IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

Petition No. CBV 00016 of 2018
[On Appeal from the Fiji Court of Appeal No. ABU 0007 of 2014]

BETWEEN : **ALI'S CIVIL ENGINEERING LIMITED**

First Petitioner

AND : **VITIANA TIMBERS LIMITED**

Second Petitioner

HABIB BANK LIMITED

First Respondent

CHALLENGE ENGINEEING LIMITED

Second Respondent

NATIONAL BANK OF FIJI

Third Respondent

DIRECTOR OF LANDS AND SURVEYOUR GENERAL

Fourth Respondent

REGISTRAR OF TITLES

Fifth Respondent

ATTORNEY GENERAL

Sixth Respondent

Coram : **Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court**
Hon. Mr. Justice Brian Keith, Judge of the Supreme Court
Hon. Mr. Justice Kankani Chitrasiri, Judge of the Supreme Court

Counsel : **Mr. V. Prasad for the Petitioners**
Ms. S. Devan for the 1st Respondent
Mr. S. Deo and Mr. D. Sharma for 2nd and 3rd Respondents
Ms. B. Narayan and Ms. M. Motofaga for 5th and 6th Respondents

Dates of Hearing : **16th and 17th October 2019**

Date of Judgment : **1st November 2019**

JUDGMENT

Saleem Marsoof, J

[1] This application for leave to appeal arises from a Judgment on Admission pronounced by the Suva High Court on 11th March 2013 pursuant to Order 27 Rule 3 of the High Court Rules 1988, which was set aside on appeal by the Court of Appeal by its impugned judgment dated 5th October, 2018.

[2] By its timely petition dated 24th October 2018, the 1st and 2nd Petitioners, Ali's Civil Engineering Ltd., (hereinafter sometimes referred to as "ACEL") and Vitiana Timbers (Pvt) Ltd., have sought leave to appeal against the judgment of the Court of Appeal on the several grounds set out in paragraph 4 of its petition, and prayed further that the said judgment of the Court of Appeal be wholly set aside and the judgment of the High Court be reinstated.

[3] Before considering the grounds urged on behalf of the Petitioners for leave to appeal, it will be prudent to briefly outline the salient facts of the case.

Outline of Salient Facts

[4] The property which constitutes the subject matter of the dispute between the Petitioners and the several Respondents is located in State foreshore in the District of Naitasiri, approximately 5 kilometers north from Suva city on Nokonoko Road abutting the Bailey Bridge, in an old established residential location commonly known as Laucala Beach Estate.

[5] It would appear that the 4th Respondent Director of Lands, by his Approval Notice of Lease dated 20th July 1989 and bearing No. L.D. 60/511, approved the application of one Kitione Namakadre of Namakadre Mobile Enterprise for the lease of an extent of land approximately 3500 square meters out of Laucala Beach Estate depicted as lot 2 on Plan DSS 1116 for a period of 10 years commencing 1st August 1989 for a consideration of FJ$ 100.00.

[6] On 3rd January 1994, the said Kitione Namakadre transferred all his rights, powers, title and interest in the said land for $20,000.00 to the 1st Petitioner, ACEL, with the consent of the Director of Lands, which transfer was registered by the Director of Lands on 5th January 1994.

[7] ACEL, with the consent of the Director of Land obtained on 2nd March 1999, granted a collateral mortgage to the 1st Habib Bank Ltd., for a principal sum of $700,000.00 over the said land to secure loan facilities granted by the said Bank to Valebasoga Tropikboards Ltd.,(hereinafter sometimes referred to as "VTBL") and the said Mortgage bearing No. 6993 which appears to have been executed on 3rd August 1999, was registered on 11th November 1999 with the Registrar of Titles.

[8] It is material to note that the following particulars of the land subjected to the said Mortgage No. 6993 are set out on the first page of the mortgage:-

Title	Number	Description	Province or Island	District or Town	A R E A
L.D	60/511	LOT 2 ON PLAN DSS 1116 LAUCALA BEACH ESTATE	NAITASIRI	NAITASIRI	3500m^2 (subject to survey)

[9] On 3rd April 2000, the Director of Lands acceded to an application made by ACEL on 25th July 1996, for which the Director of Surveys had given his conditional concurrence by his letter dated 11th February 1997, and granted ACEL an Approval Notice of Lease of Lot 1 of SO 4379 State Foreshore with an estimated area of 2.2938 hectares to be assessed upon survey for a term of 99 years with effect from 1st December 1999.

[10] It is common ground that the a clear copy of the Mortgage bearing No. 6993 which was with the 1st Respondent Bank was varied with respect to the description of land to which it was subject and was registered with the Registrar of Titles on 8th June 2004 under a "new registration No. 8465". It is noteworthy that the following particulars of the land are set out in the first page of the said purported Mortgage bearing No. 8465:-

Title	Number	Description	Province or Island	District or Town	A R E A
L.D.	60/511	LOT 2 ON PLAN DSS 1116 LAUCALA BEACH ESTATE now known as Lot 1 SO 4379 State Foreshore	NAITASIRI	NAITASIRI	3500m^2 (subject to survey) now 2.2938 ha (estimated area)

[11] It is manifest that subject to the variations referred to in the preceding paragraph of this judgment, the date of the execution of the mortgages bearing No 6993 and 8465 and the two signatures of the mortgagors as well as the witnesses for the common seal of the 1st Petitioner ACEL were identical.

[12] Admittedly, newspaper advertisements were published in January 2004 for the mortgage sale of the property referred to in Mortgage bearing No. 8465, more specifically Lot 1 Plan SO 4379, with the specified date of closure of tenders being 30th January 2004. However, no mortgage sale took place till early 2006, when the 1st Respondent, Habib Bank sold the property to the 2nd Respondent, Challenge Engineering Ltd., for $2,500,000.00, whose

purchase was funded by a loan from the 3rd Respondent, National Bank of Fiji, now trading as Colonial National Bank.

Proceedings in the High Court (2004)

[13] The 1st Petitioner ACEL and its Managing Director Bahadur Ali jointly instituted Civil Action No. HBC 35 of 2004 in the High Court of Fiji at Suva against the 1st Respondent Habib Bank on 27th January 2004 seeking injunctive relief together with an *ex-parte* application for interim relief to restrain the advertised mortgage sale.

[14] The High Court directed that the matter be heard inter-parties.

[15] After hearing the parties, the High Court [Winter, J.] dismissed the summons for injunction with costs on 5th February 2004.

[16] It is remarkable that in the course of his judgment, Winter J also observed as follows:-

> "In this case I find *there may be a serious question to be tried on the question of the extent of the security available* in respect of the Nokonoko lease properties. I emphasise the word *may* as the defendant bank still has the ability to re-advertise its mortgagee sale *using the non-contentious description in the original security*. This would leave the bank free to pursue other action against this plaintiff to determine the correct extent of the security provided under that mortgage." (*emphasis added*)

Proceedings in the High Court (2006 - 2013)

[17] On or about 7th March 2006, the Petitioners commenced proceedings in the High Court of Fiji at Suva by way of Writ of Summons with a Statement of Claim against the Respondents seeking among other things, nullification of the Mortgage bearing No 8465 registered on 8th June, 2004, purportedly in accordance with the provisions of the Land Transfer Act (Cap 131).

[18] The Petitioners filed Amended Writ of Summons and an Amended Statement of Claim on 9th March 2006, which was followed up with a 2nd Amended Statement of Claim dated 30th March 2009.

[19] All the Respondents filed their Statements of Defence answering the averments in the Petitioners' Amended Statement of Claim, but only the 1st Defendant filed a Statement of Defence in response to the Petitioners' 2nd Amended Statement of Claim.

[20] In the said 2nd Amended Statement of Claim, the Petitioners sought declarations to the effect (i) that the said varied Mortgage registered as No. 8465 is fraudulent and null and void; and (ii) that the 1st Defendant [now Respondent] had no rights estates or interests as a Mortgagee in respect of the land comprised in Lot 1 SO 4379 state Foreshore containing 2.2938 hectares or any part therefore and being LD Ref Number 60/511. The Petitioners also sought for orders (iii) restraining the 1st, 2nd and 3rd Defendants [now Respondents] and agents from in any way proceeding and /or completing the purported Mortgage sale under Mortgage Number 8465 registered on 8th June 2004; (v) for an order that the 5th Defendant [now Respondent] remove or cancel the Registration done through the Mortgage Sale on void Mortgage No 8465;(vi) for a further declaration that the sale of purported varied mortgage was registered by the 5th Defendant [now Respondent] negligently and /or in breach of Registration of Deeds Act; (vii) General Damages in the sum of $12 million;(ix) exemplary and punitive damages in the sum of $12 million; (x) such further and other relief this Honourable Court seems just; and (xi) for costs.

