

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC 45 of 2009

BETWEEN : **BHAN WATI** d/o Sibodh Chand of Qila Taveuni, Widow.

PLAINTIFF

AND : **VIJAY KUMAR** s/o Bhagirathi of Qila Taveuni, Cultivator.

1ST DEFENDANT

AND : **THE FIJI DEVELOPMENT BANK** a body corporate duly established under the Development Bank of Fiji having its registered office at Suva.

2ND DEFENDANT

COUNSEL : Mr Ram A for the Plaintiff
Mr. Sen A for the 1st Defendant
Mr Prasad S for the 2nd Defendant

Date of Trial : 14.03.2013, 15.03.2013, 08.04.2013, 09.04.2013 &
10.04.2013

Date of Judgment : 5 July 2013

JUDGMENT

Introduction

1. The Plaintiff by her Writ of Summons dated 3 October 2009, filed this action against two Defendants seeking inter alia a declaration that the Plaintiff is the rightful beneficial owner of Lot 10 comprised in CT 34557, an order that the 1st Defendant do repay the advance and obtain a discharge of the Notifications No.

592 166 from the 2nd Defendant, an order that the 1st Defendant, do transfer the CT 34557 to the Plaintiff free of encumbrances, and an order that if the 1st Defendant fails to transfer 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 transfer the title of CT 34557 to the Plaintiff.

2. The claims of the Plaintiff were based on following facts:

- (i) The Plaintiff is the widow of late Shiu Prasad, who was a son of late Bhagirathi.
- (ii) Bhagirathi was the registered proprietor of the land known as Tavumaca being Lot 1 of DP 1315 containing an area of 68a, 3r, 23p and being the whole of the land comprised in CT 6864.
- (iii) In or about year 1970, the deceased father allowed his son Shiu Prasad to build a separate dwelling for himself and allocated a piece of land which was approximately 100.10 metres long and 26.43 metres wide.
- (iv) Shiu Prasad has made an application to the Taveuni Rural Local Authority for permission to construct the house and subsequently made another application in 1980 for an extension of the same.
- (v) Bhagirathi, the father of Shiu Prasad, by his will devised the whole of land in CT 6864 to the 1st Defendant.
- (vi) The Plaintiff states the transfer was on the premise that 1st Defendant will divide the land equally between his sons.
- (vii) The Plaintiff states that, in 1985, the 1st Defendant agreed to subdivide the original title and to transfer the subdivided Lots to each son on the condition that each son to bear his share of costs of survey.

- (viii) Shiu Prasad died in 1986 and on or about 1987, a surveyor has begun subdivision and during the course of survey of the whole land, the Plaintiff had entered into an agreement with Hari Prasad, a brother of late Shiu Prasad witnessed by the 1st Defendant in which it was agreed that:
- (a) the Plaintiff at the request of Hari Prasad agreed to pay the balance of his survey costs to the surveyors Deepak and Govind.
 - (b) in exchange, Hari Prasad to give up a portion of his entitlement over an area which is 40.63 metres wide on to the road frontage and 100.10 metres deep.
 - (c) the area as assigned was part of Lot 9 on the proposed subdivision of the original title, which was allocated to Hari Prasad.
- (ix) After the subdivision plan was deposited, the 1st Defendant inter-alia:-
- (a) extracted titles in his own name for all 10 Lots of the subdivision CT 34557.
 - (b) prepared two transfers with the Plaintiff over Lot 4 and Lot 10 respectively.
 - (c) signed the transfers with the Plaintiff and had the signatures witnessed by a registered surveyor.
 - (d) took the original copies of the transfer under the pretext of registering them for the plaintiff.
 - (e) registered only the transfer in respect of Lot 4 on DP 7889.
 - (f) extracted a title in respect of Lot 10 (CT 34557) which was the Plaintiff's entitlement in his own personal name as beneficial owner.
- (x) In or about 2005, 1st Defendant initiated an action in court to evict the Plaintiff from CT 34557, which was subsequently withdrawn subject costs.

- (xi) Subsequent to the withdrawal of the action, the 1st Defendant fraudulently mortgaged CT 34557 to 2nd Defendant.
 - (xii) The Plaintiff states that the 1st Defendant has committed fraud in the following manner, inter-alia;-
 - (1) failure to subdivide the original trust in accordance with the directions of the deceased father.
 - (2) failure to transfer to the Plaintiff the CT 34557 despite her right and beneficial interest in the land.
 - (3) executing a transfer of Lot 10[CT 34557] and Lot 4 [CT 34551] infavour of the Plaintiff and under pretence of transferring both but to transferred only Lot 4.
 - (4) conspiring with the Bank fraudulently to defeat the title and ownership of the Plaintiff in Lot 10.
 - (5) mortgaging Lot 10 to the Bank with this intention to depriving the Plaintiff of her title and ownership.
 - (xiii) The Plaintiff further states that the 2nd Defendant has been grossly negligent and has acted fraudulently in granting the advance to the 1st Defendant as against the Plaintiff.
3. The 1st Defendant in the Statement of Defense denied the allegations contained in the Statement of Claims and states as follows:-
- (i) The 1st Defendant is not aware of any separate allocation made to deceased brother Shiu Prasad and no such claim was made by Shiu Prasad during his life time. Shiu Prasad was only a licensee and did not have any right to any proprietorship.
 - (ii) The 1st Defendant transferred the original title to himself as he was entitled to the same pursuant to the will of the deceased father.

- (iii) He agreed to subdivide and transfer to his brothers as a goodwill and not on condition that the costs of subdivision and costs of transfer was met by brothers and on further condition that they would not make any other demand on the 1st Defendant.
- (iv) He had promised his brother Shiu Prasad to give him and deceased brother has also agreed to accept, approximately 7 acres of CT No. 6864 prior to his death on the same conditions as promised to other brothers and that upon death of Shiu Prasad, the 1st Defendant agreed to transfer the land to his lawful widow Bhan Wati.
- (v) He states that no survey was completed by Deepak and Govind. Subsequently surveyor Inoke Bulivou carried out the survey in accordance with the survey instruction given to him by the 1st Defendant.
- (vi) Separate titles were created to his name in accordance with the instructions and said titles were the entitlement of the 1st Defendant until disposed. He never instructed to prepare any transfer of Lot 10 to the Plaintiff except Lot 4.
- (vii) The purported transfer alleged by the Plaintiff is not a registrable instrument and same is of no value and effect and not a proper conveyance document for any title and CT No 34557 was never conveyed or intended to be conveyed to the Plaintiff.
- (viii) He initiated an action to evict Plaintiff from Lot 10 as she was to move onto her Lot 4 upon conveyance and it became imperative to evict the Plaintiff when she refused to move to her allocated land.
- (ix) He states that he has all rights, powers and ownership to create a charge as no other person has any right or interest in Lot 10.

