IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

CIVIL PETITION NO. CBV 0022 of 2023
[Court of Appeal No. ABU 0025 of 2021]

BETWEEN : **PITA NASUKIREWA NAIDIRI**

Petitioner

AND : **PANAPASA TALENIWESI**

1st Respondent

DIRECTOR OF LANDS

2nd Respondent

Coram : **The Hon. Mr. Justice Salesi Temo, President of the Supreme Court**
The Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court
The Hon. Mr. Justice Brian Keith, Judge of the Supreme Court

Counsel : **Mr. R.P. Singh for the Petitioner**
: **Mr. E. Maopa for the 1st Respondent**
Mr. J. Mainavolau for the 2nd Respondent

Date of Hearing : **14 April 2025**

Date of Judgment : **30 April 2025**

JUDGMENT

Temo, P:

[1] I agree entirely with the judgment and orders of the Hon. Justice Anthony Gates.

Gates, J:

Introduction

[2] This matter comes to us from a single judge decision of the Court of Appeal. Guneratne P had refused to enlarge time within which the appeal could be brought. The petitioner seeks relief from that decision so that the Court of Appeal can go on to hear his appeal.

[3] In the High Court the plaintiffs [a father and son; in this court only the father Panapasa Taleniwesi now 1st respondent] had alleged misrepresentation and fraud against the 1st defendant [now petitioner] and also against the 2nd defendant [the 2nd respondent] the Director of Lands. The trial judge dismissed the claim of fraud against the Director of Lands but found the two claims proven against the petitioner. I will deal with the judge's orders further on in the judgment.

[4] The plaintiff had been introduced to the petitioner through a pastor of the church of which all were members. They discussed a joint venture together to commence fishpond farming. They went ahead. Later on they fell out, and these proceedings were filed.

[5] Since this was an appeal against an interlocutory order, there was no transcript providing a record of proceedings available to the single judge. At first blush, it seems there was a mismatch between the pleadings and the prayers sought, with the judgment and the orders. We decided to call for the transcript of the trial. This was produced to us within the sittings with commendable speed by the Lautoka High Court Transcription Unit.

Jurisdiction of the Supreme Court to hear appeals from the Single Judge in Civil matters

[6] It is clear that the Supreme Court is the final appellate court [section 98 (3) (a) Constitution], and that it has exclusive jurisdiction, subject to such requirements as prescribed by written law, to hear and determine appeals from all final judgments of the Court of Appeal [section 98 (3) (b) Constitution]. Such an appeal requires the Supreme Court's leave.

[7] Before the amendments made by the 1998 Act [Court of Appeal (Amendment) Act 1998] section 20 (b) of the Court of Appeal Act granted a power to a single judge in civil matters:

> *"(b) to extend the time within which a notice of appeal or an application for leave to appeal may be given or within which any other matter or thing may be done."*

[8] In a proviso to section 20, the Act also grants an entitlement to go before the full court to an aggrieved party who is unsuccessful in their application before the single judge.

[9] Such an entitlement remains in criminal cases but not in civil. An application for the single judge to vary his conditional stay order came up in ***Charan v Bansraj*** [2000] FJCA 45; ABU 0042.1999 (24 February 2000). At page 3 Tikaram P observed:

> *"In my view there is now no right in the aggrieved party to seek a review of a single judge's order by going to the full Court in civil matters. The Legislature in my view has purposely and deliberately taken away that right in civil matters; Sections 20 and 35 of the Act were reviewed following recommendations made by the Beattie Commission whose Report was adopted by the Parliament (see "Commission of lnquiry on the Courts" - Parliamentary Paper No. 24 of 1994). Extensive submissions were made to the Commission on Sections 20 and 35 of the Court of Appeal Act. It is important to note that in criminal matters the Parliament decided to retain the aggrieved party's right to ask for review by the full Court in certain circumstances only. (See Section 35 as repealed and revised by Act No. 13 of 1998 in particular 35(3)."*

[10] In ***AG & Another v Pacoil Fiji Ltd*** in Civil Appeal No. ABU0014 of 1999S the full court had exercised the section 20 powers itself. It observed:

> *"However the powers in question are powers of the court."*

[11] Tikaram P in the ***Charan*** case at page 5 said:

> *"I respectfully agree but the question is - "Can the Applicant have two or more bites at the cherry as of right in the light of clear legislative intent to delete that right under Section 20?" It must be borne in mind that the Court of Appeal is a creature of statute. In my view he cannot do so if the Applicant chooses to go to a single judge in the first instance and the single judge exercises the Court's power to deal with the application. In Pacoil the full Court itself dealt with the application."*