[21] It is in this backdrop of pleadings that on 26th September 2012, the Petitioners filed a summons for judgment on admissions pursuant to Order 27 Rule 3 of the High Court Rules.

[22] After examining the relative pleadings of the parties, affidavits filed by the various parties in support or opposition of the relief prayed for, and written and oral submissions made by respective Counsel, the learned High Court Judge [Amaratunga, J.] observed as follows in paragraphs 15 and 16 of the Judgment on Admissions:-

"15. The alleged mortgaged land was a state land and was subject to an approval notice for 10 years from 1st August, 1989. Initially, the approval notice for the said land was granted to a third party and the plaintiff with the consent of the Director of land obtained the transfer of the approval notice, signed on 3rd January, 1994 registered on 5th January, 1994. It is noteworthy that *when the Plaintiff 'mortgaged' the same to the 1st Defendant, by Mortgage No 6993 on 3rd August, 1999 1st Plaintiff did not have an interest in the said land, since the approval notice had expired on 31st July, 1999*. So the Plaintiffs could not have entered in to any agreement with the 1st Defendant on an expired notice of approval since at the time of execution of the mortgage both the approval notice as well as the consent of the director of lands was not valid. It is evident that consent of the Director of Lands is contingent on the interest that the Plaintiff had, namely the approval notice of lease dated 20th July, 1989 which had a validity period of 10 years from 1st August, 1989 and after the expiration of the approval notice the consent of the Director of Land had expired *ipso facto*.

16. The Director of Lands had consented the said land being mortgaged to the 1st Defendant on 2nd March, 1999, before the expiry of the said time period. It may be presumed that before the execution of the mortgage the said mortgage the actual unexecuted 'mortgage' was presented to the Director of Lands for his consent and this process would have taken some time, and when the approval was granted the validity of the approval notice was not an issue, though it was about to be expired within 6 months when the consent was granted, and by the time mortgage was ultimately executed between the Plaintiff and the 1st Defendant the time period stated in the approval notice had expired and there was no valid approval notice in favour of the Plaintiff to be mortgaged to the 1st Defendant. *Though consent to mortgage was obtained prior to execution it is trite law that the said consent is subject to the validity of the approval notice which expired on 31st July, 1999* and by virtue of the said expiration the consent of the Director of Land also expired. Hence the mortgage No 6993 executed on 3rd August, 1999 and registered on 11th November, 1999 violates the Section 13 of the Crown Lands Act and *deemed null and void.*" (*emphasis added*)

[23] The learned High Court Judge concluded at paragraph 42 of his Judgment on Admission as follows:-

"42. The Mortgage 8465 is illegal, void and cannot have any force in law, for more than one reason. *First it was an alteration of an illegal and void contract under in terms of the Section 13 of the Crown Lands Act as I have dealt earlier in this*

judgment. No rights flow from such an instrument which is void ab initio and the issue of variation of that would not arise, but without prejudice to the said reasoning I have discussed the other issues as well. The 1st Defendant did not obtain the Director of Land's consent as per Mortgage 8465 prior to the execution of the said mortgage as it was executed in 1999 and consent for larger land was sought only on 6th June, 2004. So, even on the said ground the *Mortgage 8465 is illegal and void since no prior consent was obtained which is mandatory according to Section 13 of the Crown Lands Act*. Any subsequent consent would not revive an *ab initio* void and illegal instrument in terms of the Section 13(1) of the Crown Lands Act. So the consent of the Director of Lands granted on 4th June, 2004 would not attach any legality to an already illegal and void instrument. Even if I am wrong on that the variation to the mortgage 6993 is not clearly authorized in terms of clauses 16 and, or 20(g) as contended by the Defendants. If the 1st Defendant is appointed as an attorney to alter the most importanct thing like the land mortgaged in a mortgage contract, it defeats the whole purpose of having a mortgage for specific land or thing as mortgagee in that event could add anything under the guise of attorney of the mortgagor! The fallacy of the argument based on Clause 16 is evident and I do not wish to labour any more. The clause 20(g) cannot be resorted as it applies to 1st Defendant and the Customer, who is not the 1st Plaintiff in this case who was the mortgagor. So, the mortgage 8465 is illegal in more than one manner and no rights would derive from that and instrument and the mortgagee sale in pursuant to that illegal mortgage 8465 is also void. The grant of the judgment on admission is a discretionary, and considering the circumstances of the case I will not use my discretion to grant a declaration as prayed in (ii) of the summons for judgment on admission. If I were to declare that the 1st Defendant has no rights, estates or interest as mortgagee in pursuant to the Mortgage 8465, I will not hesitate to grant such declaration on the admitted facts of this case, but the wording of the order (ii) sought is wider than that and it simply seeks a declaration that the 1st Defendant does not have any right or interest in the land described in the 99 year lease, approval notice for lease dated 3.04.2000. I will not use my discretion to such a wide declaration on the admitted facts considering the conduct of the 1st Plaintiff in this whole dealing. So I will decline to grant the order (ii) contained in the summons for Judgment on Admission dated 26th September, 2012 and by the same token will refrain from declaring that the conduct of the 1st Defendant was fraudulent at this juncture, on admitted facts. *The act of fraud in this case cannot he determined by the facts admitted.* Considering the circumstances of the case I will not award any cost."(*emphasis added*)

[24] Based on the above reasoning, the learned Judge of the High Court entered judgment declaring (a) that the Mortgage registered as No. 8465 is *ab initio*, null and void; and (b)

that the purported Mortgage sale under the said Mortgage No. 8465 is void, but did not award any costs.

The Appeal to the Court of Appeal

[25] Aggrieved by this decision, the Respondents sought an enlargement of time to seek leave to appeal against the judgment of the High Court, and pursuant to the order of the President of the Court of Appeal dated 20th March 2015, a Notice of Appeal dated 10th April 2015 was filed setting out 16 grounds of appeal. However as the grounds set out therein were numbered by inadvertence as 1 to 13 and then 16 to 18, these grounds are reproduced below re-numbered correctly:-

1. The Learned Judge erred in fact and in law by allowing Judgment on Admission under Order 27 of the High Court Rules 1988 in favour of the First and Second Respondents against the Appellant when there is no clear admission by the Appellant in its Statement of Defence to the First and Second Respondent's claim or any part of the claim.
2. The Learned Judge erred in fact and in law in failing to apprehend that the crux of the First and Second Respondents claim against the Appellant lies in their allegation of fraud which claim has been strongly refuted by the Appellant and the same therefore becomes a triable issue. The Learned Judge therefore erred in law when without making any findings of fraud proceeded to declare both the Mortgage Numbers 6993 and 8465 null and void on grounds that were not before the Court and based on irrelevant consideration or matters.
3. The Learned Judge therefore exceeded his jurisdiction in determining the application for a Judgment on Admission when he went beyond the ambit of Order 27 of the High Court Rules 1988 by making findings of fact that can only be determined at trial.
4. The Learned Judge in determining that the initial Mortgage No. 6993 is illegal and void *ab initio* on the basis that the Approval Notice of Lease LD 60/511 had lapsed before the Mortgage was executed on 3rd August 1999 made a grave error in fact on the face of the record as he failed to apprehend that it is an agreed fact between the parties that Mortgage No. 6993 was actually executed on 3rd December 1998 and not 3rd August 1999 and is therefore a valid Mortgage.
5. The Learned Judge therefore further erred in fact when he held that the Mortgage No. 6993 could not be varied in 2004 via Mortgage No. 8465 by including the

correct acreage of Land as one could not vary a Mortgage that was initially void *ab initio*.