- (x) He further states that the Plaintiff's claim is entirely misconceived and does not have any interest either in law or equity and has no beneficial interest over CT No 34557.
 - (xi) He states that any promise made to his late brother Shiu Prasad cannot be enforced by the Plaintiff in Law; 1st Defendant also relied Indemnity Guarantee and Bailment Act to establish that Plaintiff has no cause of action.
4. The 1st Defendant in his Statement of Defense has a Counter Claim against the Plaintiff for vacant possession as he is entitled to vacant possession of the said CT No. 34557.
 5. The 2nd Defendant, The Fiji Development Bank, in the Statement of Defense whilst denying the averments in the Statement of Claim, takes up the position that every procedure of lending has followed and the loan was granted to 1st Defendant only after full appraisal of the application which met all the lending criteria. It states that the 1st Defendant was the rightful owner and registered proprietor of CT No. 34557 and taken a mortgage over the said land.
 6. The Plaintiff in her Statement of Defense to counter claim denied the averment therein and takes up the position that the 1st Defendant is the legal owner of CT No. 34557 whilst the Plaintiff is the beneficial owner of the land and the person entitled to possession and legal ownership of CT No. 34557.
 7. It is important to note that no pre-trial conference was held, and thus the court dispensed with pre-trial conference and proceeded to trial which lasted 5 days.

The Plaintiff's Evidence

8. The Plaintiff has called 8 witnesses during the course of Plaintiff's case and marked Exhibits P1 to P14.
9. Bhan Wati, the Plaintiff in this case, Hermet Prasad a neighbour of the Plaintiff, Praneel Kumar, son of the Plaintiff, Lusiana Qaleni, Senior relationship officer of Fiji Development Bank, James Venkat Swamy, a farmer and close relative of the Plaintiff and 1st Defendant, Vidya Nand a carpenter who lives in the same village, Rajendra Prasad a plumber, also lives in the same village, and finally Inoke Bulivou, land surveyor who surveyed the land in certification of Title No. 6864, gave evidence for Plaintiff.
10. During the course of Plaintiff's case, 14 Exhibits were marked. Exhibit 1 was the Application by the Plaintiff's late husband to build a house, Exhibit 2 was the title to the entire land, Exhibit 3, was the application for extension of the house build by Shiu Prasad, Exhibit 4 was the Survey Plan, Exhibit 5 was the Survey instructions, Exhibit 6 was the receipts for Survey fee, Exhibit 7 was the receipts for the Survey of Lot 10, Exhibit 8 was the receipts for survey fees, Exhibit P9 and P10 were the photocopies of the transfer document for Lot 4 and Lot 10, Exhibit P11 was the Court Order in eviction proceedings, Exhibit 12 was the Certification of Title No. 34557, and Exhibit 13 was the notification by the Fiji Development Bank and the Exhibit 14 was the Fiji Development Bank file.
11. Bhan Wati, the Plaintiff in this case testified that she is the widow of Shiu Prasad, who was one of the sons of Bhagirathi. After the marriage, Bhan Wati along with Shiu Prasad lived for a period of 5 to 6 years in Bhagirathi's house until Bhagirathi gave a block of land to build a house in his land. She stated that Bhagirathi gave the land to Shiu Prasad on the premise that if the entire is subdivided, the area where they live and area around the hill would be given to late Shiu Prasad. Exhibit marked P1, confirms that application to build the house was made in year 1970 to Taveuni Rural Local Authority. Shiu Prasad in year 1980 made another application to same authority for an extension of the house build by them. The said application was marked as Exhibit 3. She testified that Hari Prasad, brother of Shiu Prasad, was a poor person and she

paid for his share of survey fees. She stated that the 1st Defendant, Vijay Kumar had come to her and told her to have the Hari Prasad's land surveyed and one acre will be hers and remaining 6 acres land be given to Hari Prasad.

12. In survey instructions marked as Exhibit 4 is the confirmation of the arrangement between Hari Prasad, Plaintiff and 1st Defendant. Special notes in P4 states as follows:

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

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

Signed
.....
Hari Prasad

Signed
.....
Vijay Kumar (Witness)
f/n Bhagirathi

Signed
.....
Mrs Bhan Wati
Shiu Prasad

13. The Plaintiff also stated that surveyors Deepak and Govind could not complete the survey and i Taukei surveyor known as Inoke came and completed the survey. The subdivided plan was marked as Exhibit 5 and identified the signature of the 1st Defendant who has signed as registered proprietor. She testified further that the dimensions setout in P4 special notes is identical to the dimensions of Lot 10 in Exhibit . Her position was that surveyor has given full effect to the survey instruction in Exhibit P4 to Exhibit P5. Survey fee paid by the Plaintiff for Hari Prasad which was confirmed by the receipts issued by them, marked as Exhibit 6. She stated that 1st Defendant did not pay for Lot 10 and Plaintiff is the one who paid for Lot 10 and Lot 4 and confirms the position with the receipt issued by surveyor Inoke, marked as Exhibit 7. She

further testified that she has made a payment to surveyor Inoke to effect the transfer of two Lots. She marked the receipt issued by surveyor as Exhibit 8. She also marked the two photocopies of two transfer forms, for Lot 4 and Lot 10 respectively. The position was that she signed the originals of the two forms and handed back to 1st Defendant and received photocopies. She also identified signatures of her's and 1st Defendant in two transfer documents marked as P9 and P10. Counsel for the 1st Defendant objected to the marking of two documents on the basis that two documents are fraudulent and created. The admissibility of the two photocopies would be dealt later in my judgment. She stated that she was happy as she believed that all necessary pre-requisite to transfer both Lots has taken place between Plaintiff and 1st Defendant and Lot 4 and Lot 10 are now belong to her.

