the Plaintiff and Hari Prasad. At that time **Hari Prasad was not the owner** of any part of the said land. So, it cannot be called even as an agreement, between the Plaintiff and said Hari Prasad as he never obtained the title for said portion of land (4063 square meters) to enter into an agreement for transfer of that land.
- [182] The 'special notes' of the surveyor contained the said 'survey instructions' marked 'P4' stated that the payment of the entire survey fees of Hari Prasad was to be borne by the Plaintiff 'for the exchange of the land on which Bhan Mati (the Plaintiff) existing occupation is erected. The land is 40.63m wide on to the road frontage and is 100.00, deep', **but this was subject to a condition**, and that condition was

'This usage of land shall be in for up till the time that the present occupation is removed, also until the piece of land is sold to any other party'. (emphasis is mine)

- [183] What was stated in the said document marked 'P4' was also nothing but an acceptance of '**usage**' till she is removed or land is sold to a third party. Plaintiff had accepted that ownership of the intended subdivision, was with the 1st Defendant and he was free to deal with that and her occupation was an interim measure. This document marked 'P4' also

show that the Plaintiff had on her own accepted to change of her occupation to a conditional usage after subdivision.

- [184] The documentary evidence of 'P4', proves the 'consensuses' between the Plaintiff, Hari Prasad and 1st Defendant at the time of second survey where land in dispute was demarcated as a separate lot. It proves that the Plaintiff had agreed to spend the survey fees of Hari Prasad in lieu of her occupation/usage as licensee for an area of 4063 square meters. 1st Defendant had concurred with such arrangement.
- [185] The document marked 'P4' only proves that the Plaintiff was granted a conditional occupation of an area of 4063 square meters and it cannot be considered as an agreement to transfer land comprised in CT34557, which is larger than 4063 square meters, in future without a consideration. Her position cannot be better than a licensee in terms of 'P4'.
- [186] If she was assured of transfer of subdivided land, there was no need to agree to eviction from that same land in the document marked 'P4', which is directly conflict with any agreement for ownership of a land.
- [187] Even if I am wrong on that, the Lot 10 of DP7889 (Lot 10 of CT 34554), which is the subject matter of CT34557, is comprised of an area of **6391**square meters. This is larger than the land where Plaintiff's occupation is recognized in document marked 'P4'. So, on that ground again the Plaintiff's claim for the transfer of CT 34557 based on document marked 'P4' fails. It covers only portion of land comprised in CT 34557 so any alleged 'consideration' was not for the entire land comprised in CT34557.
- [188] It is undisputed that no consideration was paid after subdivision where CT 34557 came in to existence, by the Plaintiff for the transfer of the same.
- [189] So, document marked 'P4' cannot be considered as an agreement to transfer land comprised in CT 34557, in future, firstly as it was only confined to 'usage' which conflicts with transfer for fee simple, secondly, Hari Prasad did not own land described in

document P4 at any time to enter into an agreement with the Plaintiff, and thirdly the area where her conditional usage was recognized, was smaller than area in CT 34557.

- [190] In brief document marked 'P4' established that Plaintiff obtained a conditional usage of the land described in the said document. For this she had paid additional survey fee to the surveyor.
- [191] The next document was an undated and incomplete, unregistered transfer of the land which was marked in the court below as 'P10'. This was a photo copy of the transfer that the original was kept with the 1st Defendant according to the evidence of the Plaintiff.
- [192] The document marked 'P10' was an incomplete transfer of Lot 10 in DP 7889, which was the land comprised in CT 3455. This document was allegedly, signed the 1st Defendant. There was no consideration stated and there was no date on the said transfer. The signature of the 1st Defendant was denied but in the court below it was not accepted and I do not think there is any reason to deviate from said finding of fact in the court below. So it was an incomplete document for transfer of the title CT 3455.
- [193] The Plaintiff in her evidence did not state that she had paid a consideration for the transfer of the said land. This is further evidenced by absence of consideration stated in said document. The Plaintiff is attempting to link her payment of survey fess as a 'consideration' for the transfer of land stated in document 'P10'. This cannot be accepted from the analysis of the evidence presented in the court below. Document marked 'P4' had indicated that said payment was only for conditional 'usage' and not for outright transfer in future.
- [194] On 20th November, 2002 the Plaintiff had obtained the title for Lot 4 of DP 7889 for 3.1032 ha (= 7.668 acres), for a substantial consideration. This was even more than what was initially agreed between the Plaintiff's late husband and the 1st Defendant for the transfer of ownership from the document marked 'D1'.