6. The Learned Judge erred in fact when he held that as the initial Mortgage No. 6993 was void, a Mortgage Sale could not have been effected and therefore the sale pursuant to that Mortgage was valid when on admitted facts between the parties it is clearly evident that Mortgage No. 6993 is a valid Mortgage.
7. The Learned Judge erred in law and in fact when he declared Mortgage No. 8465 null and void *ab initio* and failed to comprehend the process involved in relation to an Approval Notice of Lease
8. The Learned Judge erred in fact and in law in holding that the Approval Notice of Lease LD 60/511 had lapsed on 31st day of July 1999 without listening to the *viva voce* evidence of the Director of Lands as to the status of the said Approval Notice of Lease as at 31st July 1999.
9. The Learned Judge erred in fact and in law when he failed to comprehend the relationship between the Approval Notice of Lease LD 60/511 issued on 1st August 1989 to the Approval Notice of Lease LD 60/511 issued on 3rd April 2000 and further failed to comprehend that this issue required *viva voce* evidence of the Director of Lands.
10. The Learned Judge erred in fact and in law when he held that Mortgage No. 6993 even if it were to be deemed to be a valid Mortgage could not be varied without the consent of the Mortgagor and failed to apprehend that under the provisions of the Mortgage the Appellant had powers to vary the Mortgage to reflect the correct description the land contained in Approval Notice of Lease LD 60/511 since the Appellant was dealing with a Mortgagor who attempted to defraud the Appellant and deprive it of its Mortgage security and which fact required determination via *viva voce* evidence of the parties at trial.
11. The Learned Judge erred in fact and in law in giving his own interpretation to clause 16 of Mortgage No. 6993 without listening to *viva voce* evidence to properly determine the issue of the intention of the Mortgage (First Respondent) to pledge the Approval Notice of Lease LD 60/5011 on 9th May 2000 as security for a further advance of $550,000.00 made by the Appellant to the Borrower, Valebasoga Tropikboards Limited which can only be determined at trial and further misinterpreted the powers given to the Appellant as Mortgagee under clauses 16 and 20(g) of the Mortgage in relation to the issue of variation of Mortgage.
12. The Learned Judge erred in fact and in law in failing to comprehend that Mortgage No. 6993 prevailed over the Approval Notice of Lease LD 60/511 and whilst the debt under the said Mortgage remained due and owing it continued to prevail over

the said Approval Notice of Lease LD 60/511 irrespective of the fact that the land area in the said Approval Notice of Lease had subsequently been increased.

13. The Learned Judge erred in fact and in law in failing to comprehend the fact that since the land in Approval Notice of Lease LD 60/511 had been amalgamated due to the consent of the Director of Lands granted in February 1997 any encumbrance registered against LD 60/511 in 1999 would also be brought down against the amalgamated land area in 2000.
14. The Learned Judge therefore further erred in law and in fact by declaring the Appellant's mortgagee sale conducted under Mortgage No 8465 void thereby predetermining the substantive rights of the Appellant in a summary manner when this is a triable issue to be determined at trial.
15. The Learned Judge erred in law and in fact in making his own analysis and presumptions on facts pertaining to the grant of the several consents by the Director of Lands on Mortgage No. 6993 and Mortgage No. 8465 when this required *viva voce* evidence of the Director of Lands.
16. The Learned Judge erred in law in his interpretation of Section 13 of the Crown Lands Act [Cap 132] when he held that it was mandatory that the consent of the Director of Lands on the Mortgage should have been obtained prior to the execution of the Mortgage when this is neither the requirement in law nor a practice in the conveyancing system in Fiji.

[26] The Court of Appeal [Basnayake, JA, Almeida Guneratne, JA and Jameel, JA) heard the appeal on 10th September 2018 and pronounced judgment on 5th October 2018.

[27] Almeida Guneratne, JA, with whom Basnayake, JA and Jameel, JA concurred, determined the appeal on the basis of the reasoning in paragraphs [9] and [10] of the impugned judgment wherein his Lordship observed as follows:-

> "[9] I pause at this point to make some brief reflections – viz:
> (1) As noted earlier the learned Judge himself was *not prepared to uphold the allegations based on fraud* which spares me the task of going into that aspect.
> (2) The *express admissions made by the Appellant as recounted above do not by any stretch of imagination amount to admissions that could have founded a basis for judgment to be given in as much as if at all, the Appellant's averments are express denials of the averments contained in the Amended Statement of Claim*. It would amount to doing violence to language if an express denial is to be construed as an admission.

(3) However, if one were to look for implied admissions for the same is envisaged in Order 27 of the High Court Rules, such can be discerned within the four corners of the Amended Statement of Claim and the Statement of Defence and that is that, *the alleged alteration referred to in regard to the description of the initial Mortgage 6993 was unilaterally made by the Appellant*.
(4) Nevertheless, the Appellant offered an explanation for this in averring that,
(a) the 1st Respondent (1st Plaintiff) *defaulted in its payment* under its Mortgage to it (vide: paragraph 29(a) of the Appellant's Statement of Defence).
(b) Consequently, *to protect its Mortgage security as the 1st Respondent was not only avoiding payment of 'the debt' but also tried to restrain it from proceeding with the Mortgage Sale* (Appellant having sold the property to the 3rd Respondent) *and further trying to alter the position regarding the Mortgage Security by applying to the Director of Lands (the 5th Respondent/Original 4th Respondent) to separate the amalgamated land.* (vide: paragraph 31 of the Statement of Defence).
(c) Therefore, the Appellant averred that, *it was far from expecting such Mortgagor/debtor to consent to any variation of the Mortgage*.
[10] Viewing the matter in the perspective of what I have recounted above*, I cannot see how the learned Judge could have given a 'judgment on admissions' (express or implied) on the proceedings.* Given the demonstrable areas at which the parties are seen to have been at variance the case had to be necessarily decided on a *viva voce* trial."(*emphasis added*)

[28] It is also material to note that his Lordship Guneratne, JA made the following observations at paragraphs [14] and [15] of his impugned judgment:-

"[14] The Amended Statement of Claim *nowhere had pleaded anything traversing Section 13(1) of the Crown Lands Act for the Appellant to have responded to if that issue in any event was to be brought within the said otherwise provision*.
[15] Consequently, I agree with the Appellant's submission that, the learned Judge in his reference to the provisions of the Crown Lands Act *had exceeded his jurisdiction in that, his jurisdiction was confined to making a determination on whether there were admissions on which a judgment could have been decreed as prayed for by the 1st Respondent.*"(emphasis added)

[29] The Court of Appeal emphasized in paragraph [17] of its impugned judgment that the learned High Court Judge made findings on triable issues *which went outside the pleadings*, resulting in a Judgment on Admission being pronounced without and/or in excess, of jurisdiction.

[30] Accordingly, the Court of Appeal concluded unanimously in paragraph 27 of its judgment that the judgment of the High Court dated 11th March, 2013 must be set aside and the appeal must be allowed for the reasons (a) to begin with, the said impugned 'judgment on admissions' could not have been made and (b) consequently the case has to be remitted to the High Court for trial to be determined on *viva voce* evidence. In its consequential order the Court of Appeal also indicated that trial before the High Court would be on the substantive aspects of the rights of the parties *inter se*, if necessary by raising fresh issues thereon. The Court also ordered costs against the 1st and 2nd Respondents who are the Petitioners before this Court.

Application for leave to appeal from the Supreme Court

[31] By their petition dated 24th October 2018, the Petitioners have sought leave to appeal against the impugned Judgment of the Court of Appeal dated 5th October 2018.

[32] The exclusive jurisdiction of the Supreme Court of Fiji to hear and determine appeals from all final judgments of the Court of Appeal is derived from section 98(3)(b) of the Constitution of the Republic of Fiji. Section 98(4) of the Constitution of the Republic of Fiji provides that an appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.

[33] It is trite law that in order to succeed in obtaining leave to appeal against a final judgment of the Court of Appeal, the Petitioner should satisfy one or more of the stringent threshold criteria set out in 7(3) of the Supreme Court Act of 1998, which provides that –

> "In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises-
> (a) a far reaching question of law;
> (b) a matter of great general or public importance;
> (c) a matter that is otherwise of substantial general interest to the administration of civil justice."

[34] The above quoted threshold criteria have been examined and applied by the Supreme Court of Fiji in numerous decisions such as *Sun Insurance Co Ltd v Qaqanaqele* [2017] FJSC 23; CBV0009.2016 (21 July 2017) and *Khan v Permanent Secretary for Works & Energy* [2019] FJSC 23; CBV0011.2018 (28 August 2019). It is clear from these decisions that leave to appeal is not granted as a matter of course, and that for the grant of leave the case has to be one of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character.