[12] There had been discussion on the issue of "a final judgment of the Court of Appeal", and the jurisdiction of the Supreme Court to hear appeals from the Court of Appeal in ***Rasoki v Attorney General of Fiji*** [2022] FJSC 23; CBV0009.2017 (29 April 2022). The Court concluded:

> *"[15] It is therefore clear from the authorities discussed above that even a decision of a single judge of the Court of Appeal refusing to extend or enlarge time for filling an application for leave to appeal lodged out of time is a "final judgment" of the Court of Appeal for the purposes of section 98(3)(b) of the Constitution of the Republic of Fiji, 2013 since it has the effect of finally determining the rights of the parties concerning which appellate remedies have been exhausted or the time provided for appeal has expired. "underlining and emphasis ours"."*

[13] None of the parties disputed that Guneratne P's judgment was a final judgment. It was, and this court has jurisdiction to hear this petition and to consider whether to grant leave.

The Application for enlargement made to the Court of Appeal Single Judge

[14] The petitioner had filed a summons for leave to appeal out of time and stay application with the Court of Appeal on 7th of April 2021. The intent was to proceed with the appeal

of the High Court decision of Ajmeer J delivered on 22nd of October 2019. The petitioner himself swore an affidavit which was filed in support.

[15] The petitioner deposed that he had visited his then solicitor's firm after the judgment had been delivered. He was advised there were no grounds of appeal, no reasonable grounds, and no arguable appeal open to him.

[16] The petitioner referred to the fact that the dealing with the land, had not received the consent of the Director of Lands. He sought a stay of execution since the plaintiff had issued a judgment debtor summons before the Nadi Magistrates Court to enforce the damages award of $60,000 with 6% interest.

[17] He said his grounds had a reasonable chance of success. Those grounds were:

> *"15.1 At the time that the parties initiated talks between themselves, the 1st Respondent/Original Plaintiff was aware that the Lease to the said land was not issued however I was in a process of obtaining the same under my name and the lease was being issued. In fact it was later issued in my favour.*
>
> *15.2 I did not mislead the 1st Respondent/Original Plaintiff at any time in our dealing.*
>
> *15.3 Any dealing with the 1st Respondent/Original Plaintiff and I were not consented by the 2nd Respondent/Original 2nd Defendant.*
>
> *15.4 The damages awarded against me of **$60,000.00 (Sixty Thousand Dollars)** plus interest, I say is very exorbitant.*
>
> *15.5 The 1st Respondent/Original Plaintiff cannot have an interest in my said land, as these never was any evidence or agreement made between the parties in writing to give the 1st Respondent/Original Plaintiff an interest in the said land."*

[18] The 1st respondent deposed that the applicant for enlargement had consulted his solicitors about appeal and then allowed time to lapse without progress. No reasonable explanation had been given. He claimed he had been unfairly prejudiced by being deprived of the fruits of his successful litigation. He was burdened with extra expenses for the ongoing

litigation. He could not work or expand his shrimp and prawn business on the property, and there was further delay in the prosecution of the appeal.

Ruling of the Single Judge

[19] The single judge considered the application for enlargement of time whilst bearing in mind the principles well established in the jurisprudence of Fiji. There have being many cases dealing with a just approach to such applications. In ***Native Land Trust Board v Khan*** [2013] FJSC 1; CBV0002.2013 (15 March 2013) the Supreme Court summarised the five factors that appellate courts consider to ensure a principled approach to the exercise of a judicial discretion. Those factors were:

> *"(i) The reason for the failure to file within time.*
> *(ii) The length of the delay.*
> *(iii) Whether there is a ground of merit justifying the appellate court's consideration.*
> *(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
> *(v) If time is enlarged, will the Respondent be unfairly prejudiced?"*

[20] At paragraph 30 the Court had said:

> *"[30] Every case turns on its own special facts, though the principles for approaching such applications remain the same and all must be weighed."*

[21] Two other cases are significant in advising a broad approach to the usual factors to be considered as in ***Native Land Trust Board v Khan***.

[22] In ***Habib Bank Ltd v Ali's Civil Engineering Ltd*** [2015] FJCA 47; ABU7.2014 (20 March 2015) Calanchini P observed:

> *"These matters should be considered in the context of whether it would be just in all the circumstances to grant or refuse the application. The onus is on the*

Appellant to show that in all the circumstances it would be just to grant the application."

