IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 86 of 2016

BETWEEN : **JANARDHAN NAICKER** of Sulua Street, Drasa, Vitogo, Lautoka.

PLAINTIFF

AND : **SHAKUNTALA MANI & ASHNIL KRISHNA** both of Sulua Street, Drasa Vitogo, Lautoka.

DEFENDANTS

Mr. Mark Joseph Anthony for the Plaintiff
Mr. Zoyab Shafi Mohammed for the Defendants

Date of Hearing : - 21st September 2016
Date of Ruling : - 02nd December 2016

RULING

(A) INTRODUCTION

(1) The matter before me stems from the Plaintiff's Originating Summons, dated 20th May 2016, made pursuant to **Section 169** of the **Land Transfer Act**, for an Order for Vacant Possession against the Defendants.

(2) The Defendants are summoned to appear before the Court to show cause why they should not give up vacant possession of the Plaintiffs property comprised in **Housing Authority Sub-lease No- 240799, Lot -15, DP N0- 4188 situated in the province of Ba, Tikina of Vuda, having an area of 27.5 perches.**

(3) The Originating Summons for eviction is supported by an affidavit sworn by the Plaintiffs on 18th May 2016.

(4) The Originating Summons for eviction is strongly contested by the Defendants.

(5) The Defendants filed an 'Affidavit in Opposition' opposing the application for eviction followed by an 'Affidavit in Reply' thereto.

(6) The Plaintiff and the Defendants were heard on the 'Originating Summons'. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff and the Defendants filed a careful and comprehensive written submission for which I am most grateful.

(B) THE LAW

(1) In order to understand the issues that arise in the instant case, I bear in mind the applicable law and the judicial thinking reflected in the following judicial decisions.

(2) Sections from 169 to 172 of the **Land Transfer Act (LTA)** are applicable to summary application for eviction.

Section 169 states;

> *"The following persons may summon any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant:-*
>
> (a) **the last registered proprietor of the land;**
> (b) .....;
> (c) ...

Section 170 states;

> *"The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of the summons."*

Section 171 states;

> *"On the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in Ejectment.*

Section 172 states;

> *"If the person summoned appears he may show cause why he refuses to give possession of such land and, **if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor,** mortgage or lessor or he may make any order and impose any terms he may think fit;*
> *Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:*
> *Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons.*

[Emphasis provided]

(3) The procedure under Section 169 was explained by Pathik J in **Deo v Mati** [2005] FJHC 136; HBC0248j.2004s (16 June 2005) as follows:-

> *The procedure under s.169 is governed by sections 171 and 172 of the Act which provide respectively as follows:-*
>
> *"s.171. On the day appointed for the hearing of the Summons, if the person summoned does not appear, then upon proof to the satisfaction of the Judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in ejectment."*
>
> *"s.172. If a person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the*

judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit."

It is for the defendant to 'show cause.'

(4) The Supreme Court in considering the requirements of Section 172 stated in **Morris Hedstrom Limited v. Liaquat Ali** (Action No. 153/87 at p2) as follows and it is pertinent:

> *"Under Section 172 the person summoned may show cause why he refused to give possession of the land and if he proves to the satisfaction of the judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced."*

(5) The requirements of Section 172 have been further elaborated by the Fiji Court of Appeal in **Azmat Ali s/o Akbar Ali** v **Mohammed Jalil s/o Mohammed Hanif** *(Action No. 44 of 1981 – judgment 2.4.82)* where it is stated:

> *"It is not enough to show a possible future right to possession. That is an acceptable statement as far as it goes, but the section continues that if the person summoned does show cause the judge shall dismiss the summons; but then are added the very wide words "or he may make any order and impose any terms he may think fit" These words must apply, though the person appearing has failed to satisfy the judge, and indeed are often applied when the judge decides that an open court hearing is required. We read the section as empowering the judge to make any order that justice and the circumstances require."*

(C) THE FACTUAL BACKGROUND

(1) What are the facts here? It is necessary to approach the case through its pleadings/affidavits, bearing all those legal principles uppermost in my mind.

(2) The Plaintiff in his **'Affidavit in Support'** deposed *inter alia;*

Para 1. THAT I am the Plaintiff in the action herein.

2. THAT in so far as the content of this affidavit is within my personal knowledge it is true, in so far as it is not within my personal knowledge it is true to the best of my knowledge and information and belief.

3. THAT I am the last registered proprietor of all that piece and parcel of land comprised in Housing Authority Sublease No. 240799, Lot 15 on DP No. 4188 situated in the province of Ba, Tikina of Vuda having an area of 27.5 perches (annexed herein and marked as annexure "JN1" is a copy of the Housing Authority Sublease)

4. THAT the occupation by the Defendant and other occupants is without my consent and/or authority.

5. THAT I have also caused a notice to vacate to be served on the Defendants through my solicitors dated 24th January, 2012 and which was served on the Defendants. (Annexed herein and marked as annexure "JN2" is a copy of the Notice).

6. THAT despite the said notices the Defendants have failed refused and/or neglected to vacate the said premises.

7. THAT the Defendants have also signed the undertaking that they will vacate the Property on or before the 31st day of December 2015. (Annexed herein and marked as annexure "JN3" is a copy of the Undertaking).

8. THAT the Defendants are in unlawful occupation of the land and do not have any right or interest in the land.

9. (a) THAT despite numerous verbal and written requests the Defendants have refused to give up vacant possession of the land and has to date not vacated the said property.

(b) THAT the Defendants have become a nuisance to me

10. THAT I therefore seek the following Orders :-

(a) Order in terms of this application for immediate vacant possession.

(b) Cost on a client indemnity basis.

(3) The first named Defendant for her part in seeking to show cause against the Summons, filed an **"Affidavit in Opposition"**, which is substantially as follows;

Para 1. *THAT I am the 1st named Defendant herein and duly authorised by my son the 2nd named Defendant to swear this affidavit.*

2. *THAT the Plaintiff is my elder brother.*

4. *THAT the Plaintiff invited me, my son and my parents to move onto the Plaintiff's property and he further advised my father to sell his property and build a separate two bedroomed house on the Plaintiff's lease.*

5. *THAT he further requested me to look after our elderly parents which I did until their demise. My father died in 2011 and my mother died in the year 2009.*

6. *THAT I gave approximately $5,000.00 (Five Thousand Dollars) to my father towards the construction of our house and he assured me that in the event of both my dad and mum passing away the house was to be mine.*

7. *THAT shortly after the death of my father; my mother had died earlier, the Plaintiff asked us to vacate our house as he wanted to rent the same.*

9. *THAT the Plaintiff filed Civil Action No. 22 of 2013 in the High Court at Lautoka which was dismissed with costs against us in the sum of $500.00 (Five Hundred Dollars). We have paid the said sum.*

PROMISSORY ESTOPPEL

14. *THE Plaintiff invited us to his land with a assurance that we could stay indefinitely. There was no indication that our licence to stay would determine on our parents demise.*

15. *THAT the Plaintiff allowed us to build on his land and he now wants the house for himself and this would be unjust enrichment.*