[35] As was observed by Lord Macnaghten in *Daily Telegraph Newspaper Company Limited v McLaughlin* [1904] AC 776 at 778 to 779, leave to appeal is only exceptionally granted, and even so leave would be refused if what is canvassed is the decision on the facts of a particular case, where the judgment sought to be appealed from was plainly right, or not attended with sufficient doubt to justify the grant of special leave.

[36] The Petitioners have advanced twenty-three principal grounds of appeal set out in paragraph 4 of the application for leave to appeal filed by the Petitioners on the basis that they (a) raised far reaching questions of law (b) in a matter of general or public importance and (c) is a matter that is otherwise of substantial general interest to the administration of civil justice. These grounds require careful examination in the light of the aforesaid stringent threshold criteria.

[37] However, before dealing in detail with the grounds set out in paragraph 4 of the Petitioners application for leave to appeal, it may be useful to make a few general observations that are pertinent to all the grounds urged by the Petitioners for seeking leave to appeal.

Some General Observations

[38] It is significant that this application for leave to appeal arises in the context of a Judgment on Admission made pursuant to Order 27 Rule 3 of the High Court Rules, 1988. The said Rule provides that-

> "Where admissions of *fact or of part of a case* are made by a party to a cause or matter *either by his pleadings or otherwise*, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties and *the Court may give such judgment* or make such order on the application as *it thinks just*."(*emphasis added*)

[39] The Fiji High Court Rules of 1988 have been adapted from the English Rules of the Supreme Court 1965 by way of modifications of those Rules to suit local circumstances. Identical or very similarly worded rules of procedure are followed in many other commonwealth jurisdictions, though in some instances as in the case of India, the same numbering of Orders is not followed. It is noteworthy that the English Rules of the Supreme Court 1965, have now been replaced by the UK Civil Procedure Rules of 1998.

[40] It is significant that, as was observed by the learned High Court Judge in the instant case in paragraph 42 of his judgment, the grant of a judgment on admission under Order 27 Rule 3 is discretionary. Dealing with the identical worded corresponding provision of the Indian Civil Procedure Code, the Supreme Court of India has consistently taken the view that "the discretion conferred under Order XII Rule 6 of CPC is to be exercised judiciously, keeping in mind that a judgment on admission is a judgment without trial which permanently denies any remedy to the defendant" (*Himani Alloys Limited v Tata Steel Limited* (2011) 15 SCC 273 para 11 (*per* Raveendran, J) followed in *Hari Steel and General Industries Ltd. & Anr. v Daljit Singh & Ors.* 2019 (4) MLJ 100).

[41] In paragraph 6 of his Order in *Manisha Commercial Ltd. vs Shri N.R. Dongre & Anr* AIR 2000 Delhi 176, Justice Vikramajit Sen, has explained how a court of law should hold the balance in exercising the judicial discretion conferred by the applicable Rule in the following words:-

> "The Apex Court has observed that it is a futile exercise, and a serious miscarriage of justice, if parties are compelled to undergo a full trial where the *lis* can be brought to an earlier and quicker culmination on the foundation of admissions made by a party (which obviously is usually the defendant). The Apex Court has enjoined the

> Trial Court to meaningfully fulfill this judicial exercise. Order XII, Rule 6 in fact prescribes this duty shall be a *suo moto* exercise. This Rule however, predictably invests discretion with the Court - that is - even if there is an unequivocal admission by a party but the passing of a judgment would work injustice on it, judgment could be declined."

[42] In my opinion, the above quoted observation of the Indian Supreme Court will apply with the same force to the interpretation of the identically worded Fijian provision, which is derived from the same source, namely the laws of England.

Grounds 1) to 5) and 11) relating to Section 13(1) of the Crown Lands Act

[43] It is convenient to first take up for considerations grounds 1) to 5) and 11) urged by the Petitioners for grant of leave to appeal which are all related to the provision in section 13(1) of the Crown Lands Act (Cap. 132), which reads as follows:-

> "Whenever in any lease under this Act there has been inserted the following clause: "This lease is a protected lease under the provisions of the Crown Lands Act" (hereinafter called a *protected lease*) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, *nor to mortgage, charge or pledge the same*, without the *written consent of the Director of Lands first had and obtained*, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the *Registrar of Titles* register any caveat affecting such lease. Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void."(*emphasis added*)

[44] Grounds 1) to 5) and 11) relied upon by Mr. Prasad in his submissions before this Court are that the Court of Appeal erred in law and in fact: -

1) In wrongly taking the view and asserting that the '[14] *The Amended statement of claim nowhere had pleaded anything traversing Section 13(1) of the Crown Lands Act* for the Appellant to have responded to if that issue in any event was to be brought within the said otherwise provision' when paragraph 15, 16 and 27 of the Plaintiff's Amended Statement of Claim filed on 10 March 2006 and paragraph 21, 22 and 33 of the 2nd

Amended Statement of Claim filed on 1 April 2009 specifically pleaded material facts traversing that the First Plaintiff never sought consent under the Crown Lands Act for any mortgage over its unencumbered property Lot 1 SO 4379;

2) In wrongly determining that the High Court had exceeded its jurisdiction based on misapprehension that Plaintiff's claim *'nowhere' pleaded* anything traversing Section 13(1) of the Crown Lands Act when the relevant material facts on which the said provision of law was applicable had been fully and properly pleaded in the Plaintiffs' Amended statement of claim and 2nd Amended Statement of Claim in accordance with the rules of pleadings;
3) By making a determination that Plaintiffs' Amended Statement of claim *'nowhere' pleaded* anything traversing Section 13(1) of the Crown Lands Act' when *none of the Grounds of Appeal filed on 10th April 2015 raised any such particular point for determination*;
4) In misinterpreting that the High Court had determined that "*in relation to the Appellant having not sought from the Director of Lands (5th Respondent) approval prior to making the alterations in made to the initial Mortgage document 6993'* when that the Plaintiffs in the Amended Statement of Claim and 2nd Amended Statement of Claim had *clearly pleaded that First Plaintiff had never sought consent of Director of Land to mortgage its unmortgaged land Lot 1 SO 4379 and not that 'consent for alteration of an initial mortgage'* on the part of the Director of Lands was absent or had not been obtained as the Director of Lands has no such power to grant consent to any party to without consent of the other party to unilaterally alter security documents in any event;
5) In failing to, apart from stating that the High Court had exceeded its jurisdiction in applying the provisions of the Crown Lands Act, *to identify whether the High Court's determination on application of Section 13(1) Crown Lands Act in the particular circumstance of the purported variation of mortgage registered purported Mortgage No. 8465 was incorrect*; and
11) In failing to identify that the *reasoning of the High Court based on Section 13(1) of the Crown Lands Act was an alternative but not the sole reason for granting the declaratory orders* and which alternative reasoning the High Court itself

acknowledged that if wrong would not absolve the First Respondent of its wrongdoing.

[45] The gravamen of learned Counsel for the Petitioners Mr. Prasad's submissions before this Court pertaining to grounds 1) and 2) was that the Court of Appeal erred in holding in paragraph [14] of its impugned judgment that "the Amended statement of claim *nowhere had pleaded anything traversing Section 13(1) of the Crown Lands Act*" and in concluding in paragraph [15] thereof that the learned *High Court Judge exceeded his jurisdiction which "was confined to making a determination on whether there were admissions on which a judgment could have been decreed as prayed for*".

[46] It is manifest from paragraph 13 of the Petitioners' 2nd Amended Statement of Claim dated 30th March 2009 that the Petitioners had been expressly pleaded that the 4th Respondent had "granted consent in respect of the Original Mortgage" and further averred in paragraph 15 thereof that the said mortgage was registered "as Mortgage No. 6993 and it was so registered on 11th day of November 1999."

[47] The Petitioners have also specifically averred in paragraph 22 of their 2nd Amended Statement of Claim that the "was no application ever made by the 1st Plaintiff (ACEL) for the Director of Land's consent to mortgage the third lease (Lot SO 4379) to the 1st Defendant (1st Petitioner)".

[48] While it is clear that the Court of Appeal has been remiss in asserting as it did that section 13(1) of the Crown Lands Act has never been traversed in pleadings, I am satisfied that there is no basis for granting leave to appeal to the Petitioners solely on the basis of that error, since I am of the opinion that nothing turns on this error in the judgment of the Court of Appeal.