[23] Keith J in ***Fiji Industries Ltd v National Union of Factory and Commercial Workers*** [2017] FJSC 30; CBV 0008.2016 (27 October 2017) referred to ***Avery v Public Service Appeal Board (No 2)*** (1973) 2 NZLR 86 where it had been said that:

"in order to determine the justice of any particular case the court should…have regard to the whole history of the matter, including the conduct of the parties."

[24] In ***Fiji Industries Ltd*** [paragraph 25] Keith J summarised the approach:

"25. The bottom line here is that each case should be considered on its facts, with none of the factors which the court is required to take into account trumping any of the others. Each factor is to be given such weight as the court thinks appropriate in the particular case. In the final analysis, the court is engaged on a balancing exercise, reconciling as best it can a number of competing interests. Those interests include the need to ensure that time limits are observed, the desirability of litigants having their appeals heard even if procedural requirements may not have been complied with, the undesirability of appeals being allowed to proceed which have little or no chance of success, and the prospect of litigants who were successful in the lower court having to face a challenge to the decision much later than they could reasonably have expected."

[25] The single judge in dealing with the mistakes of lawyers indicated there were two schools of thought about the consequences of such lapses or mistakes. His Lordship said he had previously ruled that lawyers lapses must visit their clients. In ***Fiji Industries Ltd*** the Supreme Court had found against the judge on the impact of mistakes made by lawyers. However, since the Supreme Court had then gone on to dismiss the appeal, Guneratne P considered the question had remained an open issue. With respect, the Supreme Court had not left the question as an open issue. Instead, it had held a lawyer's error was to be considered in the total picture, and in the result, found the circumstances overall to have been insufficient in that case for time to be enlarged.

[26] Guneratne P concluded in his ruling in the instant case:

> *'[5] For my part I re-iterate the view expressed in the Court of Appeal (ABU0007 of 2016) otherwise the concept of recognized agent is reduced to nothing. Once a lawyer is retained by a party, that party must stand or fall by that decision unless an allegation of misconduct or unprofessional conduct can be established in appropriate proceedings or at leave gross professional negligence.'*

[27] Some litigants have deep pockets and can afford to brief new lawyers, who in turn will sue the former lawyers for the losses incurred from the unsuccessful or inadequate litigation conducted on their behalf. In this case it is obvious the lay clients were, for the most part, impecunious and unsophisticated, lacking in business skills, knowledge, and acumen. For such litigants, it is neither realistic or just for them to be told their sole remedy is to mount a claim against their lawyers.

[28] Mistaken advice is merely one of several circumstances to be taken into account in the overall picture and the history of the proceedings.

[29] Inadequate or mistaken advice was one thing but the single judge went on to say, more pertinently, in my view:

> *"Thereafter, he contends that he went to the current lawyers who proceeded to file the present appeal. In the result there resulted to a delay of 18 months on the appellant's own showing. He must take the consequences for his procrastination."*

[30] The delay of 18 months in filing his appeal was significant, and in deciding whether to allow an enlargement of time it is to be considered both a substantial period and one not adequately explained.

[31] His Lordship went on to consider "prospects of success". With this length of delay the question to be answered had to be "will the appeal probably succeed?"

[32] The petitioner's grounds were set out in the ruling. They were:

> *'1. **THAT** the Trial Judge erred in law and in fact when the High Court found that the Appellant made a fraudulent misrepresentation to the Respondents that the Appellant was owner of a State Lease when the Respondent was aware that there was no valid lease and that the Appellant had applied for renewal of the same.*
>
> *2. **THAT** the Trial Judge erred in law and in fact in granting and rewarding general damages for misrepresentation in the sum of $61,000.00 when the same award was not substantiated by evidence and the sum was excessive under the circumstances of the case.*
>
> *3. **THAT** the Learned Trial Judge erred in law and in fact in finding that the First Defendant was fraudulent.*
>
> *4. **THAT** the Learned Trial Judge erred in law and in fact in allowing the relief of the Respondents when the dealing between the Appellant and the Defendant was not connected by the Second Defendant pursuant to Section 13 of the State Lands Act.*
>
> *5. **THAT** the Learned Trial Judge erred in law and in fact in ordering that the Respondents have equitable relief in the property comprised in State Lease Number 18766 being Lot 5 ND5176 when there was consent to any dealing between the Appellant and the Respondent as required under Section 13 of the State Lands Act.'*

[33] Before considering the strength of the grounds there is an important question to be addressed – would the 1st respondent be unfairly prejudiced if the application were to be allowed? Though he is presently pursuing the petitioner with enforcement proceedings for the damages and costs awarded in the High Court, and is finding that process to be slow to bear fruit from an indigent petitioner, the 1st respondent is in a secure position on the land. Though it did not form part of the sealed orders of the court, the Director of Lands implemented the judge's directive in the body of the judgment to cancel the petitioner's lease. The 1st respondent's son, so we are informed by both counsel, had subsequently and instead, been issued with a State Lease over the property in question. It can be concluded therefore that the respondents would not be unfairly incommoded if the court were to allow the petitioner to pursue his appeal in the Court of Appeal.

