

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION
CIVIL ACTION NO. 332 OF 2002L

NO.92/2007

BETWEEN: ISAIA NASOROWALE

Plaintiff

A N D:

1. ATTORNEY GENERAL OF FIJI
2. REGISTRAR OF TITLES
3. TRUSTEE CORPORATION LIMITED
4. TRUSTEE CORPORATION LIMITED
5. NORTHERN HOTELS LIMITED
6. PARADISE POINT LIMITED

Defendants

Mr. R. Matebalavu for the plaintiff
Mr. R. Green for the first and second defendants
Mr. F. Koya for the third and fourth defendants
Mr. N. Barnes for the fifth and sixth defendants

Dates of Hearing: 29 June 2007 and By Written Submissions
Date of Judgment: 20 July 2007

J U D G M E N T

- [1] The plaintiff brings this action as representative on behalf of the members of the Mataqali Ketenatukani, Yavusa Vusu, Biausevu Village.
- [2] The action is brought against the first and second defendants as the custodians of the land registration system and the registration of land titles in Fiji.

- [3] The third, fourth, fifth and sixth defendants are the registered proprietors of lands the subject of the proceedings being lands that the plaintiff says the members of Mataqali Ketenatukani are entitled to or alternatively are entitled to compensation with respect to.
- [4] The subject lands are shown on the plan annexed hereto and marked "A" but were originally comprised in the following three parcels of land:
1. Korolevu (Crown Grant Book D Folio 563).
 - ii. Vuai (Crown Grant Book D Folio 564).
 - iii. Nakalu (Crown Grant Book D Folio 565).
- [5] The three crown grants were registered in 1981 in favour of Jessie Eldershaw. The original crown grants subsequently became respectively Certificate of Title No. 4692, Certificate of Title No. 4694 and Certificate of Title No. 4693.
- [6] The titles currently held by the third to sixth defendants all derived from the three crown grants and original Certificate of Title.
- [7] The third and fourth defendants' titles derive from all of the crown grant of Vuai being Folio 564 and part of crown grant Nakalu being Folio 565.
- [8] The fifth and sixth defendants' titles derive from all of Korolevu being Folio 563 and part of Nakalu being Folio 565.
- [9] The plaintiff claims that through fraud it was wrongfully dispossessed of the three parcels of land and in any event through misdescription of the boundary by survey, the total of 404 acres of its land was wrongfully included in the grants allowed to the original claimants.

- [10] The plaintiff claims to have been the original owners of the lands Korolevu, Vuai and Nakalu by virtue of occupation at the time of the grown grant and prior thereto. The plaintiff claims to occupy immediately adjoining lands to the current time.
- [11] The plaintiffs rely upon the affidavits of Isaia Nasorowale sworn on the 4th October 2002, 9th October 2002, 22nd April 2003 (2) and 22nd February 2006 together with the affidavit of Mani Lal Patel, surveyor, sworn on the 10th November 2006 and the affidavit of Samisoni Mataika sworn on the 3rd July 2007.
- [12] The first and second defendants rely upon the affidavits of Mohammed Jaffar sworn on the 11th February 2003.
- [13] The third and fourth defendants rely upon the affidavits of Kathleen Petrie Clark sworn on the 27th November 2002 (2) and the fifth and sixth defendants rely upon the affidavit of Rodney Acraman sworn on the 8th February 2006.
- [14] The affidavit of Mohammed Jaffar places before the Court various historical documents. The effect of which might be summarized as follows:
- i. The Deed of Cession of the 10th October 1874 by which all land in Fiji was ceded to the Crown of Great Britain.
 - ii. Ordinance No. VI 1875 of the 16th September 1875 prohibited any sales of land by the indigenous population.

- iii. Ordinance No. XV 1875 established the Lands Claims Commission to investigate all lands sales made by indigenous owners to Europeans prior to the Deed of Cession that is the 10th October 1874 and to make recommendations to the Governor of Fiji with respect to such claims.
- v. Ordinance No. XIV of 1877 extended the powers of the Lands Claim Commissioners to allow them to compel the production of documents and witnesses.
- vi. Ordinance No. XXV of 1879 provided for the final settlement of all land claims.
- vii. Ordinance No. XXV of 1879 set forth that all crown grants were not to confer indefeasible title until a period of 6 months after the 2nd October 1879 to enable objections to be heard and further that after that process, or the expiration of six months if no claims were made, then indefeasible title was to issue.