- [195] So, it is unlikely that CT 34557 would be transferred to her without any consideration specially considering she had accepted conditional 'usage' as evidenced in document marked 'P4'.
- [196] It is unlikely for 1st Defendant to agree to transfer ownership of a land close to main access road for a payment of a survey fees, considering the amount and other circumstances of the case.
- [197] Document marked 'P4', had recognised her usage, in exchange of payment of survey fees of Hari Prasad, and in any event the area of CT34557 is larger than the area of are stated in document marked 'P4' where exact dimensions were stated by the surveyor, who subdivided the land.
- [198] The demarcation of area where the Plaintiff was granted 'usage', in document marked 'P4' is paramount, considering the circumstances that came in to being of said document. She had obstructed the placing of survey pegs and the area was entered by the surveyor in his instructions as 'special notes' and that was the genesis of 'P4', and that paved way for completion of the subdivision of land.
- [199] Though Plaintiff's usage was recognised to a smaller area by Plaintiff, the surveyor had made a larger subdivision which includes her usage, which resulted in subdivision of larger area comprised in CT 34557.
- [200] Evidence of surveyor Inoke did not explain how he subdivided a larger portion of land than his survey instructions contained in document 'P4'. If that was to be transferred to the Plaintiff, without any consideration he needs to comply with the area. There was no additional instructions presented to the court, and subdivision of the land comprised in CT 34557 is larger than the area defined in 'P4'.

[201] The document marked 'P10' was an incomplete transfer and any payment contained in document marked 'P4' cannot be considered as consideration for the transfer of CT 34557. In the absence of consideration the court cannot compel 1st Defendant to transfer the property comprised in CT 34557. So, from the evidence presented in court below document marked 'P10' was only a voluntary transfer of CT 34557 in future but the vital parts like consideration and the date of transfer were not determined in the said document.

[202] It can only be described as an agreement to transfer without any consideration which was a voluntary act of the 1st Defendant. If it was a gift, 1st Defendant can refuse it before registration. No equity arise from such an action unless the Plaintiff had proved that she had changed her position in detriment, with the expectation of the execution of document marked P10. There was no evidence of improvement or action detriment to the Plaintiff on reliance of document marked 'P10' and or 'P4'.

[203] In NZ Court of Appeal case of Harvey V Beveridge (2014) 29 FRNZ 539 (Per White J) held

'Finally, in the absence of a perfected gift of the legal ownership of the Unit to Mr. Beveridge or evidence that Dr Byrd during his lifetime intended to hold the property on trust for Mr. Beveridge in the ordinary way, pending transfer of the legal ownership of the Unit to him, it was always open to Dr. Byrd during his lifetime to resile from any intention to transfer legal ownership of the Unit to Mr. Beveridge. There was nothing that Mr. Beveridge could have done to prevent Dr. Byrd from doing so. There was no question of any legally enforceable gift or trust in respect of the ultimate legal ownership of the Unit.'(emphasis is mine)

[204] The 1st Defendant was the owner of the land depicted in Lot 10 of DP 7889 before the subdivision and subdivision did not change the ownership. He remained the owner of entire land before as well as after subdivision. After registering subdivided land as CT 34554 he became the owner of all the 10 Lots in DP 7899.