[34] The trial judge made the following orders:

> *'1. **THAT** there shall be judgment in favour of the plaintiff.*
>
> *2. **THAT** the plaintiff shall have equitable right/interest on the property being Crown Lease No. 18766 being Lot 5 ND 5176 containing an area of 8 acres 1 rood 24p land known as Vutisa in the District of Nadi Province of Ba.*
>
> *3. **THAT** the first defendant shall pay general damages in the sum of $60,000.00 to the plaintiff with 6% interest from the date of writ of summons till the date of this judgment.*
>
> *4. **THAT** special damages is refused.*
>
> *5. **THAT** the claim against the second defendant is dismissed.*
>
> *6. **THAT** the first defendant shall pay summarily assessed costs of $3,500.00 to the plaintiff.'*

[35] As referred to above, in the body of the judgment [at paragraph 55] the judge had directed the Director of Lands to cancel the lease issued to the petitioner. This did not form part of the orders. However, I will return to this matter further on.

Background Facts

[36] Mr. Josefa Natau held a Crown Lease at Maqalevu, Nadi. It expired in 1995. No application was ever made to renew the lease before it expired, or at least soon afterwards.

[37] The land consisted of 8 acres near the seaside. Perhaps for that reason it appears not to have been very fertile. Only 3 acres were utilized successfully to plant sugarcane. Some land was just overgrown grass and trees. Part of the remainder by agreement of the petitioner with the 1st respondent Panapasa Taleniwesi, was prepared for fish farming as a joint venture. The 1st respondent's son Jason Matai lived on site to develop the ponds, liaise with the Fisheries Department, and look after the fish.

[38] Mr. Natau had retired from the meteorological department and was living in Suva. The petitioner who lived on the farm said Mr. Natau had asked him to look after the farm. This was in 1988.

[39] In 2003 said the 1st respondent, Mr. Natau had died. The petitioner said he had died in 2006. There was no confirmation of the exact date. There was no evidence either of his having left a Will to dispose of his property. The 1st respondent said he tried to help Mr. Natau's adopted grandson to apply for Letters of Administration, but nothing seems to have eventuated. Of course, at the time of his death, Mr. Natau had no interest in the land, the lease having expired and rents not having been paid. Had he applied for a renewal, and prior to issue of a lease, paid renewal fees and the outstanding rental arrears, no doubt he would have achieved a renewed lease. But as at his death he had no interest in the land to bequeath.

[40] Apart from Mr. Laisenia Kidanaceva who gave evidence for the Director of Lands, all of the witnesses were related in some way to each other or to the late Mr. Natau. Some were members of the United Pentecostal International Church, based at Narewa.

[41] There were four persons or groups that might benefit from the passing of Mr. Natau in connection with his expired lease at Maqalevu.

[42] First there was Epi (or Evi) Turuva. He had been adopted unofficially by Mr. Natau and lived in Maqalevu on the farm as a kind of grandson. There had been no formal adoption. It was said to have been a traditional adoption. The 1st respondent's counsel told the judge Epi was still on the land. But in evidence, his client the 1st respondent said of Epi, "Right now I only know that he went to the US, he went to Australia, so I'm not too sure where he is as of today". It was not disputed that he had been living on the property.

[43] The second person to be living there in his own house was the petitioner with his family. This was a separate dwelling to that of Epi. The petitioner said he had been there since 1988. He had retired from the hospitality industry when he had reached the age of 55

years. He said Mr. Natau was his mother's brother and the petitioner referred to him as his uncle.

[44] The 1st respondent was not related to Mr. Natau, but he entered into a verbal agreement with the petitioner to do fish farming through the ponds that he and his son prepared and dug on the land.

[45] The 1st respondent's son Jason Matai was on the land at the start of the agreement. At first he was living in a tent. Subsequently, the petitioner allowed him to build a small wooden house to live in. Jason was the operating force behind the fish venture. In the end, after the judge had directed the Director of Lands to cancel the petitioner's lease, and after several inspection visits to view the occupants living on the lease property and to assess their interests, the Director issued a fresh lease to Jason. It would appear the intended application of the grandson Epi which together with "the probate" which the 1st respondent said he was helping him to achieve, was never progressed by Epi. Hence, Epi was not in the running to obtain a lease after the grandfather's passing.