14. Subsequent to above events she stated that she received a notice and met a lawyer. Thereafter she got to know that the notice was in relation to an eviction. According to her evidence, a lawyer has told her that she has won the case and 1st Defendant had to pay \$300. Certified copy of the order made by court in relation to the eviction was marked as Exhibit P11. It is clear from P11 that 1st Defendant has initiated an originating summons and subsequently withdrawn subject to summarily assessed cost at \$300.
14. She testified that, she got to know from the neighborhood that 1st Defendant has mortgaged Lot 10 to a Bank. She stated that wife of 1st Defendant too has confirmed the mortgage of Lot 10. She also stated that 1st Defendant could have mortgaged his properties in that area instead of Lot 10 which she has been living for last 43 years.
15. Answering cross examination, the Plaintiff admitted that she never purchased Lot 10 from the 1st Defendant and it is Bhagirathi who gave a block of land belong to him for Shiu Prasad to build a house. She further admitted that that when Bhagirathi died, he gave the entire land to the 1st Defendant as he was the only beneficiary in his will. Answering further, she also admitted that Shiu Prasad never contested the will or filed a caveat. The position suggested to the Plaintiff by the Defendants is clear from the following questions and answers:

Question: After Bhagirathi died none of the brothers had a claim on the land?

Answer: Yes.

Question: Only person who could divide the land was the 1st Defendant?

Answer: All the brothers fought they wanted their share.

Question: What is the right they have to demand a share?

Answer: They said that it was their father's land and they had been living there.

16. It was further suggested that Bhagirathi gave entire land to 1st Defendant because nobody cared for him and it was the 1st Defendant who looked after him. However Plaintiff stated that Bhagirathi was everyone's father and everyone visited him.

17. The position of the Defendant in the cross examination was mainly on the premise that the 1st Defendant is the registered owner of Lot 10 and gave survey instruction to surveyor to demarcate the block for himself. Further suggested that the agreement between 1st Defendant and Plaintiff was that the Plaintiff to demolish and move to Lot 4 after the title for Lot 4 was given to the Plaintiff. The title for Lot 4 was given to Plaintiff. The Plaintiff's position was that she paid for surveyor fees based on Exhibit P4 and she should be given the title for Lot10 in relation to Exhibit P4. It was suggested that the arrangement to pay surveyor fee by the Plaintiff was only for the usage and nothing else. Exhibit P4 last paragraph states as follows:

"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."

18. Answering cross examination, she stated that she is aware that Bhagirathi gave the entire land to the 1st Defendant but Bhagirathi has told them that he is only a trustee and a care taker. It was suggested in the cross examination that the

agreement between Shiu Prasad and 1st Defendant was only in relation to Lot 4 and no other Lot and thus the Plaintiff is not entitled to Lot 10. The position of the Plaintiff in this regard was that there had been an agreement between the Plaintiff, Hari Prasad and the 1st Defendant on Lot 10 evidenced by P4, P9, P10 and receipts issued by surveyor for surveying of Hari Prasad's allocated Lots and the transfer receipts.

19. The Plaintiff was also cross examined at length on the eviction proceedings initiated by the 1st Defendant and mortgage of Lot 10 to 2nd Defendant for a loan of \$15,000.00. The stance of 1st Defendant was that the Plaintiff has no right to remain in Lot 10 after the title of Lot 4 was given to her and as a registered owner, the 1st Defendant is entitled to mortgage the land to the 2nd Defendant. The Plaintiff denied the above stance of the 1st Defendant and maintained her position that she is entitled to the title of Lot 10 based on arrangement between parties supported by documentary evidence.
20. The 2nd Defendant, in cross examination took up the position that the 2nd Defendant was not aware of the arrangement between parties and the Plaintiff has not visited the Bank to appraise the arrangement between parties if any. As per the Statement of Defense, it was the position of the Bank that Bank was not privy to discussions, undertaking, or arrangement between parties. The 1st Defendant has followed the correct procedure in granting loan as 1st Defendant was the registered owner of the property.
21. The Plaintiff's 2nd witness was Hement Prasad. He is a taxi driver by profession and lives in the same village with the Plaintiff and the 1st Defendant for a long period of time. He testified that he too helped Shiu Prasad when he was extending the house build on Lot 10 although he was a taxi driver by profession. He was a member of the advisory council of water and electricity project in the village. The permission to supply water and electricity was provided at that time by the Plaintiff to the committee without any objection by the 1st Defendant. He further stated that Hari Prasad was to be given 7 acres along with Lot 10. However he has told him, that since the Plaintiff has spent

some money on the land, part of the land allocated to him was given to the Plaintiff, which is Lot 10.

22. In cross examination, witness admitted that he was not aware of the will of Bhagirathi and title of the entire land was transferred to the 1st Defendant pursuant to the will.
23. The Plaintiff's 3rd witness was Praveen Kumar. He testified that he is a son of the Plaintiff and has been living in the house in Lot10 since birth. He was 42 years old at the time of giving evidence in court. He corroborated the evidence of the Plaintiff and explained P3, P4 and P5. He tendered Exhibit P12 and Exhibit P13 in his evidence. He stated that he was shocked and sad when he got to know that Lot 10 was mortgaged to the 2nd Defendant by the 1st Defendant as he thought that Lot 10 belongs to his mother.
24. The Plaintiff's fourth witness one Lusiana Qeleni, Senior relationship officer of the Fiji Development Bank. She testified that the 1st Defendant is a customer of the Bank and granted two loans, \$15,000.00 and \$24,000.00 respectively. The loan of \$15,000.00 was granted on the mortgage of Lot 10 which was valued by the Bank for the propose of the loan was \$22,000.00. She stated that the para 7, 8 and 9 of the valuation report has not been filed by the officer visited the place of valuation. She also stated that the loan of \$15,000.00 was to be fully paid within 7 years from the date of grant and 7 years period was now over. There is an outstanding balance of the loan of \$9,428.00. She stated that Bank was not aware of the eviction proceeding initiated by the 1st Defendant she marked the entire Bank file in relation to both loans as Exhibit P14.
25. In cross examination she stated that there was not a single complain from the Plaintiff or the solicitor for the Plaintiff and investigation could be carried out if there was any.
26. She further stated that the 1st Defendant was one of their best customers and all necessary searches and investigations were carried by the Bank prior to

granting this loan. The witness denied any negligence or fraudulent act on the part of the bank in granting loans to the 1st Defendant.