[49] I arrive at this conclusions for the reason, as already explained earlier in this judgment, that a Judgment on Admission pronounced pursuant to Order 27 Rule 3 must be based on one or more clear and unequivocal admission, but though paragraph 13 of the 2nd Amended

Statement of Claim has been admitted by the 1st Petitioner, ACEL in its Statement of Defence dated 3rd August 2012, it has *expressly denied* the vital averment pertaining to the impugned Mortgage No 8465 purporting to subject the extent of 2.2938 hectares described as Lot SO 4379, leaving the question open for determination after trial on the basis of affidavits or *viva voce* evidence.

[50] In regard to ground 3), it must be noted that the submission of Mr. Prasad to the effect that "*none of the Grounds of Appeal filed on 10th April 2015 raised any such particular point for determination*" is not quite correct since there were two grounds of appeal taken up in the Notice of Appeal dated 10th April 2015 in the Court of Appeal, namely grounds 15 and 16 (as renumbered by me to correct an inadvertent error as explained in paragraph 25 of this judgment), which adverted to the requirement of consent of the Director of Lands under section 13(1) of the Crown Lands Act.

[51] It is also necessary to emphasise that the other matters sought to be raised through grounds 4), 5) and 11) are irrelevant to the determination of this application for leave to appeal from the judgment of the Court of Appeal that set aside the Judgment on Admission of the High Court on the basis that it had traversed matters that had not been clearly and unequivocally admitted by the pleadings in the High Court.

[52] For the foregoing reasons, I hold that there is no basis for granting leave to appeal on grounds 1) to 5) and 11) urged by the Petitioners for seeking leave to appeal.

Grounds 6),7), 9), 10), 12), 16), 18), 20), 21) and 23) on the exercise of Judicial Discretion

[53] Grounds 6), 7), 9), 10), 12), 16), 18), 20), 21) and 23) relied upon by the Petitioners raise the question as to whether the judicial discretion conferred to the High Court by Order 27 Rule 3 of the High Court Rules has been properly exercised. The aforesaid grounds were to the effect that the Court of Appeal erred in law and in fact :-

6) In failing to comprehend that the 1st Petitioner was entitled to the declaratory reliefs granted by the High Court on the premise that purported Mortgage No. 8465 is not binding on the 1st Petitioner as it had not consented to the purported variation of

mortgage being the purported Mortgage No. 8465, *upon the admission of the 1st Respondent that it had unilaterally altered copies of Mortgage No. 6993 without the consent of the 1st Petitioner which admitted fact both the High Court and Court of Appeal have accepted;*

7) In failing to consider in entirety the submissions of the Petitioners that *the Mortgage No. 6993 was subject to the provisions of the Land Transfer Act, Cap 131 specifically Section 65 and 66 upon which the purported variation of mortgage purportedly registered as Mortgage No. 8465 was a nullity in law* and therefore *ab initio* null and void as correctly declared by the High Court with the consequent order that the purported mortgagee's sale pursuant to the purported Mortgage No. 8465 is void;

9) In failing to consider the main reason of the High Court in granting the limited relief as it did, based on the admission that the 1st Respondent had unilaterally without the consent of the First Petitioner purported to carry out a variation to copies of registered mortgage which could not have been done pursuant to clauses 16 and 20(g) of Mortgage No. 6993 as the 1st Respondent had contended and therefore purported Mortgage No. 8465 was *ab initio* null and void with the consequent order that the purported mortgagee's sale pursuant to the purported Mortgage No. 8465 is void.

10) In failing to comprehend that the High Court's had given *alternative reasoning for its decision which included the High Court's determination on clauses 16 and 20(g) of Mortgage No. 6993* that had been raised and relied upon by the First Respondent subsequent to admission of the unilateral alteration of the registered mortgage and in respect of which determination the First Respondent (Appellant before the Court of Appeal) had brought a challenge in Grounds of Appeal filed on 10th April 2015 being Ground 10 and Ground 11 however failed to make any cogent submissions on same in its Submission filed on 3 August 2018 before the Court of Appeal, and which reasoning of the High Court was drawn to the Court of Appeal's attention by the Petitioners but not considered at all.

12) In failing to comprehend that *the limited relief granted by the High Court was within the perimeters of the orders sought by the Plaintiffs in the Summons for Judgment on Admission* and the High Court did not make any order beyond those sought and granted the reliefs in exercise of his discretion as permitted by Order 27 rule 3 did 'make such order on the application as it thought just' and therefore there was no need for any amendment to the Summons which was also made subject to the inherent jurisdiction of the Court;

16) In wrongly only reading and referring to *parts of the Judgement of the High Court in an abstract manner when the full Judgment clearly shows that the Petitioners were not granted all the reliefs that had been sought and that the High Court had left those questions remaining to be determined at trial*;

17) In failing to comprehend that the Petitioners' *2nd Amended Statement of Claim was only answered by the 1st Defendant some 3 years and 4 months later* after its filing, by a Defence and upon the Plaintiffs' application, the Plaintiffs were entitled to, in order to same its time and costs and to have finality on an issue negatively affecting the 1st Plaintiff /1st Petitioner to have judgment as was granted;

18) In *not taking considering at all the Judgment of Winter J delivered on 5th February 2004, Suva High Court Civil Action No. HBC 35 of 2004 where the First Respondent was expressing forbidden from carrying out any mortgagee's sale* of 1st Petitioner's Lot 1 SO 4379 State Foreshore having an area of 2.2938 which was not the security under Mortgage No. 6993 with the Court expressly suggesting to the First Respondent to bring proceedings on its allegations relating to Lot 1 SO 4379 State Foreshore having an area of 2.2938;

20) In misguiding itself and *failing to comprehend that the 1st Petitioner's consent to any mortgagee's sale would only be limited to and attach to the security which was given as security under Mortgage No. 6993 and not to 1st Petitioner's un-mortgages land* Lot 1 SO 4379 State Foreshore having an area of 2.2938, for which the requirement for a valid sale would require the First Petitioner to enter into a sale and purchase agreement which it never did as shown in the First Respondent's letter dated 3 January 2006 or for the First Respondent to have obtained a court order to that effect;

21) In misguiding itself on the fact that *the 'said debt' that was being pursued by the 1st Respondent was not that of the 1st Petitioner as was self-evident from 1st Respondent's Demand Notice* dated 18th January 2002 and Demand Notice dated 12th November 2003 and in any event a claim for "said debt" did not in any manner whatsoever authorize the First Respondent to unilaterally alter a registered mortgage which was given by the 1st Petitioner as a third party mortgagor limiting its liability in any event to the secur1ity given and for the 1st Petitioner to be persecuted for the 'said debt'; and

23) In failing to give justice to the 1st Petitioner as is warranted in the circumstances and upon the clear admission that the purported Mortgage No. 8465 was never signed or consented to by the 1st Petitioner and therefore it is not bound by same and cannot be forced to be bound by same.

[54] In the course of the hearing of this application, Mr. Prasad for the Petitioners contended that given that there was a clear admission that the 1st Respondent had caused certain variations on the copy of Mortgage No. 6993 which admittedly was in its custody, thereby bringing into existence Mortgage No. 8465, which admittedly was for a land of much larger extent, the Petitioners were entitled to a Judgment on Admission pursuant to Order 27 Rule 3 of the High Court Rules. However, this was hotly contested by learned Counsel for the Respondents who have referred to the Statements of Defence filed by the Respondents, and

evidence placed before the High Court by the parties by way of affidavits and documentation which show that the case involved extremely complex circumstances and some conflicting affidavit evidence which were by their very nature capable of being resolved only by *viva voce* evidence.

[55] I shall in brief advert to some of these complexities and uncertainties. To begin with, it would appear from the attestation clause of both mortgages, namely Mortgage No. 6993 and Mortgage No. 8465 that *they were executed on the same date*, namely on what would appear to be 3rd August 1999. As seen from pages 65, 81 and 11 of the Record of the High Court Volume 1, the mortgages in question had been prepared for signature of the Mortgagor, Witnesses and Solicitor with a typed written version with the words: "This …….day of December 1998" to which the word "3rd" has been added to fill the blank and the word "December" had been scored off with a pen and "August" written in pen over it and *"1998" corrected as "1999" by pen* and one counter signature on the left margin added to authenticate more than one correction on the same line.