16. *THAT the Plaintiff is also estopped from evicting us by reason of his promise to us that we could stay indefinitely provided we paid $150.00 per month rental.*

OFFER OF SETTLEMENT
(WITHOUT PREJUDICE)

21. *THAT without prejudice to our right to challenge the Plaintiff's application we respectfully submit to this Honourable Court on a without prejudice basis that if the Plaintiff is to pay us the sum of $35,000.00 (Thirty Five Thousand Dollars) we shall vacate and relinquish all our claims to our house.*

22. *THAT alternatively, also on a without prejudice basis we respectfully submit that if the Plaintiff were to pay us the sum of $15,000.00 (Fifteen Thousand Dollars) we will dismantle our house and relocate.*

(4) The Plaintiff filed an **Affidavit in rebuttal** deposing *inter alia*;

Para 1. *THAT I am the Plaintiff in the action herein and crave to respond to the affidavit in response filed by the respondent.*

2. *THAT in so far as the content of this affidavit is within my personal knowledge it is true, in so far as it is not within my personal knowledge it is true to the best of my knowledge and information and belief.*

3. *THAT the Plaintiff denies the Respondents affidavit entirely and states that the Respondent on the 16th of June, 2016 appeared in person and informed Court she is willing to vacate the said premises.*

4. *THAT the learned Master queried the Respondent as to how much time she needed to vacate the said premises and was assisted by Counsel of the Plaintiff that they would not mind giving the Respondent a period of 30 days to vacate the said premises.*

5. *THAT the Respondent acknowledged the same and was also given 7 days to liaise with Legal Aid on the matter.*

6. *THAT the Respondent has failed to show cause in her response any entitlement she has on the subject property.*

7. *THAT I therefore seek the following Orders:-*

(a) *Order in terms of this application for immediate vacant possession*
(b) *Cost on a client indemnity basis*

(D) ANALYSIS

(1) This is an application brought under **Section 169 of the Land Transfer Act, [Cap 131]**.
Under Section 169, certain persons may summon a person in possession of land before a judge in chambers to show cause why that person should not be ordered to surrender possession of the land to the Claimant.

For the sake of completeness, **Section 169 of the Land Transfer Act,** is reproduced below;

> **169.** *The following persons may summon any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant:-*
>
> *(a)* *the last registered proprietor of the land;*
>
> *(b)* *a lessor with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or not any previous demand has been made for the rent;*
>
> *(c)* *a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired.*

I ask myself, under which limb of Section 169 is the application being made?

Reference is made to paragraph (3) of the affidavit in support of the Originating Summons.

> 3. *<u>THAT</u> I am the* ***last registered proprietor*** *of all that piece and parcel of land comprised in Housing Authority Sublease No. 240799, Lot 15 on DP No. 4188 situated in the province of Ba, Tikina of Vuda having an area of 27.5 perches (annexed herein and marked as annexure "JN1" is a copy of the Housing Authority Sublease)*

(Emphasis Added)

Section 169 (a) of the Land Transfer Act, Cap 131, requires the Plaintiff to be the last **registered proprietor** of the land.

The term "**<u>proprietor</u>**" is defined in the Land Transfer Act as "*the registered proprietor of land, or of any estate or interest therein*".

The term "**registered**" is defined in the **Interpretation Act**, Cap 7, as "*registered used with reference to a document or the title to any immovable property means registered under the provisions of any written law for the time being applicable to the registration of such document or title*"

According to the Housing Authority Sub-lease No- 240799 (annexure marked JN-1 referred to in the affidavit of the Plaintiff sworn on 18th May 2016) the Plaintiff is the last registered lessee of the subject land. There is no dispute between the parties as to the *'locus standi'* of the Plaintiff. The **Housing Authority Sub-lease No- 240799** is registered with the Registrar of Titles on 26th August 1986. According to the memorial of the Housing Authority Sub-lease No- 240799, the Plaintiff obtained registered title on 05th August 1993. Thus, it seems to me perfectly plain that the Plaintiff holds a registered lease and could be characterised as the last registered proprietor.

On the question of whether a **lessee** can bring an application under Section **169 (a) of the Land Transfer Act**, if any authority is required, I need only refer to the sentiments expressed by Master Robinson in "**Michael Nair v Sangeeta Devi**", Civil Action No: 2/12, FJHC, decided on 06.02.2013. The learned Master held;

> *"The first question then is under which ambit of section 169 is the application being made? The application could not be made under the second or third limb of the section since the applicant is the lessee and not the lessor as is required under these provisions. But is the applicant a registered proprietor? A proprietor under the Land Transfer Act means the registered proprietor of any land or of an estate or interest therein". The registration of the lease under a statutory authority, the iTLTB Act Cap 134, creates a legal interest on the land making the applicant the registered proprietor of the land for the purposes of the Land Transfer Act. He can therefore make an application under section 169 of the Land Transfer Act".*

The same rule was again applied by the learned Master in "**Nasarawaqa Co-operative Limited v Hari Chand**", Civil Action No: HBC 18 of 2013, decided on 25.04.2014. The learned Master held;

> *"It is clear that the iTLTB as the Plaintiff's lessor can take an action under section 169 to eject the Plaintiff. This is provided for under paragraphs [b] &[c]. For the lessor to be able to eject the tenant or the lessee it must have a registered lease. It is not in dispute that the Plaintiff holds a registered lease, the lease is an "Instrument of*

Tenancy" issued by the iTLTB under the Agricultural Landlord and Tenancy Act. It is for all intents and purposes a native lease and was registered on the 29 November 2012 and registered in book 2012 folio 11824. It is registered under the register of deeds. There is nothing in section 169 that prevents a lessor ejecting a lessee from the land as long as the lease is registered. How will the lessee then eject a trespasser if the lessor in the same lease can use section 169? The lessee under section 169 can eject a trespasser simply because the lessee is the last registered proprietor. The Plaintiff does not have to hold a title in fee simple to become a proprietor as long as he/she is the last registered proprietor. A proprietor is defined in the Land Transfer Act as "proprietor" means the registered proprietor of land, or of any estate or interest therein". The Plaintiff has an interest by virtue of the instrument of tenancy and therefore fits the above definition and can bring the action under section 169."

A somewhat similar situation as this was considered by His Lordship Justice K.A. Stuart in **Housing Authority v Muniappa** (1977, FJSC.) His Lordship held that the Plaintiff Housing Authority holds a registered lease therefore it could be characterised as the last registered proprietor.

In **Habib v Prasad** [2012] FJHC 22, Hon. Madam Justice AngalaWati said;

"The word registered is making reference to registration of land and not the nature of land. If the land is registered either in the Registrar of Titles Office or in the Deeds Office, it is still registered land. This land has been registered on 4th March, 2004 and is registered at the Registrar of Deeds Office, it is still registered land. The registration is sufficient to meet the definition of registered in the Interpretation

Act Cap 7:-

"Registered" used with reference to a document or the title to any immoveable property means registered under the provision of any written law for the time being applicable to the registration of such document or title".