[46] The 1st respondent himself never applied formally for a lease, according to the Director of Land's witness. He had invested substantial monies he said, which was accepted by the judge, on establishing the fish ponds. Jason was asked why he or his father had not applied for a lease. He said he left all those things to his parents.

[47] Lastly, the church was interested in the land. Jacob Gutuvakaca said the 1st respondent was his brother-in-law. His sister was married to the 1st respondent. Jacob was the Senior Pastor living in Narewa. The petitioner was the church secretary and treasurer. Jacob had introduced his brother-in-law to the petitioner. This was for the purpose of carrying out a fish pond venture.

[48] Initially, Jacob went to the petitioner to ask if the church could use a piece of land for fish farming, which previously they had been using to plant vegetables. The petitioner agreed. Then the pastor mentioned his brother-in-law and his desire to do a farming venture for

fish and prawns. Jacob said he agreed "to give us the land that we planting". This occurred around the middle of 2009.

[49] The 1st respondent said the agreement was for the ownership of the ponds to be divided up, one pond for the church, one for the pastor, one for the petitioner, and two for the developer the 1st respondent. The petitioner testified that, "the arrangement that was made, that the money that was going to be earned from the fish pond, was also to assist in the running of the church". Finance was to be provided by the 1st respondent and the church would assist with labourers for some digging, cleaning, and fencing. The church through the pastor and his brother-in-law imposed rules concerning the use of the land, amongst other things forbidding the consumption of, or dealing with, yaqona and alcohol. This led to trouble later when the rules were broken.

Why they fell out

[50] It is not clear exactly why relations between the 1st respondent and the petitioner soured. It may be because the 1st respondent had been to see the Divisional Surveyor and as a result further inspections were made of the land, its uses and occupants. At one point the petitioner wrote to the Prime Minister's office about the Lands Department's visits made after he had received his lease. Perhaps the petitioner thought attempts were being made to unseat him from his lease. There was an issue over where the 1st respondent wanted to build his house. He alleged that the petitioner had ploughed up the area where the house was to be built. In the course of a heated meeting afterwards the 1st respondent said: "I told him you lied in the first place about that piece of land".

[51] The 1st respondent went on to say in evidence "then I started to find legal ways so I could secure myself to win back the piece of land that I had developed".

[52] Tension arose when Epi's mother living in the house next to the petitioner complained about more of the land being used by the 1st respondent and Jason. Jason said he was only planting cassava on the vacant land. There was some intercropping. Jason said in evidence

Epi's mother had argued with the petitioner, both of whom are related, saying "why did he bring us [Jason and his father, the 1st respondent] onto the farm since he was not the owner". The land she said belonged to Epi. Apparently, when this row broke out according to Jason, the petitioner gave away the pond allocated to himself to Epi. If that were the case that would mean effectively that the petitioner was no longer likely to have any benefit from the fish venture. He had given two ponds to the 1st respondent as developer, one to the church pastor, one to the church, and his own pond now belonged to Epi.

[53] Of course, none of these parties had made any inquiries with the Titles Office, or the Lands Department as to the ownership and status of the land, before considering entering upon the land to develop it. No consent from the Director of Lands to the dealings was ever contemplated. Nothing resembling a due diligence approach was ever undertaken. But it would be most unlikely for the Director to have contemplated subdividing a small rural estate lease into further subdivisions to accommodate four more titles for each of the individual pond "owners".

The Judge's Direction to Cancel the Petitioner's Lease

[54] In their statement of claim the 1st respondent and Jason had sought several orders, one of which was:

> *"(e) An Order that the Crown Lease No. 18766 being Lot 5 ND 5176 containing an area of 8 acres, 1 rod, 24 p land known as Vutisa in the District of Nadi, Province of Ba registered under the defendant is obtained by fraud hence is cancelled forthwith."*

[55] The pleadings made three allegations of fraud against the 2nd defendant, the Director of Lands. First, it was said there were arrears of rent on the previous title (and yet) the Director processed the application for a lease by the petitioner. A fresh applicant, which was what the petitioner was, would not have been liable for the arrears of rent of the deceased leaseholder. The Director's knowledge it was claimed was evidence of fraud by the Director's staff. It was not and this factor was irrelevant.