[56] It is also curious that in paragraph 6 of their Amended Statement of Claim of 9th March 2006, the Petitioners stated that Mortgage No 6996 was executed "*in or about December 1998*" but were more evasive in their 2nd Amended Statement of Claim dated 30th March 2009 and refrained from specifying any date of execution. and ACEL's Managing Director Niwaz Ali in paragraph 17 of the Affidavit filed on behalf of the Petitioners stated that the date of execution was *3rd December 1988*.

[57] However, in the affidavit of Suresh Bhai Patel filed on behalf of the 1st and 2nd Respondents, the date of execution of the said mortgage is stated as *3rd December 1998* which is also reiterated in the further affidavit filed by him dated 25th September 2012 in paragraph 13 [i]. Since admittedly the Director of Lands gave consent to the mortgage on 22nd March 1999, the question whether the said mortgage was executed in 1988 or 1999 is crucial in regard to the issue as to whether the said Mortgage was executed with the written consent of the Director of Lands "*first had and obtained*" as envisaged by section 13 of the Crown Lands Act. The Court of Appeal has in paragraphs 16(d) and 17(ii) of its impugned

judgment adverted to this inconsistency and its ramifications and in the latter paragraph observed that-

> "Both Ms. Devan who appeared for the Appellant [1st Respondent to this application] and Mr Sharma for the 3rd and 4th Respondents [2nd and 3rd Respondents to this application] submitted that *the learned Judge [of the High Court] had made a fundamental error of fact in regard to the date of execution of Mortgage 6993* when he held that it was August, 1999 when in fact the 1st Respondent's own pleadings (in the original Statement of Claim) at paragraph 6 confirmed that it was executed in December, 1998.(*emphasis added*)

[58] The complexities and uncertainties outlined above are by themselves sufficient to refuse relief to the Petitioners by way of the grant of leave to appeal against the impugned judgment of the Court of Appeal on the basis of grounds 6), 7), 9), 10), 12), 16), 18), 20), 21) and 23) relied upon by the Petitioners. The discretion conferred under Order 27 Rule 3 of the Fiji High Court Rules has to exercised judiciously, keeping in mind that a judgment on admission is a judgment without trial which permanently denies any remedy to the defendant. The learned High Court Judge had exercised his discretion in refusing the declaration sought by the Petitioners on the ground that Mortgage No. 8465 was fraudulent, and the question arises as to whether having rejected relief on the basis of fraud, which was the main cause of action pleaded in the 2nd Amended Statement of Claim, it was open to the learned High Court Judge to grant a declaration that the said mortgage was *ab initio* void in all the circumstances of this case.

[59] It may be useful in this context to note that in ground 18) urged by Mr. Prasad, reference is made to the judgment of Winter J delivered on 5th February 2004, Suva High Court Civil Action No. HBC 35 of 2004, which case and judgment have been briefly discussed in paragraphs 13 to 16 of this judgment. It is also noteworthy that the High Court dismissed the action filed by ACEL and Bahadur Ali with the objective of restraining the holding of the then impending Mortgage Sale, and in doing so, Winter, J. observed as follows:-

"I find that there is no serious question to be tried. I accept the response of the defendant bank to the plaintiffs' allegation. *I find against the plaintiffs' credibility*. *If there is factual conflict, I prefer the defendant's version*." (*emphasis added*)

[60] The High Court Civil Action No. HBC 35 of 2004 also sheds light on another obscure feature of the instant case regarding which ground 21) has been formulated. Mr. Prasad's main complaint here is that the Court of Appeal did not take into account the fact that the 'debt' that was being pursued by the 1st Respondent and which ultimately resulted in having to take steps to hold a Mortgage Sale in January 2004, was not that of ACEL as was self-evident from 1st Respondent's Demand Notices referred to therein. Mr. Prasad has argued that a claim for "said debt" did not in any manner whatsoever authorize the First Respondent to *unilaterally alter a registered mortgage which was given by the 1st Petitioner ACEL as a third-party mortgagor* limiting its liability in any event to the security contained in Mortgage No. 6993.

[61] This contention of Mr. Prasad is intrinsically linked to the position he has taken up that Clause 20(g) of the Mortgage No. 6993 did not confer on the 1st Respondent Bank the right or power to vary the said mortgage since it was confined in its application to a "customer" of the bank which ACEL claimed it was not. Serious doubt is cast in regard to the veracity of this position since the said judgment of Winter's J discloses not only the close nexus between the ACEL and Valebasoga Tropikboards Limited but also the fact that Bahadur Ali who is the Managing Director of ACEL, was also a Director of Valebasoga. It is necessary in this regard to refer to a letter Bahadur Ali wrote to the Director of Lands on 31st July 1996 annexed marked 'SP2' to Sureshbhai Patel's affidavit dated 4th October 2012, wherein Bahadur Ali has referred to Valebasoga Tropikboards Limited as "my company". These relationships are material to the various transactions that loomed large in the course of argument in this case.

[62] There is one other matter that needs to be stressed, which is that Bahadur Ali has in a letter signed by him on behalf of AECL dated 29th December 2005 addressed to the Country Manager of the 1st Respondent Bank, which letter is annexed marked 'SP9' to Sureshbhai

Patel's affidavit of 4th October 2012, *expressly consented to sell the property secured by Mortgage No. 8465 to an "interested buyer",* w*ho in actual fact was the 2nd Respondent to this application*. Mr. Deo, who appeared for the 2nd Respondent at this hearing has strenuously argued that by reason of the contents of the said letter, the 1st Petitioner ACEL is estopped from challenging the mortgages in question.

[63] For these reasons, I am of the view that the application for leave to appeal on grounds 6), 7), 9), 10), 12), 16), 18), 20), 21) and 23) cannot succeed.

Grounds 8, 13, 14, 15, 19 and 22 raising other Miscellaneous Matters

[64] Grounds 8), 13), 14), 15), 19) and 22) seek to raise some miscellaneous matters that may be summarily dealt with. In ground 8), the Petitioners complain that the Court of Appeal had rephrased certain pleadings and admissions in its impugned judgment, and in ground 13) they complain that the Court of Appeal did not comprehend that the law does not require a party to plead provisions of law in a statement of claim. Ground 14 is to the effect that the Court of Appeal failed to consider "all the various decisions/authorities submitted by the Petitioners". All these grounds are so trivial that they do not satisfy any of the threshold criteria that need to be considered for the grant of leave to appeal by the Supreme Court.

[65] The same has to be said in regard to ground 15), which is to the effect that the Court of Appeal erred in stating that in its impugned judgment that the Petitioners relied on the decision in *Wallersteiner v. Moir* [1974] 3 All ER 991 when it was not the case, ground 19 wherein the Petitioners complain that the Court of Appeal readily accepted the submissions of the 1st Respondent and 2nd Respondent including earlier decisions between the parties without examining any documents while ignoring those submitted by the Petitioners, and thereby causing a miscarriage of justice, which grounds too do not satisfy any of the criteria set out in section 7(3) of the Supreme Court Act for the grant of leave to appeal to the Supreme Court.

[66] Ground 22) where the Petitioners complain that the Court of Appeal failed to provide any reasons as to why costs ought to be ordered against the Petitioners in a case where the 1st Petitioner was seeking justice, does not merit any further consideration since that too does not satisfy the stringent threshold criteria that need to be satisfied for the grant of leave toa appeal to the Supreme Court.

[67] For the foregoing reasons leave to appeal under grounds 8), 13), 14), 15), 19) and 22) has to be refused.

Conclusions

[68] In the result, for all the reasons set out above, the application of the Petitioners for leave to appeal is refused and their application is dismissed.

[69] Before parting with this judgment I would like to make it clear that the findings and observations made by this Court are confined to the determination of this application for leave to appeal, and shall not bind any of the parties when this matter is taken up for hearing as directed by the Court of Appeal in its impugned judgment. The High Court is free to arrive at its findings on the various issues which fall for consideration in the suit on its own merits.

[70] In all the circumstances of this case, the High Court is requested to expedite trial and dispose of this long pending matter expeditiously.

[71] I would award costs in a sum of $5,000 to be payable by the 1st Petitioner to the 1st Respondent and $2,500 each to be paid by the 1st Petitioner to the 2nd and 3rd Respondents, but I would not make any other order for costs because the other Respondents took no significant part in this application.