27. The 5th witness of the Plaintiff was James Verkent Swamy. He testified that he is closely related to Shiu Prasad and the 1st Defendant. He stated that he is a preacher and a member of advisory council appointed by the Government for a period of 3 years. He further stated that the Plaintiff has told him that Lot 10 belong to her. He said that he is aware of the two surveys carried out by two surveyors for subdivision of the entire land. The witness was also a member of the water and electrification project in the village and permission was obtained from the plaintiff and not from the 1st Defendant and there was no objection from the 1st Defendant for obtaining permission from the Plaintiff.
28. In cross examination he admitted that he was not aware of the transfer of the entire land to the 1st Defendant pursuant to the will of Bhagirathi.
29. The Plaintiff's sixth witness has Vidya Nand a carpenter by profession who has helped Shiu Prasad in the extension of the house. He stated that Shiu Prasad has told him that he got the block of land from his father Bhagirathi. This witness testified that all wages were paid by Shiu Prasad and material were supplied by him.
30. The Plaintiff's seventh witness was Rajendra Prasad who lives in the same village. This witness too testified that Shiu Prasad has told him that he got a block of land from Bhagirathi to build a house and the Plaintiff has told him that she was going to get the block in subdivision. This witness too had helped Shiu Prasad in the extension of the home and all materials were supplied by him.
31. This witness in the cross examination stated that each one got 7 acres in the subdivision of the land and others moved to their land except the Plaintiff. He

further stated in cross-examination that Plaintiff has told him that she got the title for the land.

32. Plaintiff last witness was Inoke Bulivou, land surveyor who carried out the survey of CT No. 6864 which was initiated by Deepak and Govind. He testified that he relied upon the sectional and demarcations of the previous surveyor to complete the survey. He stated that he knew the 1st Defendant and commenced the survey on his instructions of the 1st Defendant and divided the entire in to 10 Lots as he was the registered owner. He also stated that the understanding among the beneficiaries of subdivision should bear the share of survey cost of their respective land.
33. He stated that he knew the Plaintiff and she paid for survey fees for Lot 4 and Lot 10. He admitted that P7 and P8 have issued by him to the Plaintiff. He stated that there was some friction amongst the family member initially which was subsequently ironed out. He explained the subdivision of the land P2 in his evidence. In relation to P9 and P10, his position was that he prepared both documents and identified as true photocopies of the original. He stated that transferor was the 1st Defendant and transferee was the Plaintiff in the transfer of Lot4 and Lot 10.
34. He recognized the signatures of the 1st Defendant and the Plaintiff as genuine signatures. He categorically stated that the understanding and the intention the 1st Defendant was to transfer Lot 4 and Lot 10 to the Plaintiff and accepted the survey fee on that basis. He stated that there was no complain up to date about surveying of the land in CT No. 6864 from any one.
34. In cross examination of the witness, several questions were asked on Survey Act and his practising certification after 2009. He admitted that he can obtain instructions only from the owner. He also admitted the issuance of Exhibit P7 and P8 and preparation of Exhibit P9 and P10.

35. In re examination he specifically stated that according to instruction he received from the 1st Defendant at the time of subdivision of the land, Lot 4 and Lot 10 to be given to the Plaintiff. He further stated that he gave photocopies P9 and P10 to the Plaintiff after preparation.
36. Only the 1st Defendant gave evidence for the 1st Defendant and no witnesses were called by the 2nd Defendant.
37. The evidence of the 1st Defendants was that his father Bhagirathi died in 1977. He had 6 boys and 6 girls. He said that he was the only one who looked after his father in his last days. His father made a will bequeathing all of his land contained in CT No. 6864 containing 68 acres 3 roods 23 perches to him. He said pursuant to the will he took out a probate. The probate was exhibited. He was sole beneficiary and he was not obligated to give anything to anybody. He said that the plaintiff never lived on her land but lived on an estate. He said after she was chased out from the estate, Shiu Prasad asked for about 2 chains of land from Bhagirathi to build a house.
38. Shiu Prasad was not given any land in the will of their deceased father Bhagirathi. He said that the brothers had no land so out of goodwill he gave 7 acres each. He said a deed was prepared. This deed is tendered as defendant's Exhibit D1. He said a deed was prepared for Shiu Prasad and all his other brothers. The agreement was that once the land was surveyed and 7 acres to given, his respective brothers would move to their respective 7 acres. Pursuant to the deed, the brothers were supposed to pay the cost of the transfer and survey and the transfer was to take place as soon as the land was surveyed to the transferee. The said land in the deed referred to the 7 acres to be given to Shiu Prasad and according to the deed the relatives of Shiu Prasad's wife (Bhan Wati's relatives) were not to remain on the land for more than a week. The deed further fortifies the plaintiff's assertion that Shiu Prasad and his family were to move on the said land (7 acres) where the relatives of the plaintiff were not allowed for more than a week.

39. He said after the land was surveyed his brothers Mangal, Arjun and Hari Prasad who lived behind his house moved to their respective lots. It was Shiu Prasad that did not move out. At that time Shiu Prasad has a stroke and he was bedridden. He said that the survey went smoothly except Bhan Mati would remove the pegs and fight. He further said that once the special notes as appearing in plaintiff's Exhibit 4 was executed then only she stopped interfering with the survey and agreed to move out once she was given title to Lot 4.
40. This witness told the court that the house was built by Shiu Prasad and he did not want any part of it. He said that the subdivision was planned in accordance with the deed which formed the scheme. He said he never agreed that he would give anything else to Bhan Wati. He said that after the transfer was completed and tiles were registered. He transferred the same to rightful owners. Because Shiu Prasad has died, he transferred Lot 4 to Bhan Wati. He told the court that when Bhan Wati did not move after the title was given to her then he instituted High Court proceedings through Raman Singh & Associates being High Court Civil Action No. 72 of 2005. He said he never agreed to give Lot 10 to Bhan Wati as this was his land. He created it for himself as the owner of the land. He said he had given good fertile 7 acres to all his brothers including Shiu Prasad. All of them shifted except Shiu Prasad. He said that he did not give any instructions to Kohli & Singh Associates to withdraw the proceedings and he never paid any money to the Plaintiff. He said that the Plaintiff did not have any interest in Lot 10. This witness told that he never had any dealing with Bhan Wati but only dealing with Shiu Prasad as per his deed (D1).
41. In cross examination the witness admitted that the dimensions stated in Exhibit 4 is identical to the dimensions of Lot 10 in the survey plan. The position of the Plaintiff in the cross examination in relation to dimensions was to establish that the land was demarcated to accommodate the house in the block and not to be demolished by the Plaintiff and move to Lot 4.