[56] When considering Epi's application the Department had noted the arrears of $3,325.39 from the time of the expiry of Mr. Natau's lease in 1995 to the date of the application in 2011. It was not clear why this was so. Was it because the Department regarded this as an extension of the old lease to be applied for by the administrator of his estate? Or was it a mistaken view that a fresh applicant namely Epi must pay the arrears from the old lease continued as a tenancy at will in the intervening years?

[57] Second, it was claimed there was fraud by the Director's staff because they had accepted fees for the application for a new lease by Epi, and that they had made a file recommendation for the lease renewal to be processed first. Epi had failed to persist with his application. When the petitioner was granted a new lease on the 12th of January 2012, effective 1st of January 2011, it was already 16 years after the expiry of the former lease. If the first in line relative did not achieve a new lease, it was hardly surprising the next in line living on the property [namely the petitioner] should apply instead. The Director cannot force an applicant to proceed. Epi, for whatever reason, did not do so. It maybe he could not pay off the arrears. But the state had a duty to lease the land. The petitioner came forward with a valid application and was granted a new lease.

[58] Third, it was claimed the staff knew that there were others residing on the land and that their rights to the property, to a new lease, were not considered.

[59] Unsurprisingly, the trial judge concluded these claims had not been proved. None of the allegations could prove fraud, and in themselves, no adverse inferences could be drawn from them.

[60] Inadequacies of procedure by the Lands Department could not amount to fraudulent conduct. The processing of the petitioner's application was in many ways unremarkable. It was high time a new lease was issued for State Land on which no rent was presently being paid. In the judgment the judge had stated incorrectly that the petitioner since being issued with the new lease had failed to pay any rent. The Lands Department witness was

asked about this and he answered "Yes My Lord he has done some repayment" [Transcript p100].

[61] There was no evidence given of the criteria observed by the Lands Department for determining which applicant should be offered a lease upon the demise of a former lessee, a relative of the competing new applicants. What were the factors which placed one applicant living on the land ahead of another? It follows there was nothing to suggest that the Director of Lands had not acted in accordance with such criteria.

The Judge's Directive to the Director of Lands

[62] The judge did not make an order for cancellation of the petitioner's lease in accordance with the prayer (e) in the claim. Instead he issued a directive in the body of the judgment. If valid, that directive should have featured in the orders at the end of the judgment. From those orders, the successful plaintiff would then have sought a sealed order of the court, making the order enforceable.

[63] But was it within the power of the judge to give such a directive? The judge had found the Director of Lands not to have been fraudulent in his dealings with the petitioner. Leaving aside what orders might be appropriate as against the petitioner, what jurisdiction, in the absence of fraud, did the court possess to direct a public official as to how he should perform his duties? No doubt the Director could make up his own mind, what action was to be taken on the lease and what powers the lessor should exercise in the circumstances. This was an unusual exercise of judicial powers, and I conclude the judge had no power to issue such directive. Once the plaintiff had failed to establish fraud against the Director there was no nexus for that claim with the plaintiff. The plaintiff had nothing to do with whether the Director had correctly handled the petitioner's application for a lease. The Director had sufficient powers to re-enter or to exercise other powers in the lease. It was a matter for him to decide in accordance with those rights and powers.

What must be proved in order to establish fraud in Civil cases

[64] From time to time this issue comes up in appeals to the Supreme Court. Much has already been said on the matter. The two leading cases are ***Derry and Peek [1889] 14 App Cas 337*** and ***Bradford Third Equitable Benefit Building Society v Borders [1941] 2 AII ER 205***. In Fiji see ***Ali's Civil Engineering Limited v Habib Bank Ltd*** [2019] FJSC 30; CABV00016.2018 (1 November 2019) and ***Kuar v Singh*** [2022] FJSC 19; CBV0017.2018 (29 April 2022).

[65] In the ***Bradford*** case Viscount Maugham at page 211A set out the requirements of proof:

> *"My Lords, we are dealing here with a common law action of deceit, which requires four things to be established. First, there must be a representation of fact made by words, or, it may be, by conduct. The phrase will include a case where the defendant has manifestly approved and adopted a representation made by some third person. On the other hand, mere silence, however morally wrong, will not support an action of deceit: Peek v. Gurney (2), at p.390 per Lord Chelmsford, and at p.403, per Lord Cairns, and Arkwright v. Newbold (3), at p.318. Secondly, the representation must be made with a knowledge that it is false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true: Derry v. Peek (4) and Nocton v. Ashburton (Lord) (5). Thirdly, it must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which will include the plaintiff, in the manner which resulted in damage to him: Peek v. Gurney (2) and Smith v. Chadwick (6), at p.201. If, however, fraud be established, it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made: Derry v. Peek (4), at p.374, and Peek v. Gurney (2), at p. 409. Fourthly, it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing: Clarke v. Dickson (7). I am not of course, attempting to make a complete statement of the law of deceit, but only to state the main facts which a plaintiff must establish."*