Brian Keith, J

[72] I have had an opportunity to read a draft of the judgment of Marsoof J, and I agree entirely with him that leave to appeal should be refused. I wish to say a few words of my own out of deference to the judgment of the High Court with which we are respectfully disagreeing.

[73] Ord 27 rule 3 of the Rules of the High Court provides that where a party to an action admits a particular fact, whether in its pleading "or otherwise", the court "may give such judgment or make such order … as it thinks fit" in favour of another party to the action. The admission on which the Plaintiffs, Ali's Civil Engineering Ltd and Vitiana Timbers Ltd, rely is an admission by the First Defendant, Habib Bank Ltd ("the Bank"), in para 31 of its Defence that it varied the mortgage deed to which the case related without first obtaining the Plaintiffs' consent. The Plaintiffs did not seek to rely on any other admission made elsewhere under the "or otherwise" part of Ord 27 rule 3. The question, therefore, is whether *that* admission entitled the Plaintiffs to the declarations which the High Court made, namely that the relevant mortgage was null and void, and that the purported sale of the land to which it related was of no effect.

[74] The facts of the case are complicated, but the core facts can be stated relatively simply. The First Plaintiff, Ali's Civil Engineering Ltd ("ACEL"), was the lessee of a plot of land measuring 3,500 square metres on Laucala Beach. In due course, the plot was mortgaged to the Bank to secure the repayment to the Bank by Valebasoga Tropikboards Ltd ("VTL") of debts up to $700,000. A plan annexed to the mortgage deed described the plot as Lot 2. I shall refer to this mortgage from now on as the first mortgage. The Bank admitted all that in its Defence, stating that Bahadur Ali and his wife were directors of both ACEL and VTL.

[75] It is common ground that the debt to the Bank increased to $1,250,000. The dispute relates to how that debt was thereafter secured. ACEL's case is that the whole of this sum was secured by the mortgage over Lot 2. The Bank's case is that it was secured on a different plot of land, which was described in various plans as Lot 1, and which comprised (a) the land comprised in Lot 2 *and* (b) a larger plot of land adjacent to Lot 2. Lot 1 in all measured 2.3938 hectares. Since a hectare is 10,000 square metres, Lot 1 is very much larger than Lot 2. That explains why ACEL is so keen to limit the security for the debt to Lot 2, and

why the Bank wants Lot 1 to be regarded as the security for the debt. On a forced sale, Lot 1 would realise much more for the Bank than Lot 2.

[76] In due course, the Bank called in the debt. At least part of it remained unpaid. The Bank therefore sought to realise its security by advertising Lot 1 for sale. ACEL and Mr Ali then issued proceedings in the High Court, and sought an interlocutory injunction restraining the Bank from proceeding with the sale of Lot 1, on the basis that the Bank's power of sale was limited to Lot 2. The Court refused to give ACEL and Mr Ali interlocutory relief, but it did find that there was a serious question to be tried about whether the Bank's security was limited to Lot 2 as ACEL and Mr Ali claimed, or whether it comprised Lot 1 as the Bank claimed. In due course, the Bank sold Lot 1 for $2,500,000 to the Second Defendant, Challenge Engineering Ltd ("CEL"). ACEL claims that this was a substantial undervalue, and that its true value was at least $7,000,000. CEL financed its purchase of Lot 1 with a loan from the Third Defendant, the National Bank of Fiji trading as the Colonial National Bank ("CNB"). Save for the true value of Lot 1, none of that is disputed.

[77] That brings me to the current proceedings. They are based on one particular document – the mortgage deed for Lot 2. That is the document which the Bank admitted altering. It is at pages 57-66 of Volume 1 of the Record of the High Court. It was signed on behalf of ACEL by Mr Ali and someone else (who was either a director or the company secretary of ACEL). The date on which they signed it read 3 August 1999, though that was written in hand and a previous date for an unidentified day in December 1998 which had had been typed on the document had been crossed out. It recorded that Lot 2 measured 3,500 square metres, and it was endorsed with the Director of Lands' consent to the mortgage relating to a debt not exceeding $700,000. That endorsement was dated 2 March 1999 – five months or so *before* it had purportedly been signed by Mr Ali! It had been registered with the Registrar of Titles, whose office had given the mortgage deed number 6993 and had recorded its registration on 11 November 1999. It is common ground that after the mortgage deed had been executed, it remained in the Bank's custody. That is, of course, what you would expect. However, he Bank admits that following the refusal of ACEL's application for an interlocutory injunction, and while the mortgage deed was still in its custody, it altered the deed. The altered version of the mortgage deed is at pages 103-112

of Volume 1 of the Record of the High Court. I shall, of course, come shortly to why it did that, but its admission that it did that is the admission on which the Plaintiffs relied to obtain judgment.

[78] The mortgage deed was altered in two important respects. First the description of the plot of land to which it related was changed. Although it still referred to Lot 2, it said that Lot 2 was "now known as Lot 1". Secondly, although it still referred to the area of the plot of land as 3,500 square metres, it said that the estimated area was "now 2.2938 hectares". In addition, the page on which Mr Ali had apparently signed the document purported to be the same document as that in the original mortgage deed, though it is apparent from a comparison of page 65 with 111 of Volume 1 of the Record of the High Court that *they are not the same page*. The altered deed must have been sent by the Bank to the Director of Lands for his consent, because on 4 June 2004 it was endorsed with the Director of Lands' consent to a mortgage relating to a debt not exceeding $1,250,000. It must also have been sent to the Registrar of Deeds for registration, because the Registrar of Deeds' office had given the altered mortgage deed number 8465 and had recorded its registration on 8 June 2004. I shall refer to this mortgage from now on as the second mortgage.

[79] ACEL's case is that in order to alter the mortgage deed in the way it did, the Bank must have photocopied the original mortgage deed, erased the references in it to 1999, and made the additions on the photocopy relating to the description of the plot of land and its area, before submitting the photocopy with these alterations to the Director of Lands and the Registrar of Deeds. The reason for this subterfuge, says ACEL, was obvious. The Bank did it in order to support its assertion that Lot 1 represented the true security for the debt, and that it was therefore entitled to realise its security by selling Lot 1 and not just Lot 2. The true position, claims ACEL, was that the Bank did not believe the truth of its assertion that Lot 1 represented the true security for its debt, that it always knew that the extent of its security was over Lot 2, but that in order to be able to recoup the debts which ACEL had provided security for, it decided to assert that the plot of land to which the first mortgage related was Lot 1, and in order to establish that it altered the mortgage deed, and had the altered mortgage deed registered as the second mortgage.

[80] The Bank disputes the way it is said to have altered the mortgage deed. It claims that it made the alterations, not on a photocopy of the mortgage deed which had had the description of the plot of land and its area erased, but on a clean copy of the deed as it had never been registered under the Land Transfer Act (Cap 131). Its case is that it altered the mortgage deed simply to reflect what it claims it had always genuinely believed, namely that its security for the debt was not limited to Lot 2, but related instead to Lot 1. Indeed, it claims that when its solicitors informed the Director of Lands that the true security for the debt was Lot 1, not Lot 2, the Director of Lands advised its solicitors to apply for a variation (presumably of the mortgage deed) to show the correct security. That was what the Bank claims it did by sending the altered mortgage deed to the Director of Lands.

[81] That is the background against which the Bank's admission that it altered the mortgage deed has to be considered. Did that admission amount to an admission of everything which the Plaintiffs had to prove in order either to obtain the relief it sought in the present proceedings, or the relief which the High Court gave them? The relief they sought was for-

> (i) declarations that the second mortgage was null and void, that the Director of Lands should not have caused the second mortgage to be registered by the Registrar of Deeds, that the Bank's interest as a mortgagee did not comprise Lot 1, and that the sale of Lot 2 to CEL was of no effect;
> (ii) orders restraining the Bank, CEL and CNB from taking any further steps to sell Lot 2 (presumably to the extent that the sale of Lot 2 to CEL had not been completed), and requiring the Director of Lands to remove or cancel the registration of the second mortgage; and
> (iii) damages.

The High Court found for the Plaintiffs. But it did not give them all the relief they had sought. As I have said, the relief it gave the Plaintiffs consisted of declarations that the second mortgage was null and void, and that the sale of Lot 2 to CEL was of no effect. The judge did not say whether judgment was given in favour of ACEL or both plaintiffs.