42. The 1st Defendant, in answering to the questions of the Plaintiff, testified that P4 was only for usage of the land and nothing else. He further stated that Hari Prasad cannot agree to give part of the land to anyone as he is the registered owner of the property. He admitted his signature in Exhibit P4 and P5.

A specific questions in this regard was asked from the witness.

Question: If the Plaintiff was to move to Lot 4, why did you accommodate the Plaintiff's house in the plan.

Answer: It is my land, I did it the way I want.

The witness was questioned on Exhibit P9 and P10. He denied his signature in both documents. The basis of the denial was that:

Question: You said that your signature does not match with the signature in Exhibit P9 and P10.

Answer: Yes.

Question: You said that in your signature in Exhibit P9 and P10 'v' is separate from 'k' but in the Exhibit 6, 'v' and 'k' is together?

Answer: Yes.

However it was established in the cross examinations through several documents including his marriage certificates, driving license and several other documents in P14 the letter 'v' and 'k' are separate and not together.

43. He was also questioned as to why the surveyor has stated you as transferor and the Plaintiff as transferee. Answer of the witness was that only Surveyor Inoke should know about P9 and P10 and one Hussen formally did the transfers.
44. He was also questioned as to why Hari Prasad got 6 acres when each son of Bhagirathi was promised 7 acres. In answering, the witness said that he only gave 6 acres to him and subsequently said that only the surveyor Inoke knew

why only 6 acres were given to Hari Prasad. He also stated that he decided to keep Lot 10 for himself.

45. The witness was also questioned on fencing of the Lot 10 after the survey. He admitted that fences of two sides of Lot 10 was already there and the Plaintiff after the survey erected fence in other sides of Lot 10.
46. However he stated that he did not object to fencing as the family members chased him out of the land with sticks and knives.
47. The witness was also questioned on payment of survey fees for Lot 10. It was the position of the Plaintiff that the Plaintiff paid for surveying of Lot 10 evidenced by receipts. It was suggested that the 1st Defendant never paid any survey fees for Lot 10 though he said that he paid for Lot 10, and that was the reason as to why he was unable to provide any receipts up to date where as Plaintiff produced Exhibit 6, 7 and 8 to support her stance.
48. The witness was questioned on the eviction proceeding initiated by him in High Court. His position was in answering to the question of the Plaintiff was that he never gave any instruction to his Lawyer to withdraw the case though the case was withdrawn.
49. The witness was also questioned on mortgage of Lot 10 two months after withdrawal of the case. It was suggested that the intention of the Plaintiff was to obtain a loan from the 2nd Defendant and default and thereby to get rid of the Plaintiff from the land.
50. The witness admitted that the repayable period of the loan of \$15,000.00 was seven years and he has only settled a part and balance outstanding was approximately over \$9,000.00 even after a lapse of seven years. He admitted that if there was default, the bank could realize the security to recover the unsettle loan.

The Determination

The Plaintiff's claim is founded upon the principles of equitable trust, constructive trust, beneficial interest, proprietary estoppel, and equitable estoppel.

The evidence of the Plaintiff in summary was that lot 10 was created for the beneficial occupation and possession of the plaintiff and grant of title upon submission.

Pathik J. in Ocean Shores Estates Ltd -v- Karavaki (1997) FJHC 29 said:

“The question that looms large on the facts of this case is how did D1 manage to stay on the land for so long without being evicted long before? Is it a case of proprietary estoppel? This doctrine is stated thus in HANDBURY AND MAUDSLEY MODERN EQUITY 11th Ed. P. 736 – 737:

“This doctrine is applicable where one party knowingly encourages another to act, or acquiesces in the other's actions, to his detriment and in infringement of the first party's rights. He will be unable to complain later about the infringement and may indeed be required to make good the expectation which he encouraged the other party to rely on. Unlike other estoppels, therefore, this doctrine may, in some circumstances, create a claim and an entitlement to positive proprietary rights; in others, it can operate negatively, or can produce a compromise situation appropriate to the particular circumstances.”

It is further stated at p. 737 ibid that “where a man suffered another to build on this ground, without setting up a right till afterwards, the Court will oblige the owner to permit the person building it to enjoy it quietly” (EAST INDIA CO v VINCENT (1740) 2 Atk 83; JACKSON v CATOR (1800) 5 Ves. 688). It is also mentioned there at p. 737 that:

“The most extreme cases are those where a non-owner, in reliance upon a gratuitous promise of a gift of the land, has built on the land. Clearly, it would be wrong to allow him to be turned out. The Court has on occasion ordered a conveyance of the land. On other occasions, the non-owner has been given a lien on the land for his expenditure; or compensation for the value of the improvement; or awarded the improved land on payment of a reasonable price for the site, or has been given protection from eviction without obtaining a proprietary interest in the land.”

In ***Jamandas Sports (Fiji) Ltd v Stinson Pearce Ltd (1994) FJCA 20.***

The court acknowledged that;

*“Proprietary estoppel may arise in a variety of situations. One category of cases in which it arises is where one person is encouraged by a landowner to do work on the landowner’s land and to believe that, by doing so, he will acquire an interest in the land that will be legally recognized (*Combes v Smith* (1986) 1 W.L. R. 808). The work must have been done in reliance on the landowner’s promise. In many cases the work has benefited the landowner. (e.g. *Dilwyn v Liewillyn* (1862) 4 D.F. & G. 517) and the doctrine has been regarded as providing a remedy to prevent unjust enrichment.”*

Halsbury 4th Edition Volume 16 Para 1072 says:

“The real test is said to be whether on the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the Plaintiff or the person having the right sought to be enforced, to continue to seek to enforce it.”