[15] As is set forth above the plaintiff's claim is essentially in two parts. Firstly that the transactions that led to the original crown grants 563, 564 and 565 were fraudulent and therefore void and alternatively if the transactions were indeed valid there was an error in that 404 acres being the land shown on the plan annexed hereto as Lot 2 were inadvertently transferred by virtue of a misdescription.

[16] As would be expected the evidence of the plaintiff is without documentary support. It is not surprising as the allegations made by the plaintiff to support its claim relate to events that occurred in 1881 and prior thereto. The evidence is therefore in the main mere assertions unsupported in any way.

- [17] The only documents to which the plaintiff can refer to support its contention are the two reports prepared with respect to the grants to Jessie Eldershaw.
- [18] Those two reports are set forth as annexures to the submission filed by counsel on behalf of the fifth and sixth defendants. The documents there set forth are translations of the original.
- [19] Paragraph 2 of the first report describes the boundaries of the land, the subject of the proposed grant and in paragraph 1 it says it has an area of some 350 acres.
- [20] The report dated the 2nd April 1880 refers to the plan having been explained by the “witnesses Nagagabolaku and Railau son of Siga-ni-Lewa the other vendors, both of him freely acknowledged they were correct”.
- [21] The document also refers to their being three parcels of land and that “these two pieces of land form the balance of the claim by Jessie Eldershaw after deducting the piece for which under the name of Korolevu we have recommended that a crown grant be issued.”
- [22] It would seem on a reasonable interpretation of these documents that the first refers to 350 acres and the second to an area in addition to that 350 acres which is not part of the Korolevu grant.
- [23] It is not in dispute that the third, fourth, fifth and sixth defendants are the registered proprietors of the subject land.

Indefeasibility of Title

[24] The principle of indefeasibility of title appears to have commenced in Fiji with the Ordinance XXV of 1879 which Article XIX states:

“All crown grants to be issued under this Ordinance shall be registered as prescribed by the Real Properties Ordinance, 1876 and if so registered shall, with the exceptions about mention, be indefeasible from date of issue as well as also certificates of title following thereupon in conformity with section XIV of the Real Property Ordinance.”

[25] The position is now dealt with in section 42 of the Land Transfer Act which provides:

“(1) No action to possession, or other action for the recovery of any land subject to the provisions of this Act, or any estate or interest therein, shall lie or be sustained against the proprietor in respect of the estate of interest of which he is registered, except in any of the following cases:

(a) The case of a mortgagee as against the mortgagor in default;

(b) the case of a lessor as against a lessee in default;

- (c) *the case of a person deprived of any land, estate or interest by fraud, as against the person registered as proprietor of that land, estate or interest through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;*
- (d) *the case of a person deprived of or claiming any estate or interest in land included in any grant or certificate of title of other land by mis-description of that land, or of its boundaries, as against the proprietor of any estate or interest in the other land, not being a transferee or deriving from or through a transferee thereof bona fide for value;*
- (e) *the case of a proprietor claiming under an instrument of title prior in date of registration, in any case in which two or more grants or two or more instruments of title, may be registered under the provisions of this Act in respect of the same land, estate or interest.*

(2) In any case other than as aforesaid, the production of the register or of a certified copy thereof shall be held in every court of law or equity to be a absolute bar and estoppel to any action against the registered proprietor of the land, estate or interest the subject of the action, any rule of law or equity to the contrary notwithstanding.

[26] The provisions of section 42 of the Land Transfer Act are in almost identical terms to the provisions of similar legislation are contained in the Real Property Act in various states of Australia and in New Zealand..

[27] In *Breskvar v Wall* (1971) 126 CLR 376 at 400 Windeyer J referred to the Torrens System and to a book written by Torrens himself in 1862 as registrar general and went on to say:

“Later, using language which has become familiar, he spoke of “indefeasibility of title”. He noted, as an important benefit of the new system, “cutting off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder is in the same position as a grantee direct from the Crown.” This is an assertion that the title of each registered proprietor comes from the fact of registration, that it is made the source of the title, rather than a retrospective approbation of it as a derivative right.”