However, as far as I can tell, no cause of action was pleaded on behalf of the Second Plaintiff, and I shall proceed on the basis that the judgment was, or should have been, entered in favour of ACEL alone. Having said that, nothing turns on that for present purposes.

[82] In these circumstances, the question is whether the Bank's admission that it altered the original mortgage deed meant that there was nothing further which ACEL had to prove in order to be entitled to the relief which the judge awarded it. Altering documents – forgery by any other name – is not itself actionable. You have to identify the appropriate cause of action. So in this case the court has to identify ACEL's cause of action on the basis of the facts asserted in the Re-amended Statement of Claim, to state what the elements of that cause of action are, and then to decide whether all those elements have been proved by the Bank's admission that it altered the original mortgage deed. It is not enough simply to say that the Bank's conduct was fraudulent. That fraud has to be brought within a recognized cause of action. It is significant that, although the High Court gave ACEL limited declarations, it refrained from declaring that the Bank's conduct had been fraudulent. Indeed, at the end of its judgment at page 33 of Volume 1 of the Record of the High Court, it said that "[t]he act of fraud in this case cannot [b]e determined by the facts admitted".

[83] It is not difficult to identify ACEL's cause of action on the basis of the facts pleaded in the Re-amended Statement of Claim. It is the tort of deceit. A convenient statement of the requirements of an action for deceit is set out in Winfield and Jolowicz, *Tort*, 19th ed, para 12-004:

> "(1) there must be a representation of fact made by words or conduct; (2) the representation must be made with knowledge that it is or may be false, or at least made in the absence of any genuine belief that it is true; (3) the representation must be made with the intention that it should be acted upon by the claimant, or by a class of persons which includes the claimant, in the manner which resulted in damage to him; (4) it must be proved that the claimant has acted upon the false

statement; (5) it must also be proved that the claimant suffered damage by so doing."

[84] It is a little difficult to tell precisely how ACEL was putting its case on the facts pleaded in the Re-amended Statement of Claim. One possibility is that

> (1) by sending the altered mortgage deed to the Director of Lands for him to endorse his consent to the mortgage on it, *the Bank was representing to the Director of Lands that the mortgage deed reflected the true nature of its security for the debt*;
> (2) that representation was false because the true nature of the security was not Lot 1 as the altered mortgage deed stated but Lot 2, and the Bank knew that this representation was false because it knew that the true security for the debt was Lot 2;
> (3) the representation was made with the intention that it be acted upon by the Director of Lands by endorsing his consent to the second mortgage on the altered mortgage deed;
> (4) it was acted upon by the Director of Lands because he did indeed endorse his consent to the second mortgage on the altered mortgage deed; and
> (5) ACEL suffered damage because a plot of land, namely that part of Lot 1 which did not include Lot 2, was wrongly sold by the Bank to CEL, thus depriving ACEL of it.

If that was how ACEL was putting its case, it would not, in my opinion, have been entitled to judgment simply on the basis that the Bank had admitted that it had altered the mortgage deed. The case would then have turned on (a) what the true nature of the Bank's security was, and (b) if the true nature of the security was Lot 2 rather than Lot 1, whether the Bank had been aware of that. The Bank's admission that it had altered the mortgage deed did not mean that ACEL had proved both those things. The true nature of the security may indeed have been Lot 1, and even if it was not, the Bank may genuinely, albeit erroneously, have believed that that was the case.

[85] But there is another way in which ACEL might have been putting its case on the basis of the facts pleaded in the Re-amended Statement of Claim. That possibility is that

> (1) by sending the altered mortgage deed to the Director of Lands for him to endorse his consent to the mortgage on it, *the Bank was representing to the Director of Lands that the contents of the altered mortgage deed (in particular the description of the security as Lot 1) had been consented to by ACEL as it had purportedly been signed by at least one director of ACEL*;
>
> (2) that representation was false because ACEL had not consented to the alterations to the mortgage deed, and the Bank knew that ACEL had not consented to them because the Bank had concealed them from ACEL;
>
> (3) the representation was made with the intention that it be acted upon by the Director of Lands by endorsing his consent to the second mortgage on the altered mortgage deed;
>
> (4) it was acted upon by the Director of Lands because he did indeed endorse his consent to the second mortgage on the altered mortgage deed; and
>
> (5) ACEL suffered damage because the altered mortgage deed was used by the Bank to realise its purported security over Lot 1 by selling it to CEL.

The advantage to ACEL of putting its case in this way was that it did not have to prove that the security for the debt was only Lot 2, and not Lot 1.

[86] I am uncertain whether that was the way in which the case was being put in the Re-amended Statement of Claim on the basis of the facts pleaded in it. But even if it was, ACEL would not, in my opinion, have been entitled to judgment simply on the basis that the Bank had altered the mortgage deed. ACEL would still have to prove that the Director of Lands had endorsed his consent to the second mortgage on the altered mortgage deed because he thought that the alterations had been consented to by ACEL. That is a fact which is very much in issue, the Bank's case being that the Director of Lands endorsed his consent to the second mortgage on the altered mortgage deed, not because he thought that ACEL had consented to the alterations, but because he believed, rightly or wrongly, that the alterations

reflected the true nature of the security for the debt. It follows that, however ACEL was putting its case on the facts pleaded in the Re-amended Statement of Claim, there were still facts which ACEL needed to prove, despite the Bank's admission that it had altered the mortgage deed, if it was to be entitled to judgment. I therefore agree with the conclusion which the Court of Appeal reached on the outcome of the appeal to it.

[87] I add two things which may be some consolation for ACEL. First, the High Court gave ACEL only limited relief. As I have said, it simply declared the second mortgage to be null and void, and the sale of Lot 1 to CEL to be of no effect. It refused to declare that the Bank had no interest in Lot 1. In effect, therefore, the High Court was refusing to declare that the security for the debt had only been Lot 2. That was still left to be determined. So even if the Supreme Court were to restore the judgment of the High Court, that issue would remain to be litigated. The effect of the High Court's judgment was that in that litigation the Bank could not rely on the altered mortgage deed to show that the security related to Lot 1, not Lot 2.

[88] Secondly, in addition to rejecting a number of arguments advanced on behalf of the Bank that its alteration of the mortgage deed was sanctioned by some of its express terms, the High Court held that the second mortgage was null and void because the lease of Lot 1 was a protected lease within the meaning of the Crown Lands Act (Cap 132), section 13(1) of which prohibited its mortgage without the consent of the Director of lands, and that consent had not been given by 3 August 1999 when the second mortgage was purportedly signed by at least one of ACEL's directors. As the Court of Appeal noted, this was not part of ACEL's pleaded case. That was the real reason why it concluded that the second mortgage was null and void. That may have been an appropriate finding to make if ACEL's summons had been a summons for summary judgment under Ord 14 of the Rules of the High Court. But it had not been. It was a summons for judgment on admissions, that admission being the Bank's admission that it had altered the mortgage deed. That admission was not relevant to the question whether the second mortgage had been rendered null and void by the operation of section 13(1).

[89] For all these reasons, I do not think that the appeal raises any of the matters which would justify the grant of leave to appeal to the Supreme Court, and I would therefore refuse the Plaintiffs leave to appeal. I agree with the orders for costs proposed by Marsoof J.

Kankani Chitrasiri, J

[90] I have perused in draft the judgment of Marsoof, J. and the concurring judgment of Keith, J. and agree with their conclusions and proposed orders.

Orders of Court

(1) The application for leave to appeal is refused;

(2) The Petitioners' application is dismissed;

(3) The case is remitted to the High Court for trial on the merits;

(4) The High Court is requested to expedite trial and dispose of this long pending matter expeditiously.

(5) Costs in a sum of $5,000 is awarded against the 1st Petitioner payable to the 1st Respondent, and in sums of $2,500 each payable to the 2nd and 3rd Respondents. All costs to be paid by the 1st Petitioner within 30 days from the date of this judgment.

SUPREME COURT OF FIJI
FIJI

Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court

Hon. Mr. Justice Brian Keith
Judge of the Supreme Court

Hon. Mr. Justice Kankani Chitrasiri
Judge of the Supreme Court

Solicitors:

Cromptons for the Petitioners

Neel Shivam Lawyers for the 1st Respondent

R. Patel Lawyers for the 2nd and 3rd Respondents

Attorney General's Chambers for the 4th, 5th and 6th Respondents