The Court of Appeal considered whether it should grant an access sought by a Plaintiff land away relying on the Defendant’s oral promise of access. ***Scarman LJ. In Crabb – v- Arun District Council (1976) Ch. 179*** said:-

“If the Plaintiff has any right, it is an equity arising out of the conduct and relationship of the parties. In such a case I think it is now well settled law

that the court, having analysed and assessed the conduct and relationship of the parties, has to answer three questions. First, is there an equity established? Secondly, what is the extend of the equity, f one is established. And, thirdly, what is the relief appropriate to satisfy the equity?'

“The rule of law applicable to the case appears to me to be this: 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 o encouraged by the landlord,” – my italics – “that he shall have a certain interest, takes possession of such land, with the consent 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 landlord to give effect to such promise or expectation.”

In the case of Pascoe v Turner (1919) 2AER 945 the Court dealt with a case where the Defendant had spend moneys and made improvements to a house allegedly given to her by the Plaintiff who knew of the improvements being done. The Learned Judges found:-

“that a proprietary estoppel arose by virtue of her improvements to the house made with his encouragement and acquiescence and in reliance on his declaration that he had given the house to her”

So if A puts B in possession of piece of land and tells him I give it to you that you may build a house on it and B on the strength of the promise, with the knowledge of A expends a large sum of money in building a house accordingly. I cannot doubt that the done acquires a right from the subsequent transaction to perform that contract and complete the imperfect donation which was made.

Referring to the Privy Council decision in the case of **Shamsul Nisha vs Abdul Munif (1999) FJHC 113 45 FLR 246 Shameem J** said:-

“The leading local case on the creation of equitable trusts in property is Sheila Maharaj v. jai Chand [1986] 1AC 898 a decision of the Privy Council reversing the judgment of the Fiji Court of Appeal.

In that case the parties had lived together for twelve years in a de facto relationship. They had one child of their own. The Plaintiff had obtained land from the housing Authority and had made all contributions for the financing of the home. The Defendant used her earnings to support the family.

The Plaintiff sought vacant possession of the property. The Defendant claimed an equitable trust and estoppel. At page 125 of the Judgment, the Privy Council said:

*“The authority now classic is the speech of Lord Diplock in **Gissing v. Gissing [1971] AC 886**, 902 – 911, and later reviewed in the judgments of the Court of Appeal in Grant v. Edward [1986] 2 All ER 426, which concerned an unmarried couple. In such cases a contract or an express trust at the time of the acquisition may not be established, because of lack of certainty or consideration or non-compliance with statutory requirements of writing; but a constructive trust may be established by an inferred common intention subsequently acted upon by the making of contributions or other action to the detriment of the claimant party. And it has been held that, in the absence of evidence to the contrary, the right inference is the claimant acted in the belief that she (or he) would have an interest in the house and not merely out of love and affection.”*

In **Gissing v. Gissing [1971] AC 886** Lord Diplock said at p. 905:

“A resulting, implied or constructive trust – and is unnecessary for present purposes to distinguish between these three classes of trust – is created by a transaction between the trustee and the cestui que trust with the acquisition by the trustee of a legal estate in land whenever the trustee has so conducted himself that it would be unequitable to allow him to deny to the cestui que 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 que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.”

The principle is not confined to interests in the matrimonial home. The court should look for evidence of the common intention of the parties when the property was acquired.

The conclusion Shameem J reached was:

“The Defendant cannot now in all conscience, insist that the Plaintiff live elsewhere, nor can he deny, her beneficial interest in the property.”

In the case of **Waltons Stores (Inter state) v Maher (1988)** 164 CLR 387,

It was held:

“Per Brennan J. To establish equitable estoppels it is necessary for a plaintiff to prove that:

- i) The Plaintiff assumed that a particular legal relationship then existed between him and the defendant or expected that a particular relationship would exist between them and, in a latter case, that the **defendant would not be free to withdraw from the expected legal relationship;**

- ii) The defendant **induced** the plaintiff to adopt that assumption or expectation;
- iii) The plaintiff **acts or abstains from acting in reliance on the assumption or expectation;**
- iv) The defendant **knew** or intended him to do so;
- v) The plaintiff's action or inaction **will occasion detriment if the assumption or expectation is not fulfilled;**
- vi) The defendant has failed to avoid that detriment **whether by fulfilling the assumption or expectation or otherwise.**

In the case of **Inwards -v- Baker (1965) 1 AER 446**, is similar in facts to instant case. A father had encouraged his dwelling on the father's land but had subsequently by will not provided for the son and devised the whole of the land to his wife, who then sought to evict the son. The Court of Appeal said:

"..... the Court must look at the circumstances in each case to decide in what way the equity can be satisfied".

"So in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the Court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spend the money in the 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. In this case it is quite plain that the father allowed an expectation to be created in the son's mind that this bungalow was to be his home. 'in the light of the equity, the father could not in 1932 have turned to

his son and said: "You are to go. It is my land and my house". Nor could he at any time thereafter so long as the son wanted it as his home."

"But I think that any purchaser, who took with notice, would clearly be bound by the equity. So here too the present plaintiff's the successors in title of the father, are clearly themselves bound by this equity. It is an equity well recognized in law. It arises from the expenditure of money by a person in actual occupation of land when he is led to believe that, as the result of that expenditure, he will be allowed to remain there. It is for the Court to saying what way the equity can be satisfied."

I would like to refer to the observations in the Judgment of the Privy Council at p.713 of the report of **Plimmer v. Mayor etc. of Wellington**. It is said there:

"Their Lordship consider that this case falls within the principles stated by Lord Kingsdown as to expectations created or encouraged by the landlord, with the addition that in this case the landlord did more than encourage the expenditure for he took the initiative in requesting it".

"there are the same circumstances in the resent case. The appellant was induced to give up his project of building a bungalow on land belonging to somebody else other than his father, in which case he would have become the owner or tenant of the land in question and thus have his own home. His father induced him to build on his, the father's, land and expenditure was made by the appellant for the purpose of the erection of the bungalow.