- [28] In that same decision, Barwick CJ at 376 set out principles of indefeasibility as:

“The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title that the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivatives. It is the title that registration itself has vested in the proprietor.”

- [29] Barwick CJ was a member of the Privy Council that decided *Frazer v Walker & Others* [1967] 1 A.C. 567 where it was held that registration was effective to vest title in a registered proprietor notwithstanding that he acquired his interest under an instrument that was void.
- [30] The court there considered the earlier decisions of *Boyd v Wellington Corporation* [1924] NZLR 1174 and *Assets Co. Ltd v Mere Roihi & Others* (1905) A.C. 176 with approval.
- [31] The system was also considered and described by the Privy Council in *Abigail v Lapin & Anor.* [1934] A.C. 491 where at page 500 Their Lordships said:

“The Real Property Act, 1900, of New South Wales, embodies what has been called, after the name of its originator, the Torrens system of the registration of title to land. It is a system which is in force throughout

Australasia and in other parts as well. It is a system for the registration of title, not of deeds; the statutory form of transfer gives a title in equity until registration, but when registered it has the effect of a deed and is effective to pass the legal title; upon the registration of a transfer, the estate or interest of the transferor as set forth in such instrument with all rights, powers and privileges thereto belonging or appertaining is to pass to the transferee.”

- [32] The plaintiff asserts that it is by fraud that it was wrongfully dispossessed of the subject land.
- [33] In *Frazer v Walker* it was held that fraud in the context of indefeasibility of title means actual fraud by the registered proprietor or his agent.
- [34] This principle has been followed in Fiji by the Fiji Court of Appeal in *Sharma v Singh* - ABU 0027/2003 where the Court referred to its earlier decision in *Ram Nandan v Shiu Dutt* - Civil Appeal No. 29 of 1982.
- [35] The fraud that the Court must consider is not fraud at the time of the original crown grants but fraud with respect to the most recent transaction. This was expressed by Barwick CJ in *Breskvar v Wall* at 386:

“Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason

for which the instrument is void. The affirmation by the Privy Council in Frazer v Walker of the decision of the Supreme Court of New Zealand in Boyd v Mayor of Wellington now places conclusion beyond question."

Misdescription

[36] Section 42(3) of the Land Transfer Act provides:

"(3) Nothing in this Act contain shall be so interpreted as to leave subject to an action of ejectment or for recovery of damages or for deprivation of the estate or interest in respect to which he is registered as proprietor and he bona fide purchase her for valuable consideration of any land subject to the provisions of this Act or any estate or interest therein, on the ground that the proprietor through or under whom he claims was registered as a proprietor through fraud or error or has derived from or through a person registered as a proprietor through fraud or error; and this whether such fraud or error consist in wrong description of the boundaries or of the parcels of any or otherwise howsoever."

[37] The authorities referred to by the plaintiff are unhelpful with respect to this issue and predate the authorities that have been referred to earlier.

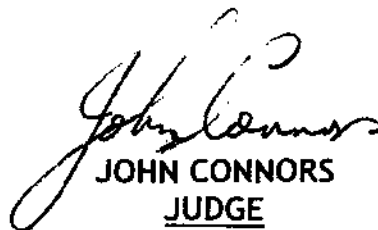
Conclusion

[38] It would appear that the door to the plaintiff's claim started to close with Ordinance No. XXV in 1879. With no objection having been lodged against the grant pursuant to that Ordinance the grants became indefeasible upon the expiration of 6 months. That indefeasibility has been perpetuated by the provisions of the Land Transfer Act. The plaintiffs are unable to overturn the registered proprietor's right to title by virtue of alleged fraud or error which occurred in 1881.

[39] The declarations sought are declined. The Originating Summons is dismissed and the existing injunctive relief is dissolved. The plaintiffs are to pay the defendants' costs as agreed or taxed.



At Lautoka
20 July 2007


JOHN CONNORS
JUDGE