Applying the aforesaid principles to the instant case, I am driven to the conclusion that the Plaintiff is the last registered proprietor of the land comprised in Housing Authority Sub-lease No- 240799.

(2) Pursuant to Section 170 of the Land Transfer Act;

(1) **the Summons shall contain a "description of the Land"**

AND

(2) **shall require the person summoned to appear in the court on a day not earlier than "sixteen days" after the service of Summons.**

The interval of not less than 16 days is allowed to give reasonable time for deliberations and to prevent undue haste or surprise.

I ask myself, are these requirements sufficiently complied with by the Plaintiff?

The Originating Summons filed by the Plaintiff does contain a description of the subject land. The subject land is sufficiently described. For the sake of completeness, the Originating Summons is reproduced below.

ORIGINATING SUMMONS

1. *The Defendant to show cause why she should not give up immediate vacant possession to the Plaintiff of that portion of all that piece and parcel of* ***land comprised in Housing Authority Sublease No. 240799, Lot 15 on DP No. 4188 situated in the province of Ba, Tikina of Vuda having an area of 27.5 perches*** *which the Defendant is occupying.*

2. *An Order that the Defendant give immediate vacant possession to the Plaintiff of that portion of all that piece and parcel of* ***land comprised in Housing Authority Sublease No. 240799, Lot 15 on DP No. 4188 situated in the province of Ba, Tikina of Vuda having an area of 27.5 perches*** *which the Defendant is occupying.*

(Emphasis Added)

In light of the above, I have no doubt personally and I am clearly of opinion that the first mandatory requirement of Section 170 of the Land Transfer Act has been complied with.

(3) Now comes a most relevant and, as I think, crucial second mandatory requirement of Section 170 of the Land Transfer Act.

The Originating Summons was returnable on 16th June 2016. According to the Affidavit of Service filed by the Plaintiff, the Originating Summons was served on the Defendants on 26th May 2016.

Therefore, the Defendants are summoned to appear at the Court on a date not earlier than "sixteen days" after the Service of Summons. Therefore, the second mandatory requirement of Section 170 of the Land Transfer Act too has been complied with.

(4) To sum up; having carefully considered the pleadings, evidence and oral submissions placed before this Court, it is quite possible to say that the Plaintiff has satisfied the threshold criteria spelt out in Section 169 and 170 of the Land Transfer Act. **The Plaintiff has established a prima facie right to possession.**

Now the onus is on the Defendants to establish a lawful right or title under which they are entitled to remain in possession.

In the context of the present case, I am comforted by the rule of law expounded in the following judicial decisions.

In the case of **Vana Aerhart Raihman v Mathew Chand**, Civil Action No: 184 of 2012, decided on 30.10.2012, the High Court held;

> *"There is no dispute between parties as to the locus standi of the Plaintiff, and once this is established the burden of proof shifted to the Defendant to prove his right to possession in terms of the Section 172 of the Land Transfer Act."*

In the case of **Morris HedstromLimited –v- Liaquat Ali** CA No: 153/87, the Supreme Court said that:-

> *"Under Section 172 the person summoned may show cause why he refused to give possession of the land and if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure.* ***That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence***

establishing a right or supporting an arguable case for such a right must be adduced."

(Emphasis is mine)

Also it is necessary to refer to Section 172 of the Land Transfer Act, which states;

> *"If the person summoned appears he may show cause why he refuses to give possession of such land and,* ***if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor,*** *mortgage or lessor or he may make any order and impose any terms he may think fit; Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:*
> *Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons".*

[Emphasis provided]

(5) Turning now to the application, at the commencement of the oral hearing before the court, counsel for the Plaintiff raised an objection to the Defendants Affidavit in Opposition. It was contended by Counsel for the Plaintiff that the Defendants 'Affidavit in Opposition' is defective as it has not been indorsed with the note as is mandatorily required under Order 41, rule 9 (2) of the High Court Rules, 1988.

It is true that the Affidavit in Opposition filed by the Defendants lacked the mandatory indorsement of Order 41, rule 9 (2).

However, I grant necessary leave pursuant to Order 41, rule 4 for the Affidavit in Opposition filed by the Defendants to be used in evidence in these proceedings.

See; **Chandrika Prasad v State (2001) (2) FLR 39**

(6) What are the Defendants reasons refusing to deliver vacant possession?

The application for vacant possession is opposed by the Defendants on various reasons expressly set out in the affidavit in opposition. There is a considerable amount of overlap between one reason and another and that it is more likely to be helpful for them to be looked at cumulatively rather than separately. As I understand the

objections, the Defendants reasons raise the question of **'promissory or equitable estoppel, equitable interest and unjust enrichment'**. The reasons fall within a very small compass.

Reference is made to paragraph (4), (5), (6), (7), (14) and (15) of the First Defendant's Affidavit in Opposition.

> *Para 4. THAT the Plaintiff invited me, my son and my parents to move onto the Plaintiff's property and he further advised my father to sell his property and build a separate two bedroomed house on the Plaintiff's lease.*
>
> *5. THAT he further requested me to look after our elderly parents which I did until their demise. My father died in 2011 and my mother died in the year 2009.*
>
> *6. THAT I gave approximately $5,000.00 (Five Thousand Dollars) to my father towards the construction of our house and he assured me that in the event of both my dad and mum passing away the house was to be mine.*
>
> *7. THAT shortly after the death of my father; my mother had died earlier, the Plaintiff asked us to vacate our house as he wanted to rent the same.*
>
> *PROMISSORY ESTOPPEL*
>
> *14. THE Plaintiff invited us to his land with a assurance that we could stay indefinitely. There was no indication that our licence to stay would determine on our parents demise.*
>
> *15. THAT the Plaintiff allowed us to build on his land and he now wants the house for himself and this would be unjust enrichment.*

(7) Let me now move to consider the first ground of objection raised by the Defendants i.e., **the promissory or equitable estoppel**

(Reference is made to paragraph (4), (5), (6) and (14) of the Defendants affidavit in opposition

> *Para 4. THAT the Plaintiff invited me, my son and my parents to move onto the Plaintiff's property and he further advised my father to sell his property and build a separate two bedroomed house on the Plaintiff's lease.*

> 5. *<u>THAT</u> he further requested me to look after our elderly parents which I did until their demise. My father died in 2011 and my mother died in the year 2009.*
>
> 6. *<u>THAT</u> I gave approximately $5,000.00 (Five Thousand Dollars) to my father towards the construction of our house and he assured me that in the event of both my dad and mum passing away the house was to be mine.*
>
> 14. *<u>THE</u> Plaintiff invited us to his land with a assurance that we could stay indefinitely. There was no indication that our licence to stay would determine on our parents demise.*

(8) The first ground of objection requires some examination of the law regarding **"Promissory or equitable estoppel."**

<u>Spry</u> in his <u>"Principles of Equitable Remedies" 4th Edition</u> 1990 page 179 sets out the basic principles of equitable proprietary estoppel as follows:

- *The Plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendants or expected that a particular legal relationship would exist between them and, in the latter case that the defendant would not be free to withdraw from the expected legal relationship.*
- *The Plaintiff has induced the defendant to adopt that assumption or expectation.*
- *The Plaintiff acts or abstains from acting in reliance on the assumption or expectation.*
- *The defendant knew or intended him to do so.*
- *The Plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled.*
- *The defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.*

Lord Kingsdown in the case of **<u>Ramsden v Dyson</u>** (1865) L.R. 1 H.L. 129 said at p. 140;

> *"If a man under a verbal agreement with a landlord for a certain interest in land or what amounts to the same thing under the expectation created or encouraged by the landlord, 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 any objections by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation."