[66] In the ***Derry*** case the defendants, Directors of a company, had stated in their prospectus that their Tramway Company had obtained the consent of the Board of Trade to use steam for their carriages as opposed to horses. The question was, though the defendants knew that their statement was not strictly accurate, did they intend to deceive? They honestly thought that their statement conveyed a substantially accurate representation of fact. There are several similarities with the instant case.

[67] Each of the four groups of interested parties held a sense of entitlement here. What each had to say to neighbours about those interests, they would have had to admit later (if pressed) were not strictly accurate. For instance Epi, the adopted grandson of the original lease holder, together with his mother, considered that he was the owner of the land. Jason referred in his evidence to this claim being made by Epi. If Epi had given evidence no doubt counsel would have brought him to acknowledge that although he had applied for his grandfather's lease he had not pressed forward with the application, and thus he was not the holder of the lease, and therefore not the owner of the land, as he had been saying, according to Jason.

[68] In cross-examination the 1st respondent, Panapasa, was asked whether he had ever owned land that is a lease for business. He said, yes, and said it was in Savusavu. He was asked to explain whether it was iTaukei land belonging to his clan, or whether it was a leasehold land, meaning owned separately by him. He then varied the "owner" answer to that "it belongs to my Mataqali." So the first answer the 1st respondent gave was that he owned the land, and that it was leased land. That answer had not been strictly accurate but that did not mean he was making a misrepresentation in the nature of a deceit.

[69] The evidence in relation to the date when the misrepresentation was made is not clear. The petitioner admitted that he had said he was the owner of the land. He had said that because he had lived there from 1988 to 2009, and that he had used the land for cane production in that period.

[70] Certainly in a letter dated the 1st of May 2010, addressed to the Fisheries Department at Nausori he had stated, "I, Pita Nadiri, a cane farmer and also the owner of the farm mentioned above…" The writer's address at the top of the letter had given the address as "Maqalevu Farm Settlement at Nadi". It was accepted that he lived on the farm in a house that belonged to him personally. He had represented that he was the farm owner. He had not stated that he had held a Crown Lease over the farm. He was the cane farmer. But what he said was not strictly accurate. The judge at [paragraph 32] said he had represented himself as the owner of "the property" in question, and [paragraph 33] as the owner of the

subject "land". So there is a slight difference here between saying I am the owner of the "farm" and saying "I am the owner of "the lease" or "the property" or "the land".

[71] The judge found at [paragraph 40]:

> *"[40] On the evidence, I find that the first defendant had made an unambiguous false statement of existing fact to the plaintiff that he was the owner of the subject-land at the time when he was not actually so, such representation was fraudulent and that his conduct is giving rise to a claim for misrepresentation. It was fraudulent because he did not disclose the fact that he had applied for a lease for the subject-land and a decision on that application was yet to be taken by the fact induced the plaintiff to enter into the joint venture investment project on the land spending significant amount of money."*

[72] In ***Derry*** Lord Herschell delivering the leading speech in the House of Lords said:

> *"I conclude by saying that on the whole I have come to the conclusion that the statement, "though in some respects in-accurate and not altogether free from imputation of carelessness, was a fair, honest and bona fide statement on the part of the defendants, and by no means exposes them to an action for deceit."*

[73] Lord Herschell summarised the basis for holding that civil liability had not been made out [paragraph 379]:

> *"I think they were mistaken in supposing that the consent of the Board of Trade would follow as a matter of course because they had obtained their Act. It was absolutely in the discretion of the Board whether such consent should be given. The prospectus was therefore inaccurate. But that is not the question. If they believed that the consent of the Board of Trade was practically concluded by the passing of the Act, has the plaintiff made out, which it was for him to do, that they have been guilty of a fraudulent misrepresentation? I think not. I cannot hold it proved as to anyone of them that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short, I think they honestly believed that what they asserted was true, and I am of opinion that the charge of fraud made against them has not been established."*

[74] In the instant case the basis for the petitioner's representation was not well brought out in the evidence. There was some ambiguity here and the evidence that the representation was a misrepresentation amounting to deceit did not reach the civil standard of proof.