"In my view the case comes plainly within the proposition stated in the cases. It is not necessary I think to imply a promise. It seems to me that this is one of the cases of an equity created by estoppel, or equitable estoppel, as it is sometimes called, by the person who has made the expenditure is induced by the expectation o obtaining protection, and equity protects him so that an injustice may not be perpetrated."

In the case of **Semi v Wati HBC** [2010] FJHC 35 of 2005 (7 June 2010) Justice Calanchini considered what would constitute a constructive trust.

“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. In a case such as the present where the legal title was held in the deceased’s name alone, the presumption is that the deceased was the sole owner of the equitable interest.

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 means of a constructive trust or by means of proprietary estoppels if the Plaintiff has suffered detriment.

Furthermore in the event that the Plaintiff had contributed to the purchase price of the land and/or to the improvements or any other financial contribution, effect would be given to the common intention of the parties by way of a constructive trust or proprietary estoppels.

Proprietary estoppels enables an equitable interest to be granted to person who has been induced to suffer detriment upon reliance on a representation that ht Plaintiff would acquire ownership of the land as a result. Under the remedy the court may award 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. (See **Equity and Trusts** supra at page 631 -631).*

51. Having considered the principles laid down in the above judgments and on the totality of the evidence adduced before me and Exhibits P1, to P14 and D1 and D2, I am satisfied that the Plaintiff has established that equitable trust created in favour of her for Lot 10 comprised in certification of title 34557.

In 1st Defendant's defense against the Plaintiff's claim on equitable interest is mainly based on the following grounds:

- a. That the Plaintiff has no cause of action.
 - b. The Plaintiff's claim is in violation of Sec 59 of the Indemnity Guarantee and Bailment Act.
 - c. The claim is barred by Limitation Act.
 - d. Indefeasibility of title.
 - e. Last paragraph in P4 confines only to 'usage' and not to transfer Lot 10 to the Plaintiff.
52. In relation to the issue of locus standi and the cause of action, this court has taken in consideration of paragraph 10 of the Statement of Defense, which clearly admits that the 1st Defendant has recognized the Plaintiff as the person entitled to the estate of Shiu Prasad.
53. The Exhibit D1 being the deed giving Lot 4 was made in 1985 between 1st Defendant and Shiu Prasad and not the Plaintiff. However, the 1st Defendant transferred Lot 4 to the Plaintiff and not to her as the administrator in the estate of Shiu Prasad. Survey receipt marked as Exhibit 6, 7 and 8 were issued in the name of Plaintiff and even in Exhibits P9 and P10 were issued in the name of the Plaintiff.
54. I am unable to accept the position taken by the 1st Defendant that P9 and P10 are created and not genuine for the reason that the surveyor Inoke who

prepared the P9 and P10 confirmed that P9 and P10 photocopies of originals. Furthermore the reason as to why the 1st Defendant was not accepting P9 and P10 as genuine was that 'v' and 'k' in those documents are separate in comparison of D1. However, such assertion was sufficiently challenged by the Plaintiff through some of his own documents.

55. It is further stated that all parties dealt with the Plaintiff as the person entitled to Lot 4 and Lot 10. Surveyor Inoke testified that he received survey instruction from the 1st Defendant as he was the registered owner, confirmed that he too recognized the Plaintiff as the person entitled for Lot 10 in a transfer.
56. The second issue for consideration of this court is the provisions of the Indemnity Guarantee and Bailment Act. Section 59 reads:

No action shall be brought:

- a. Whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or*
- b. Whereby to charge the defendant upon any special promise to answer for the debt, default out of his own estate; or*
- c. To charge any person upon any agreement made upon consideration of marriage; or*
- d. Upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; or*
- e. Upon any agreement that is not to be performed within the space of one year from the making thereof.*

Unless the agreement upon which such action is to be brought for some memorandum or note thereof is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.

57. It is noted that the plaintiff's case is entirely founded upon equitable trust. The Plaintiff relied on oral testimony of several witnesses and exhibit P4, P9 and P10 to establish that all arrangement and pre requisite for the transfer of Lot 10 has been made.

58. The Bailment, Indemnity and Guarantee Act provides that title is created only upon registration and the 1st Defendant's assertion is that there is no such document in content to Section 59 of the Act. It is observed that the Plaintiff in her claim is not disputing or contrasting the 1st Defendant's title, what the Plaintiff claims in her Statement of Claim is that 1st Defendant has vested on equitable interest in the plaintiff and entitled the legal title under the constructive trust for the plaintiff.
59. Third issue for consideration of this court is the applicability of Limitation on Act. The 1st Defendant's position is that the action is time barred as 6 year period has already lapsed.
60. It is important to state that the plaintiff case is founded on constructive trust. It is noted that the eviction proceeding in High Court was withdrawn in 2004 and even if the 6 years period is applicable, Plaintiff should file the action before 2010. This case was filed in 2009. This court further noted that the Plaintiff has not violated or breached the provision in the Limitation Act.
61. The fourth issue for consideration of the court is the defense of indefeasibility of title.

The 1st Defendant has stated that:

- 1] By compulsory registration of the land under the land Transfer Act Cap 131 guarantees the registered proprietor certain rights and privileges. The title is registered through an effective system or registration where the parcel of land is precisely defined through accurate survey and the state guarantees to the registered proprietor possession of that land. In this case the CT No. 34557 has been registered in accordance with Land Transfer Act Cap 131 and the 1st defendant is named as the registered proprietor under the seal of the register.
- 2] The register kept at the Registrar of Titles is the keystone of the Torrens System. The plaintiff has not produced any instrument defined under

the Land Transfer Act that could be taken as conveying the 1st Defendant's rights and interests of the title to the plaintiff. The purported instruments produced by the plaintiff are not only improper but void under **Section 21 (1) and 37 of the Land Transfer Act**.