Also at p. 140 Lord Cransworth L.C. said:

"If a stranger begins to build on any land supposing it to be his own and I perceiving his mistake, abstain setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land in which he had expended money on the supposition that the land was his own."

Promissory or equitable estoppel is described in <u>Halsburys Laws of England, Fourth Edition, Volume 16</u>, at paragraph 1514:

"When one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."

<u>Snell's Equity (13th Ed)</u>, at para 39 – 12 states that:

"Proprietary estoppel is one of the qualifications to the general rule that a person who spends money or improving the property of another has no claim to reimbursement or to any proprietary interest in the property".

Proprietary estoppel, unlike promissory estoppel, is permanent in its effect. It is capable even of conferring a right of action. For it to apply there must exist essential elements or conditions. The Court, in Denny v. Jensen [1977] NZLR 635 identified four conditions namely, as p.638.

"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 <u>In re Vendervell's Trust (No. 2) [1974] CH 269</u> describes the essential elements this way, at p. 301,

> *"... 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 wilfully passive in order to profit by the mistake".*

In **<u>Denny v. Jensen</u>** **[1977]** 1 NZLR 635 at 639, Justice White very aptly summarised 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 **<u>Plimmer v Willington City Corporation</u>** (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 **<u>Chalmers v Pardoe</u>** [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 **<u>Inwards v Baker</u>** [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 Salon LJJ agreed, said that all that was necessary:*
>
> *"... is that the licencee 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)

Hon. Mr Justice Deepthi Amaratunga observed in **Vishwa Nand v Rajendra Kumar** (Civil Action HBC 271 of 2012) that;

> *"The general rule, however is that "liabilities are not to be forced upon people behind their backs" and four conditions must be satisfied before proprietary estoppel applies.* ***There must be an expenditure, a mistaken belief, conscious silence on the part of the owner of the land and no bar to the equity."***
>
> (Emphasis Added)

Hon. Madam Justice Anjala Wati in **Wilfred Thomas Peter v Hira Lal and Farasiko** (Labasa HBC 40 of 2009) held that;

> *"I must analyse whether the four conditions have been met for the defence of proprietary estoppel to apply. The conditions are:*
>
> *i. An expenditure*
> *ii. A mistaken belief*
> *iii. Conscious silence on the part of the owner of the land*
> *iv. No bar to the equity*

Returning back to the case before me, it is not disputed that the subject land is 'Housing Authority Sub-lease' and the Plaintiff is the last registered lessee. The Housing Authority is the lessor.

Clause 2 of the Housing Authority Sub-lease No- 240799 (Annexure marked JN-1 referred to in the Affidavit of Plaintiff) provides;

"The lessee shall not transfer ,mortgage, assign ,sublet or part with the possession of or alienate or deal with the demised land or any building thereon or any part thereof without the written consent of the lessor first had and obtained which consent may be withheld in the absolute discretion of the lessor ".

In my view, the "arrangement" entered into between the Plaintiff and the Defendants amounted to granting the Defendants permission to enjoy occupation of the land comprised in the Housing Authority sub-lease and to erect a dwelling house thereon as the Defendants wished. It is true that the "arrangement" did not amount to a formal sub-lease of the land or to a formal transfer of the Plaintiff's (lessees) interest in the land comprised in the Housing Authority Sub- lease. The least possible legal effect which in my opinion could be given to this arrangement would be to describe it as a

licence to occupy coupled with possession, granted by the lessee (Plaintiff) to the Defendants.

In my view, the granting of such a licence and possession constitutes 'dealing with the demised land' without the written consent of the head lessor (Housing Authority) first had and obtained. It was not disputed that the Housing Authority has not given written consent to the arrangement entered into between the Plaintiff and the Defendants.

Thus, the purported arrangement is illegal and unenforceable as a consequence of the operation of Clause 2 of the Housing Authority Sub-lease No:- 240799. The purported arrangement is entered into in contravention of Clause 2 of the Housing Authority sub-lease.

Thus, the purported arrangement is null and void *ab initio* and has no effect or force in the eyes of the law.

The Defendants cannot plead promissory or equitable estoppel due to the illegality of the arrangement.

Moreover, the Defendants get no equity by reasons of their expenditure (viz, the payment of $5000.00 for the construction of the dwelling house and the payment of rentals) on the land due to the illegality in the purported arrangement.

The consent of the Housing Authority was admittedly not obtained prior to entering into the purported arrangement, which thus becomes unlawful and acquires all the attributes of illegality. An equitable charge or promissory estoppel or equity cannot be brought into by an unlawful transaction and the Defendants claim to such a charge must therefore fail.

One which I think worth mentioning is that the Plaintiff's claim for possession is based on the independent and untainted grounds of his registered ownership.

The Plaintiff being the registered owner of the land is entitled to recover possession because his right to possession does not depend on the illegal arrangement but rested on his registered ownership and the Defendants cannot rely on the arrangement because of its illegality they cannot justify their remaining in possession.

Therefore, I reject the first ground of objection as being wholly lacking in substance.

(9) One word more, the Plaintiff obtained registered title on 05th August 1993 and his title is not subject to an 'equitable claim' or 'encumbrance', because at the time of registration there was no any legal agreement affecting the subject land or an agreement which is enforceable either at law or in equity. There is no valid contract or an agreement registered against the Title of the Plaintiff.

As I understand the affidavit in opposition, the Defendants do not allege **fraud** against the Plaintiff.
Therefore, I am clearly of the opinion that the Plaintiff's title cannot be impeached. Section 39 of the Land Transfer Act provides that a registered proprietor, except in case of Fraud, holds the land free from all encumbrances except those registered against title.

Returning back to the case before me, there is no evidence whatsoever that the Plaintiff had acquired his registered title to the land through fraud; and in fact no allegation of fraud has been made against him. Thus, I would hold that the title of the Plaintiff to the subject Land is not subject to any interest, equitable or otherwise, of the Defendants. **Therefore, the first ground of objection fails.**

In this regard, I am comforted by the following legislative provisions and the rule of law expounded in the following judicial decisions.