[205] 1st Defendant had transferred the Lot 10 of DP 7889 in his name and had also mortgaged the same to the 2nd Defendant and obtained a loan. 1st Defendant in his evidence said that the reason for mortgage this land was that the amount he obtained was small and that he had advised the bank of the pending litigation at that time to evict the Plaintiff in terms of Section 169 of LTA (Cap 131). No caveat was lodged even after institution of said action for eviction by the 1st Defendant in 2005.

[206] It should also be noteworthy that no caveat was lodged by the Plaintiff despite having possession of photo copy of the unregistered transfer of Lot 10 in DP 7889 (P10) comprised in CT 34557 **until the present action in the court below was instituted** (the statement of claim of the Plaintiff is dated 3rd October, 2009 and the caveat was dated 7th October, 2009). The conduct of the Plaintiff did not indicate of a fraud by the 1st Defendant. If there was a fraud Plaintiff would have acted swiftly to safeguard her interest.

[207] In Waimiha Sawmilling Company Limited (in liquidation) vs Waione Timber Company Limited 1926 A.C 101 (Privy Council) (1925) NZPCC 267 Lord Buckmaster in the interpretation of 'fraud' under Torrens System in NZ held. At p106

"...it is plain that unless conduct coming within the meaning of the word "fraud" as used in these sections can be imputed to the respondents their title succeeds,

[208] In the words of the NZ Supreme Court in Fels v Knowles⁷:

"The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor such person upon the registration of the title under which he takes from the registered proprietor has indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute." ("By statute" would be more correct). "Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest or in the cases in which registration of a right is authorized, as in the case of easement or incorporeal rights, the rights registered."

⁷ 26 N.Z.L.R.604,620

Now fraud clearly implies some act of dishonesty. Lord Lindley in Assets Co. v Mere Roihi⁸ states that: "Fraud in these actions" (i.e., actions seeking to affect a registered title) "means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud- and 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."

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 clear⁹..... The act must be dishonest, and dishonestly must not be assumed solely by reason of knowledge of an unregistered interest....'

- [209] 1st Defendant did not have to cheat any person as he became the owner of entire 68 acres. CT 34554 comprised of part of that land which was subdivided and also registered in his name.
- [210] So there was no fraud on the part of the 1st Defendant in obtaining the title for CT 34554. It was only a subdivided part of entire land owned by the 1st Defendant. The existence of incomplete transfer contained in document marked 'P10', cannot defeat the title of 1st Defendant, and there was no proof of fraud on the part of the 1st Defendant.
- [211] The signing of document marked 'P10' and non-transfer of property under document marked 'P10', cannot be considered as a fraud. As stated earlier since there was no proof of consideration for intended transfer, it can be described as a voluntary transfer or a gift. Equity cannot compel completion of voluntary transfer, in the absence of unconscionable conduct and any action or change of status to the detriment based on the intended transfer. This was held in the cases of Milroy v Lord (1862), 4 De GF & J 264, 31 LJCh 798, 7 LT 178, 25 Digest 530, 206, Re Fry, Chase National Executors & Trustees

⁸ [1905] A.C. 176,210.

⁹ This statement was cited in *Waller v Daviex* [2007] NZCA 51; [2007] 2 NZLR 508; (2007) 8 NZCPR 1 at [32] (CA) per Hammond J for the Court (leave to appeal refused: Supreme Court of New Zealand, SC 20/2007, 13 June 2007, Tipping, McGrath and Anderson JJ; [2007] NZSC 43).

Corpn v Fry [1946] 2 All ER 106, [1946] Ch 312, 115 LJCh 225, 175 LT 392, 2nd Digest Supp.¹⁰

- [212] Re Rose (deceased); Midland Bank Executor and Trustee Co Ltd v Rose and Others [1948] 2 All ER 971 at 978 Jekings J held,

'I was referred to Milroy v Lord and also to Re Fry, Chase National Executors & Trustees Corpn v Fry. Those cases, as I understand them, turn on the fact that the deceased donor had not done all in his power, according to the nature of the property given, to vest the legal interest in the property in the donee. In such circumstances it is well settled that there is no equity to complete the imperfect gift.'