- 3] There were no memorials or instruments presented to the Registrar of Titles pertaining to plaintiff's claim and therefore none can be relied on as creating interest on her behalf. It is respectfully submitted that the title to the land being CT No. 34557 passed onto the 1st Defendant pursuant to registration of title as he was owner of whole land that was subdivided and he was entitled to obtain a title for himself by law.
- 4] The Plaintiff in this case claims her purported unregistered interest but says that the same has not been created either by sale or by lease or for any valuable consideration paid to the 1st defendant.
62. The 1st Defendant relied on Section 39 of the Land Transfer Act to consider the defense of indefeasibility of title.
63. Having considered the issue at indefeasibility of title and the judgments relied upon by the 1st Defendants mainly, ***Sturt v Mc Innes*** (1974) INZLR 729, *Byeon Bak kwon* and ***Euitaekim v Phul Wati***, Civil Appeal no ABU 0047 of 2007 and ***Ambika Prasad v Santa Wati e Anu***. 1 FJCA 50 [2001] 1FCR 430, I conclude as follows:

It must be noted that fraud is an exception to indefeasibility. Next it should be noted that an equitable interest created under constructive trusts or situations where promissory estopples would apply to prevent a legal owner reneging on an agreement acted upon, even though not in writing. The Torrens title system deals with the legal ownership to title, and upon registration a transferee receives indefeasible title. The Plaintiff is not disputing the legal title held with the 1st Defendant. The 1st Defendant is firstly bound by an equity he had knowledge of, and by his actions of agreeing to subdivide and apportion upon obtaining legal title to CT 6864. The

subsequent conduct created a constructive trust when he was the legal owner and Bhan Wati was the equitable owner. The case has nothing to do with impeaching the 1st Defendant title to CT 34557. In equity, it is now unconscionable for the 1st Defendant to retain the legal title to CT 34557.

64. The 1st Defendant has relied upon the last paragraph of Exhibit P4 to establish that he never intended to transfer Lot 10 to the Plaintiff and P4 was prepared only subject to the condition stated therein.
65. However, in my view, the court has taken in to considerations of oral and documentary evidence in order to interpret P4. In the evidence of Surveyor Inoke Bulivou and Exhibit P9 and P10 is relevant to consider the exact intention of the 1st Defendant. His evidence was that he received instructions from the 1st Defendant to prepare P9 and P10 as all necessary steps to transfer Lot 10 has been fulfilled. Even the first paragraph of P4 clearly stipulated that the payment of surveyor fees by the Plaintiff for the exchange of the land on which the Plaintiff's existing occupation has erected which was allocated to Hari Prasad. Thus I am unable to agree with the contention of the 1st Defendant with regard to P4.

The Plaintiff's case against the 2nd Defendant.

66. The Plaintiff alleges that the 2nd Defendant was acted fraudulently and or negligently in granting a loan of \$15,000.00 to the 1st Defendant.

Particulars of Fraud of Second Defendant

- a. *Failing to make proper investigations into the title of Lot 10.*
- b. *Failing to do any inspection of the land (Lot 10) before agreeing to make any advance to the First Defendant.*
- c. *Failing to note the existence of Plaintiff's dwellings and those of her family erected on C.T 34557.*

- d. *Failing to investigate the rights of occupation of the Plaintiff and her family when they were conspicuously in possession of the land to be mortgaged before making the advance.*
- e. *Entering onto and/or becoming a party to a scheme with the First Defendant to encumber C.T 34557 with the eventual consequence of a mortgage's sale of that land.*
- f. *Allowing the First Defendant to conduct the loan account unsatisfactorily and not reducing the debt in a financially prudent manner.*

ALTERNATIVELY *the bank has been grossly negligent in making the loan to the First Defendant in the circumstances upon the security of a mortgage over C.T. 34557 and conducting the loan account thereafter.*

PARTICULARS OF NEGLIGENCE OF THE SECOND DEFENDANT

- a. *Failing to inspect the land properly.,*
- b. *Failing to see that the land was occupied by persons other than the registered proprietor.*
- c. *Failing to discover that either the title nor the building nor the occupation of the same were in the same person.*
- d. *Failing to make adequate enquires from the First Defendant or the occupiers of C.T 34557 as to the rights and title of Plaintiff and her family as occupiers.*
- e. *Carelessly creating a situation where the Plaintiff and members of her family could lose their beneficial interest in C.T 34557 at the whim of the First Defendant.*
- f. *Allowing the First Defendant to conduct the loan account unsatisfactorily and not reducing the debt in a financially prudent manner.*
- g. *Alternatively allowing itself to be used as a possible to obtained eviction of the Plaintiff from C.T 34557.*

CONSEQUENT *upon the actions of the First Defendant and the Second Defendants the Plaintiff now stands in grave danger of losing her beneficial*

interest in C.T 34557 together with all developments on the said land under a probable mortgagee's sale."

67. Having considered the evidence adduced by the Plaintiff with regard to the above two, causes of actions against the 2nd Defendant, I am of the view that the Plaintiff has failed to establish the necessary requisites to prove fraud or negligence against the Bank.
68. It is noted that the Bank was not privy to the undertaking, promise or the arrangement between the Plaintiff or her late husband Shiu Prasad, Hari Prasad and the 1st Defendant. The 1st Defendant being the registered owner of the Lot 10, which was not disputed by either party to the action, has made an application for a loan. The Bank as a lending agency in my view has acted within their purview and thus not liable to the reliefs prayed by the Plaintiff in her Statement of Claims.

The Counter Claim of the 1st Defendant

69. The counter claim of the 1st Defendant in my judgment, I have already concluded that the Plaintiff has established sufficiently that there was a equitable trust created in favour of her for Lot 10. Thus the 1st Defendant's counter claim for vacant possession necessary fails.

Orders

- [a] The Plaintiff is declared as the rightful beneficial owner of Lot 10 comprised in CT 34557.
- [b] The 1st Defendant is ordered to repay the advance and obtain a discharge of the Notification No. 592166 from the 2nd Defendant.
- [c] The 1st Defendant is ordered to transfer the C.T 34557 to the Plaintiff free of encumbrances.
- [d] The Registrar of titles is directed to execute a transfer and do all things necessary to register the title of CT 34557 to the Plaintiff if the 1st Defendant fails to transfer the CT 34557 to the Plaintiff within two months of the making of this order.
- [e] The claims of the Plaintiff against the 2nd Defendant is declined.
- [f] The counter claim of the 1st Defendant against the Plaintiff is declined.
- [g] I assess costs summarily assessed at \$4,000.00 payable by the 1st Defendant to the Plaintiff.
- [h] I assess costs summarily assessed at \$2,500.00 payable by the Plaintiff to the 2nd Defendant.

.....
SUSANTHA N BALAPATABENDI
JUDGE

5 July 2013
at Suva