Sections 38 and 39 (1) of the Land Transfer Act, can be regarded as the basis of the concept of "indefeasibility of title" of a registered proprietor. Under Torrens System of land law the registration is everything and only exception is **fraud.**

I should quote Section 38 and 39 (1) of the **Land Transfer Act**, which provides;

Section 38 provides;

> *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.*

Section 39 (1) provides;

> *"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 if the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except...*

I am conscious of the fact that **Section 40** of the Land Transfer Act seeks to dispel Notice of a Trust or unregistered interest in existence in the following manner;

> *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, or to see to the application of the purchase money or any 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."*

(Emphasis added)

With regard to the concept of "**indefeasibility of title of a registered proprietor**", the following passage from the case of **"Eng Mee Young and Others (1980) AC 331** is apt and I adopt it here;

> *"The Torrens system of land registration and conveyancing as applied in Malaya by the National Land Code, has as one of its principle objects to give certainty to land and registrable interests in land. Since the instant case is concerned with Title to the land itself their Lordships will confine their remarks to this, though similar principles apply to other registrable interests. By s.340 the title of any person to land of which he is registered as proprietor is indefeasible except in cases of fraud, forgery or illegality and even in such cases a bond fide purchase for value can safely deal with the registered proprietor and will acquire from him on indefensible registered title."*

(10) **Suffice it to say that the Defendants stance will not stand as, Section 59 (d) of the 'Indemnity, Guarantee and bailment Act' (Cap 232)** states that no action shall be brought upon **any contract or sale of lands or any interest** in them unless the agreement upon which such action is brought or a memorandum thereof is in writing.

Quite plainly this provision is designed to prevent fraud.

No such writing is in evidence in the present case. There is no shred of evidence tending to establish such writing. Accordingly, the purported arrangement is invalid and unenforceable.

For the sake of completeness, Section 59 (d) of the act is reproduced below.

> ***59.*** ***No action shall be brought-***
>
> *(a)* ………………………
> *(b)* ………………………
> *(c)* ………………………
> *(d)* ***upon any contract or sale of lands,*** *tenements or hereditaments or any interest in or concerning them; or*
>
> *(e)* ………………………………
>
> ***Unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged there or some other person thereunto by him lawfully authorised.***
>
> (Emphasis added)

(11) Let me now move to consider the **second ground of objection** i.e, **unjust enrichment.** It is not disputed that the construction of a dwelling house on the land by the Defendants and the subsequent payment of rentals to the Plaintiff lacked the knowledge and the prior consent of the Housing Authority as head lessor. Thus, the issues of compensation from improvements cannot justify continual occupation of the property. Any prejudice to the Defendants from the improvements to the land they have made can be dealt with by way of a separate action against the landlord seeking compensation for those improvements. **As a matter of equity, I consider the Defendants would be entitled to at least some compensation. The Defendants should pursue such claims by separate proceedings. The fact that improvements were made is not really an answer to the Plaintiffs application for vacant possession. It is for the Defendants in occupation to establish their title if they are to defeat the legal title which the Plaintiff clearly has.**

The Fiji Court of Appeal in **Ram Chand v Ram Chandar, Appeal No:- ABU 0021, 2002** observed that the mere fact that a tenant carries out improvements without the consent of his or her landlord does not give him a right to continue occupation of the land, if the landlord is otherwise lawfully entitled to it. The fact that improvements are made is not really an answer to a landlord's application for possession.

Therefore, the second ground of objection fails.

(12) To sum up, for the reasons which I have endeavoured to explain, it is clear beyond question that the Defendants have failed to show cause to remain in possession as required under Section 172 of the Land Transfer Act.

At this point, I cannot resist in reiterating the judicial thinking reflected in the following judicial decisions;

In the case of **Morris Hedstrom Limited v Liaquat Ali,** CA No, 153/87, the Supreme Court held,

> *"Under Section 172 the person summonsed may show cause why he refused to give possession of the land if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure.* ***That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for a right must be adduced."***

(Emphasis is mine)

In **Shankar v Ram,** (2012) FJHC 823; HBC 54.2010, the Court held;

> *"What the Defendant needs to satisfy is not a fully – fledged right recognized in law, to remain possession but some tangible evidence establishing a right or some evidence supporting an arguable case for such a right to remain in possession. So, even in a case where the Defendant is unable to establish a complete right to possession, if he can satisfy an arguable case for a right*

still he would be successful in this action for eviction, to remain in possession."

Being guided by those words, I think it is right in this case to say that the Defendants have failed to adduce some tangible evidence establishing a right or supporting an arguable case for such a right. It is not disputed that at the time the Plaintiff commenced the proceedings he was the registered owner of the Housing Authority Sub-lease No- 240799. Under Section 169, the Plaintiff is entitled to seek possession of the property on the **strength of his title**. His right to possession does not depend on the purported arrangement but on his **registered ownership**. The purported arrangement is of no consequence to a claim by the Plaintiff based on his being the **registered owner.**

Thus, I disallow the grounds adduced by the Defendants refusing to deliver vacant possession.

(13) Finally, the Plaintiff moved for **'indemnity costs'.**

It is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing **"indemnity costs"**.

Order 62, Rule (37) of the High Court Rules empower courts to award indemnity costs **at its discretion.**

For the sake of completeness, Order 62, Rule (37) is reproduced below.

Amount of Indemnity costs (O.62, r.37)

37.- (1) The amount of costs to be allowed shall (subject to rule 18 and to any order of the Court) be in the discretion of the taxing officer.

G.E. Dal Pont, in "Law of Costs", Third Edition, writes at Page 533 and 534;

'Indemnity' Basis

"Other than in the High Court, Tasmania and Western Australia, statute or court rules make specific provision for taxation on an

indemnity basis. Other than in the Family Law and Queensland rules – which define the 'indemnity basis' in terms akin to the traditional 'solicitor and client basis' – the 'indemnity basis' is defined in largely common terms to cover all costs incurred by the person in whose favour costs are ordered except to the extent that they are of general law concept of 'indemnity costs'. The power to make such an order in the High Court and Tasmania stems from the general costs discretion vested in superior courts, and in Western Australia can arguably moreover be sourced from a specific statutory provision.

Although all costs ordered as between party and party are, pursuant to the 'costs indemnity rule', indemnity costs in one sense, an order for 'indemnity costs', or that costs be taxed on an 'indemnity basis', is intended to go further. Yet the object in ordering indemnity costs remains compensatory and not penal. References in judgments to a 'punitive' costs order in this context must be seen against the backdrop of the reprehensible conduct that often justifies an award of indemnity costs rather than impinging upon the compensatory aim. Accordingly, such an order does not enable a claimant to recover more costs than he or she has incurred."

Now let me consider what authority there is on this point.

The principles by which Courts are guided when considering whether or not to award indemnity costs are discussed by Hon. Madam Justice Scutt in "**Prasad v Divisional Engineer Northern** (No. 02)" (2008) FJHC 234.