- [213] First Defendant had not transferred property CT 34557 in pursuant to 'P10' but had mortgaged it to the 2nd Defendant to obtain a loan, and this mortgage was registered. So, again in the absence of fraud on the part of the 2nd Defendant rights derived from the registered mortgaged is indefeasible.

- [214] Yeoman's Row Management Ltd and another v Cobbe [2008] 4 All ER 713 at p737-8 Lord Walker held,

'equitable estoppel is a flexible doctrine which the court can use, in appropriate circumstances, to prevent injustice caused by the vagaries and inconstancy of human nature. But it is not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way. Certainty is important in property transactions. As Deane J said in the High Court of Australia in Muschinski v Dodds (1985) 62 ALR 429 at 452:

'Under the law of [Australia]--as, I venture to think, under the present law of England ... proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion ... subjective views about which party "ought to win" ... and "the formless void of individual moral opinion" [references omitted].'

¹⁰ Re Rose (deceased); Midland Bank Executor and Trustee Co Ltd v Rose and Others [1948] 2 All ER 971

[215] So the doctrine of equity needs to be applied in 'disciplined and principled' manner. In my judgment the conduct of the 1st Defendant cannot be considered as unconscionable, and he cannot be directed to transfer CT 34557 without consideration against his wish. The fact that document marked 'P10' was undated and absence of any evidence of consideration being paid made it incomplete and uncertain. 1st Defendant could refuse to complete the incomplete transaction as it was a voluntary transaction between two relatives.

[216] In **Denny v Jessen** [1977] 1 NZLR 635 at 639 Justice White summarized the proprietary estoppel as follows:

*"In Snell's Principles of Equity (27th ed) 565 it is stated that proprietary estoppel is "... capable of operating positively so far as to confer a right of action". It is "one of the qualifications" to the general rule that a person who spends money on improving the property of another has no claim to reimbursement or to any proprietary interest in the property. In **Plummer v Wellington City Corporation** (1884) 9 App Cas 699; NZPCC 250 it was stated by the Privy Council that "...the equity arising from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated."(ibid, 713, 29). After referring to the cases, including **Ramsden v Dyson** (1866) LR 1 HL 129, the opinion of the Privy Council continued, "In fact the court must look at the circumstances in each case to decide in what way the equity can be satisfied" (9 App Case 699, 714; NZPCC 250, 260). In **Chalmers v Pardoe** [1963] 1WLR 677; [1963] 3 All ER 552 (PC) a person expending money was held entitled to a charge on the same principle. The principle was again applied by the Court of Appeal in **Inwards v Baker** [1965] 2 QB 29; [1965] 1 All ER 446. There a son had built on land owned by his father who died leaving his estate to others. Lord Denning MR, with whom Danckwerts and Salmon L JJ agreed, said that all that was necessary;*

"... is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do."(ibid, 37,449). (emphasis added)

[217] There is no evidence that the Plaintiff changing her position after document marked 'P10' or 'P4' was signed. She had occupied the same land even before the existence of

document marked P10, and there is no evidence of any action by the Plaintiff in reliance of document marked 'P10'. 'P4' expressly gave only a limited 'usage'.

- [218] In Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Trustees Co Ltd [1981] 1 All ER 897 at 909, [1982] QB 133n at 144:

'... if A, under an expectation created or encouraged by B that A shall have a certain interest in land, thereafter, on the faith of such expectation and with the knowledge of B and without objection by him, acts to his detriment in connection with such land, a court of equity will compel B to give effect to such expectation.'

- [219] The Plaintiff had failed to prove beneficial interest to land comprised in CT 34557 based on document marked 'P10' and also from the circumstances of the case. It was her unconscionable conduct in the survey of subdivision already agreed between the parties that had resulted survey instructions contained in document marked 'P4'. In the analysis 'P4' was an acknowledgment of conditional usage by the Plaintiff of defined land. The court cannot compel the 1st Defendant to execute a transfer contained in 'P10', which is larger than land defined in 'P4', without a consideration.