As to the **"General Principles"**, Hon. Madam Justice Scutt said this;

- *A court has 'absolute and unfettered' discretion vis-à-vis the award of costs but discretion 'must be exercised judicially':* ***Trade Practices Commission v. Nicholas Enterprises*** *(1979) 28 ALR 201, at 207*
- *The question is always 'whether the facts and circumstances of the case in question warrant making an order for payment of costs other than by reference to party and party':* ***Colgate-Palmolive Company v. Cussons Pty Ltd*** *[1993] FCA 536; (1993) 46 FCR 225, at 234, per Sheppard, J.*
- *A party against whom indemnity costs are sought 'is entitled to notice of the order sought':* ***Huntsman Chemical Company Australia Limited v. International Cools Australia Ltd*** *(1995) NSWLR 242*
- *That such notice is required is 'a principle of elementary justice' applying to both civil and criminal cases:* ***Sayed Mukhtar Shah v. Elizabeth Rice and***

Ors (*Crim Appeal No. AAU0007 of 1997S, High Court Crim Action No. HAA002 of 1997, 12 November 1999*), *at 5, per Sir Moti Tikaram, P. Casey and Barker, JJA*

- *'... neither considerations of hardship to the successful party nor the over-optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs. But additional costs may be called for if there has been reprehensible conduct by the party liable':* **State v. The Police Service Commission; Ex parte Beniamino Naviveli** *(Judicial Review 29/94; CA Appeal No. 52/95, 19 August 1996), at 6*
- *Usually, party/party costs are awarded, with indemnity costs awarded only 'where there are exceptional reasons for doing so':* **Colgate-Palmolive Co. v. Cussons Pty Ltd** *at 232-34;* **Bowen Jones v. Bowen Jones** *[1986] 3 All ER 163;* **Re Malley SM; Ex parte Gardner** *[]2001] WASCA 83;* **SDS Corporation Ltd v. Pasonnay Pty Ltd &Anor** *[2004] WASC 26 (S2) (23 July 2004), at 16, per Roberts-Smith, J.*
- *Costs are generally ordered on a party/party basis, but solicitor/client costs can be awarded where 'there is some special or unusual feature of the case to justify' a court's 'exercising its discretion in that way':* **Preston v. Preston** *[1982] 1 All ER 41, at 58*
- *Indemnity costs can be ordered as and when the justice of the case so requires:* **Lee v. Mavaddat** *[2005] WASC 68 (25 April 2005), per Roberts-Smith, J.*
- *For indemnity costs to be awarded there must be 'some form of delinquency in the conduct of the proceedings':* **Harrison v. Schipp** *[2001] NSWCA 13, at Paras* ***[1], [153]***
- *Circumstances in which indemnity costs are ordered must be such as to 'take a case out of the "ordinary" or "usual" category ...":* **MGICA (1992) Ltd v. Kenny & Good Pty Ltd (No. 2)** *(1996) 140 ALR 707, at 711, per Lindgren J.*
- *'... it has been suggested that the order of costs on a solicitor and client basis should be reserved to a case where the conduct of a party or its representatives is so unsatisfactory as to call out for a special order. Thus, if it represents an abuse of process of the Court the conduct may attract such an order':* **Dillon and Ors v. Baltic Shipping Co. ('The Mikhail Lermontov')** *(1991) 2 Lloyds Rep 155, at 176, per Kirby, P.*
- *Solicitor/client or indemnity costs can be considered appropriately 'whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known ... he had no chance of success':* **Fountain Selected Meats (Sales) Pty Ltd v. International Produce Merchants Ltd & Ors** *[1988] FCA 202; (1998) 81 ALR 397, at 401, per Woodward, J.*
- *Albeit rare, where action appears to have commenced/continued when 'applicant ... should have known ... he had no chance of success', the presumption is that it 'commenced or continued for some ulterior motive or ... [in] willful disregard of the known facts or ... clearly established law' and the court needs 'to consider how it should exercise its unfettered discretion':* **Fountain Selected Meats**, *at 401, per Woodward, J.*

- *Where action taken or threatened by a defendant 'constituted, or would have constituted, an abuse of the process of the court', indemnity costs are appropriate:* ***Baillieu Knight Frank (NSW) Pty Ltd v. Ted Manny Real Estate Pty Ltd*** *(1992) 30 NSWLR 359, at 362. per Power, J.*
- *Similarly where the defendant's actions in conducting any defence to the proceedings have involved an abuse of process of the court whereby the court's time and litigant's money has 'been wasted on totally frivolous and thoroughly unjustified defences':* ***Baillieu Knight Frank****, at 362, per Power, J.*

- *Indemnity costs awarded where 'the defendant had prima facie misused the process of the court by putting forward a defence which from the outset it knew was unsustainable ... such conduct by a defendant could amount to a misuse of the process of the court':* ***Willis v. Redbridge Health Authority*** *(1960) 1 WLR 1228, at 1232, per Beldam, LJ*
- *'Abuse of process and unmeritorious behaviour by a losing litigant has always been sanctionable by way of an indemnity costs order inter parties A party cannot be penalised [for] exercising its right to dispute matters but in very special cases where a party is found to have behaved disgracefully or where such behaviour is deserving of moral condemnation, then indemnity costs may be awarded as between the losing and winning parties':* ***Ranjay Shandil v. Public Service Commission*** *(Civil Jurisdiction Judicial Review No. 004 of 1996, 16 May 1997), at 5, per Pathik, J. (quoting Jane Weakley, 'Do costs really follow the event?' (1996)* ***NLJ*** *710 (May 1996))*
- *'It is sufficient ... to enliven the discretion to award [indemnity] costs that, for whatever reasons, a party persists in what should on proper consideration be seen to be a hopeless case':* ***J-Corp Pty Ltd v. Australian Builders Labourers Federation Union of Workers (WA Branch)(No. 2)*** *(1993) 46 IR 301, at 303, per French, J.*
- *'... where a party has by its conduct unnecessarily increased the cost of litigation, it is appropriate that the party so acting should bear that increased cost. Persisting in a case which can only be characterised as "hopeless" ... may lead the court to [determine] that the party whose conduct gave rise to the costs should bear them in full':* ***Quancorp Pty Ltd &Anor v. MacDonald &Ors****[1999] WASC 101, at Paras* ***[6]-[7]****, per Wheeler, J.*
- *However, a case should not be characterised as 'hopeless' too readily so as to support an award of indemnity costs, bearing in mind that a party 'should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain' for 'uncertainty is inherent in many areas of law' and the law changes 'with changing circumstances':* ***Quancorp Pty Ltd &Anor v. MacDonald &Ors*** *[1999] WASC 101, at Paras* ***[6]-[7]****, per Wheeler, J.*
- *The law reports are replete with cases which were thought to be hopeless before investigation but were decided the other way after the court allowed the matter to be tried:* ***Medcalf v. Weatherill and Anor*** *[2002] UKHL 27 (27 June 2002), at 11, per Lord Steyn*
- *Purpose of indemnity costs is not penal but compensatory so awarded 'where one party causes another to incur legal costs by misusing the process to delay*

or to defer the trial and payment of sums properly due'; the court 'ought to ensure so far as it can that the sums eventually recovered by a plaintiff are not depleted by irrecoverable legal costs': ***Willis v. Redbridge Health Authority,*** *at 1232, per Beldam, LJ*

- *Actions of a Defendant in defending an action, albeit being determined by the trial judge as 'wrong and without any legal justification, the result of its own careless actions', do 'not approach the degree of impropriety that needs to be established to justify indemnity costs ... [R]egardless of how sloppy the [Defendant] might well have been in lending as much as $70,000 to [a Plaintiff], they had every justification for defending this action ... The judge was wrong to award [indemnity costs] in these circumstances. He should have awarded costs on the ordinary party and party scale':* ***Credit Corporation (Fiji) Limited v. Wasal Khan and MohdNasir Khan*** *(Civil Appeal No. ABU0040 of 2006S; High Court Civil Action No. HBC0344 of 1998, 8 July 2008), per Pathik, Khan and Bruce, JJA, at 11*

Defining 'Improper', 'Unreasonable' or 'Negligent' Conduct in Legal Proceedings as Guide to Indemnity Costs Awards: *Cases where 'wasted costs' rules or 'useless costs' principles have been applied against solicitors where their conduct in proceedings has led to delay and/or abuse of process can provide some assistance in determining whether conduct in proceedings generally may be such as to warrant the award of indemnity costs. These cases specifically relate to solicitors' conduct rather than directly touching upon the indemnity costs question; nonetheless the analysis or findings as to what constitutes conduct warranting an award of costs can be helpful. See for example:*

- ***Ridehalgh v. Horsefield and Anor****[1994] Ch 205*
- ***Medcalf v. Weatherill and Anor****[2002] UKHL 27 (27 June 2002)*
- ***Harley v. McDonald*** *[2001] 2 AC 678*
- ***Kemajuan Flora SDN Bh v. Public Bank BHD &Anor****(High Court Malaya, Melaka, Civil Suit No. 22-81-2001, 25 January 2006)*
- ***Ma So So Josephine v. Chin Yuk Lun Francis and Chan Mee Yee*** *(FACV No. 15 of 2003, Court of Final Appeal Hong Kong Special Administrative Region, Final Appeal No. 15 of 2003 (Civil)(On Appeal from CACV No. 382 of 2002, 16 September 2004)*
- ***SZABF v. Minister for Immigration (No. 2)*** *[2003] FMCA 178*
- ***Heffernan v. Byrne*** *[2008] FJCA 7; ABU0027.2008 (29 May 2008)*

Some of the matters referred to include:

- *At the hearing stage, the making of or persisting in allegations made by one party against another, unsupported by admissible evidence 'since if there is not admissible evidence to support the allegation the court cannot be invited to find that it has been proved, and if the court cannot be invited to find that the allegation has been proved the allegation should not be made or should be withdrawn:* ***Medcalf v. Weatherill and Anor,*** *at 8, per Lord Bingham*

- *At the preparatory stage, in relation to such allegations – not necessarily having admissible evidence but there should be 'material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it:* ***Medcalf v. Weatherill and Anor****, at 8, per Lord Bingham*
- *Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples of wasting the time of the court or an abuse of its processes resulting in excessive or unnecessary costs to litigants:* ***Harley v. McDonald****, at 703, Para* ***[50]*** *(English Privy Council)*
- *Starting an action knowing it to be false is an abuse of process and may also involve knowingly attempting to mislead the court:* ***Ma So So Josephine v. Chin Yuk Lun Francis and Chan Mee Yee*** *(FACV No. 15 of 2003, Court of Final Appeal Hong Kong Special Administrative Region, Final Appeal No. 15 of 2003 (Civil)(On Appeal from CACV No. 382 of 2002, 16 September 2004), at Para* ***[43]****, per Ribeiro, PJ (Li, CJ, Bokhary and Chan, PJ and Richardson, NPJ concurring)*
- *Lending assistance to proceedings which are an abuse of the process of the court – using litigious procedures for purposes for which they were not intended, 'as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest' or evading rules intended to safeguard the interests of justice 'as by knowingly failing to make full disclosure on ex parte application[s] or knowingly conniving at incomplete disclose rue of documents':* ***Ridehalgh v. Horsefield*** *[1994] Ch 205, at 234, per Bingham, MR*
- *Initiating or continuing multiple proceedings which amount to abuse of process:* ***Heffernan v. Byrne*** *[2008] FJCA 7; ABU0027.2008 (29 May 2008), per Hickie, J.*

Specific Circumstances of Grant/Denial Indemnity Costs: *Specific instances supporting or denying the award of indemnity costs include:*

- *Indemnity costs follow per a '****Calderbank*** *offer', that is, where a party makes an offer or offers prior to trial, which is/are refused, and that party succeeds at trial on a basis which is better than the prior offer:* ***Calderbank v. Calderbank****[1975] 3 WLR 586*
- *However, no indemnity costs awarded where* ***Calderbank*** *letter contains no element of compromise, making it not unreasonable for the party not to accept the offer. The question is '... whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs ...':* ***SMEC Testing Services Pty Ltd v. Campbelltown City Council*** *[2000] NSWCA 323,*

at Para[37], per Giles, JA Hence, if the offer is not a genuine offer of compromise and/or there is no appropriate opportunity provided to consider and deal with it, then no indemnity costs follow: **Richard Shorten v. David Hurst Constructions P/L; D. Hurst Constructions v. RW Shorten** [2008] Adj LR 06/17 (17 June 2008), per Einstein, J. (NSW Supreme Court, Equity Division T&C List); **Leichhardt Municipal Council v. Green** [2004] NSWCA 341, at Paras**[21]-24]**, **[36]**, per Santow, JA, Stein, JA (concurring); **Herning v. GWS Machinery Pty Ltd (No. 2)** [2005] NSWCA 375, at Paras[4]-[5], per Handley, Beazley and Basten, JJA; **Elite Protective Personnel v. Salmon** [2007] NSWCA 322, at Para **[99]; Donnelly v. Edelsten**[1994] FCA 992; [1994] 49 FCR 384, at 396

- *Indemnity costs awarded:*
  - *upon a winding-up petition's being presented on a debt known to the petitioner to be genuinely disputed on substantial grounds;*
  - *the clearly established law being that a winding up order will not be granted in such circumstances, meaning that the petitioner 'had no chance of successfully obtaining a winding up order';*
  - *where in these circumstances the filing of the petition 'constituted a deliberate tactical manipulation of the winding up process by the [petitioner, the State Government Insurance Commission 'SGIC'] for the purposes of bringing very substantial pressure to bear' on Bond Corp Holdings 'BCH';*
  - *this in the circumstances meant that the 'filing of the petition was an abuse of process of the court in the true sense of that expression';*
  - *the discretion to stay the petition should not be exercised because this would 'cause BCH serious harm' meaning it would be 'extremely difficult for BCH to be able to conduct its business normally if the petition [were] not dismissed': citing **Re Lympne Investments** [1972] 1 WLR 523, at 527, per Megarry, J.; also **Re Glenbawn Park Pty Ltd**[1977] 2 ACLR 288, at 294, per Yeldham, J.*
  - *an abuse of process 'having been established in the circumstances outlined, justice requires the award of solicitor and client, or, rather, "indemnity" costs' so that 'the SGIC should be ordered to pay all the costs incurred by BCH except insofar as they are of an unreasonable amount or have been unreasonably incurred, so that, subject to [these] exceptions, BCH be completely indemnified by the SGIC for its costs', citing **Foundation Selected Meats (Sales) Pty Ltd v. International Produce Merchants** [1988] FCA 202; (1988) 81 ALR 397, at 410, per Woodward J.: **Re Bond Corp Holdings Ltd** (1990) 1 ACSER 350, at 13, per Ipp, J.*