- [220] Section 37 and 38 of the LTA (Cap 131) states as follows;

37. No instrument until registered in accordance with the provisions of this Act shall be effectual to create, vary, extinguish or pass any estate or interest or encumbrance in, on or over any land subject to the provisions of this Act, but upon registration the estate or interest or encumbrance shall be created, varied, extinguished or passed in the manner and subject to the covenants and conditions expressed or implied in the instrument.

Registered instrument to be conclusive evidence of title

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

[221] In terms of the above provisions the registered mortgage in favour of the 2nd Defendant, which was registered, in the absence of fraud on the part of the 2nd Defendant is indefeasible. So 2nd Defendant's rights as mortgagee's rights cannot be defeated by 'P4' and or 'P10', where they were not a party.

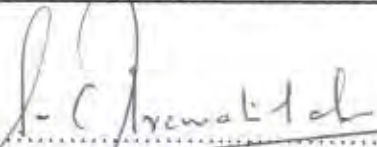
[222] There was no proof of fraud against 1st and 2nd Defendants. The decision of the court below should be set aside and appeal is allowed. Respondent's notice is struck off. Considering the circumstances I would not award any costs. For the reasons given I agree with the final orders proposed by Calanchini P.

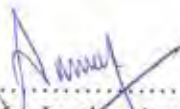
Orders (Prematilaka JA dissenting):

1. *Appeal by Kumar allowed.*
2. *Respondent's notice dismissed.*
3. *Orders of the Court below are set aside.*
4. *The claim by the Plaintiff Wati is dismissed*
5. *Vacant possession is awarded to Kumar with a stay of 30 days.*
6. *Parties are to pay their own costs in both the court below and in this Court.*




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


.....
Hon. Mr Justice Prematilaka
JUSTICE OF APPEAL


.....
Hon. Mr. Justice Amaratunga
JUSTICE OF APPEAL

- [171] Late husband of Plaintiff, obtained the permission from the local authority to build a house in 1970(P1). At that time the owner of the entire land was his late father (late Bhagiranthi) and he died in 1977 bequeathing the entire property to the 1st Defendant.
- [172] On 17.6.1980 an application was made to the local authority for 'extension' of one 'sitting room' (14' X18') and one 'bedroom' (8'X14') worth \$500 on the disputed portion. At that time the executor and trustee of the estate including the entire land of 68 acres, was the 1st Defendant. In my judgment, this extension did not create an equitable interest for the Plaintiff. This was substantiated by the subsequent conduct of 1st Defendant and late Shiu Prasad, which indicate that no claim was made by late Shiu Prasad other than farm land which was subsequently transferred for a consideration.
- [173] On 3rd June, 1985 an agreement was entered between the 1st Defendant and the late Shiu Prasad (late husband of the Plaintiff) to transfer a 7 acres of land from 68 acres (D1), but this agreement did not include the portion of land they were living at that time. This was a formal agreement prepared by a solicitor annexing a sketch plan. This agreement was also stamped for revenue purpose. Before the subdivision was completed said Shiu Prasad died, but the 1st Defendant transferred 7.668 acres to Plaintiff for a consideration. This was a farm land promised to be transferred when the Plaintiff's husband was alive marked in the court below as 'D1'. It should be noted that before subdivision started the siblings executed individual agreements with the 1st Defendant, for the intended land parcels after subdivision. Though the Plaintiff was living on the said land no agreement was entered at that time regarding where they were living.
- [174] There was no evidence of such an agreement similar to 3rd June, 1985 (document marked D1) between the Plaintiff or her late husband and 1st Defendant regarding land comprised in CT 34557, or the place where they were living. The documentary evidence that Plaintiff relied was a document marked as 'P4' in the court below, which was a 'survey instruction' at the time of second survey, which I will be dealing later in this judgment, later in more detail.