- *Indemnity costs are appropriate where an applicant (in an unfair dismissal):*
  - *'insists' over a respondents' objections that an application should proceed to trial rather than await the outcome of other possible litigation (including a police investigation);*
  - *fails repeatedly, despite allowances, to meet deadlines for lodgment of a witness statement;*
  - *fails to advise her lawyers of her whereabouts so denying them of the ability to inform the court of reasons for seeking an unqualified adjournment less than a week prior to trial;*
  - *fails to comply with directions to provide a current address, consult a medical specialist and obtain a report of fitness to attend the trial;*
  - *fails to appear at the final hearing when on notice that the application will be dismissed in event of such failure:* ***Nicole Pender v. Specialist Solutions Pty Ltd*** *(No. B599 of 2004. 17 May 2005), per Bloomfield, Commissioner*

- *Indemnity costs denied as against a Plaintiff who discontinued a claim for a permanent injunction to restrain a Defendant's industrial action, where the Defendant had filed a chamber summons seeking to have the Plaintiff's claim struck out as an abuse of process:* ***Cooperative Bulk Handling Ltd v. Australian Manufacturing Workers Union (WA Branch)****(Unreported, WASC, Lib. No. 970190, 30 April 1997), per Wheeler, J.*

- *Indemnity costs cannot be awarded in a criminal appeal, albeit 'in criminal appeals, as in civil cases, unreasonable conduct by the unsuccessful party might increase a usual award':* ***Sayed Mukhtar Shah v. Elizabeth Rice and Ors*** *(Crim Appeal No. AAU0007 of 1997S, High Ct Crim Action No. HAA02 of 1997, 12 November 1999), at 4, per Sir Moti Tikaram, P., Casey and Barker, JJA*

- *Indemnity costs awarded then reversed on appeal where solicitor held liable for costs (under a 'wasted costs' order) in initiating action for clients where solicitor taken to have known that the basis of the clients' action was wholly false"*

I observed is that the oral and written submissions of Counsel for the Plaintiff has not addressed why *'indemnity costs'* should be awarded **in the current proceedings for vacant possession.**

The Court has not been pointed to any "*reprehensible conduct*" in relation to the **current proceedings for vacant possession**. Indeed, as was set out by in ***Carvill v HM Inspector of Taxes*** (Unreported, United Kingdom Special Commissioners of Income Tax, 23 March 2005,Stephen Oliver QC and Edward Sadler)(Bailii:[2005]UKSPCSPC00468,http://www.bailii.org/cgibin/markup.cgi?doc=/uk/cases/UKSC/2005/SPC00468.html),"*reprehensible conduct*" requires two separate considerations (at paragraph 11):

"The party's conduct must be unreasonable, but with the further characteristic that it is unreasonable to an extent or in a manner that it earns some implicit expression of disapproval or some stigma."

I have not found, any evidence of "reprehensible conduct" by the Defendants in relation to the present proceedings before me.

In my view, the Defendants have done no more than to exercise their legal right to contest the Plaintiff's Summons for vacant possession. This simply does not approach the degree of impropriety that needs to be established to justify indemnity costs. The Defendants are not guilty of any conduct deserving of condemnation as disgraceful or as and abuse of process of the court and ought not to be penalised by having to pay indemnity costs.

In the context of the present case, I am comforted by the rule of law enunciated in the following decisions;

In **Ranjay Shandill v Public Service Commission** [Civil Jurisdiction Judicial Review No:- 004 of 1996] Pathik J held;

> *"[A party] cannot be penalised [for] exercising its right to dispute matters but in very special cases where a party is found to have behaved disgracefully or where such behaviour is deserving of moral condemnation, then indemnity costs may be awarded as between the losing and winning parties."*

In **Quancorp PVT Ltd &0020Anor v. MacDonald &Ors** [1999] WASC 101, Wheeler J held;

> *".... 'hopeless' too readily so as to support an award of indemnity costs, bearing in mind that a party 'should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain' for 'uncertainty is' inherent in many areas of law' and the law changes' with changing circumstances"*

Furthermore, is it a correct exercise of the Court's discretion to direct the Defendants to pay costs on an indemnity basis to the Plaintiff because the Plaintiff had undergone hardships during the present proceedings for vacant possession?

The answer to the aforesaid question is in the negative which I base on the following judicial decisions;

- **Public Service Commission v Naiveli Fiji Court of Appeal decision, No: ABU 0052 11/955, (1996) FJCA 3**

- **Thomson v Swan Hunter and Wigham Richardson Ltd, (1954) ,(2) AER 859**

- **Bowen Jones v Bowen Jones (1986) 3 AER 163**

In **"Public Service Commission v Naiveli" ;**(*supra*),The Fiji Court of Appeal held;

> ***"However, neither considerations of hardship to the successful party nor the over optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs.*** *But additional costs may be called for if there has been reprehensible conduct by the party liable – see the examples discussed in Thomson v. Swan Hunter and Wigham Richardson Ltd [1954] 2 All ER 859 and Bowen-Jones v. Bowen Jones [1986] 3 All ER 163."*

(Emphasis added)

On the strength of the authority in the aforementioned three (03) cases, I venture to say beyond a per-adventure that neither considerations of hardship to the Plaintiff nor the over optimism of the unsuccessful Defendants would by themselves justify an award beyond party and party costs.

(E) CONCLUSION

Having had the benefit of oral submissions for which I am most grateful and after having perused the affidavits, written submissions and the pleadings, doing the best that I can on the material that is available to me, I have no doubt personally and I am clearly of the opinion that the Defendants have failed to show cause to remain in possession as required under Section 172 of the Land Transfer Act.

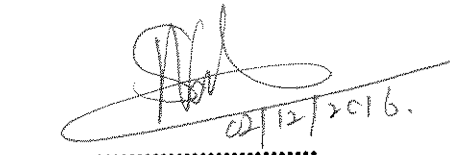
In these circumstances, I am driven to the conclusion that the Plaintiff is entitled to an order as prayed in Summons for immediate vacant possession.

(F) ORDERS

(1) The Defendants to deliver immediate vacant possession of the land comprised in **Housing Authority Sub-lease No- 240799, Lot-15 on DP No- 4188.**

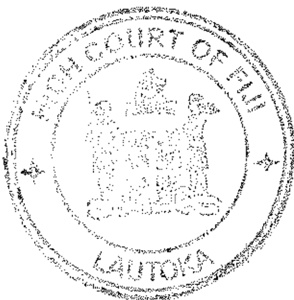
(2) The Plaintiff's application for indemnity costs is refused.

(3) The Defendants to pay costs of $750.00 (summarily assessed) to the Plaintiff within 14 days hereof.



....

Jude Nanayakkara
Master



At Lautoka
02nd December 2016.