[75] The judge's finding of fraud in paragraph 40 of his judgment did not deal with the necessary elements before fraud could be found. The failure as the judge saw it, by the petitioner to reveal that he was applying for a lease of the land could not have bolstered the allegation of fraud or weakened the 1st respondent's position on the land. By the time the preparatory works on the ponds were completed by the 1st respondent and his son, over a period of seven or eight months from mid 2010 as the 1st respondent had said, the petitioner had his new lease backdated to 1st of January 2011. Had they not fallen out, the parties would have continued with their joint venture, though other irregularities such as the lack of the Director's consent were still to be resolved.

[76] How had the lack of immediate title for the petitioner, and the petitioner's representation caused damage to the joint venture? That was not made clear. Had a misrepresentation been unambiguously proven to have caused the financial losses claimed? Was it not more likely that these expenses were the startup costs for the developer rather than resulting from insecurities over the title to the land? The link was not established.

[77] I conclude that fraud had not been established in this case.

Conclusion

[78] The President of this court has allowed an enlargement of time for this court to hear the petition against the refusal of enlargement in the Court of Appeal. I concur with Temo P's orders.

[79] This case, having its factual origins in 2009 and even going back to the expiry of Mr. Natau's lease in 1995, has not brought a speedy resolution for the parties. The duration of the dispute and the need for more urgent disposal does not support the return of this case

either to the Court of Appeal for a hearing of its appeal or indeed for return to the High Court for a retrial. It is likely also that the parties may find it financially difficult to continue further lengthy litigation. We were informed that the lawyers for the petitioner have provided their services without charge in the Court of Appeal and in this court. Instead, it is proposed to complete all matters now in this Court.

[80] I would grant leave to appeal under section 7 (3) (a) finding a far reaching question of law in the misapplication of the elements of fraud in civil proceedings, as also in the wrongful exercise of a direction to the Director of Lands to cancel a lease.

Keith, J:

[81] I have had an opportunity to read a draft of the judgment of Gates J in this case. I entirely agree with it and with the orders which he proposes. I add a few words of my own because this case has revealed in a stark form three of the problems which the Supreme Court sometimes faces when considering an appeal.

[82] The first is this. Facts are the raw data with which judges work. The rights and wrongs of a dispute cannot properly be determined unless the relevant facts are clear – or where they are in dispute, unless clear findings have been made about them. Unfortunately, the facts on which all the relevant parties in this litigation relied were not sufficiently explained in the pleadings, nor were they spelled out in the trial judge's judgment. We had no alternative but to call for a transcript of the evidence given at the trial to see what the parties were saying. Even then, I am far from sure whether I have properly understood the parties' respective cases on the facts. The evidence was not given with the clarity which one would like, and ambiguities in the evidence were not resolved by further questioning. To give a simple example (even though nothing turns on it), Epi Turuva was described at various times in the evidence as Josefa Natau's son, as his grandson and as his adopted son, without any attempt being made to resolve the ambiguity. That is why, although I agree entirely with Gates J's understanding of the facts, I rather doubt whether even he can guarantee its accuracy.

[83] This therefore represents a plea on my part for lawyers to set out the relevant facts in the pleadings with accuracy and to iron out in the course of the trial any ambiguities there may be in the evidence. It is also a plea for judges to craft their judgments in such a way that the facts which they find – and to which they then apply the relevant law – are sufficiently clear for both the parties and the appellate courts to understand them.

[84] The second problem which this case has highlighted relates to the form of the Record of the Supreme Court prepared for our use. When it is thought that a particular affidavit should be included in the Record, the current practice is to include in the Record all the documents exhibited to the affidavit. That can result in particular documents being included in the Record more than once – and in an extreme case a number of times. That is what happened here. Ajmeer J's judgment appeared in the Record no less than eight times.[1] That was not the only example of unnecessary duplication of the exhibits to the affidavits in this case. To give a few more examples, the order which Ajmeer J made giving effect to his judgment appeared in the Record in six places[2], and the judgment debtor's summons requiring the petitioner to appear at the Magistrate's Court in Nadi appeared in the Record in seven places.[3]

[85] That should be avoided. There are two ways of doing that. First, there is no need to exhibit documents which are already on the court file or which have been referred to in previous affidavits. Secondly, there is no need to include in the Record of the Supreme Court (or in the Record of the High Court or the Record of the Court of Appeal) documents which have already been included in that record.

[86] This duplication was not limited to the exhibits to affidavits. The pleadings together with an order for directions and the minutes of the pre-trial conference were correctly included in the Record. But immediately following them were the same documents – included in

[1] Pages 14-27, 188-201, 225-238 and 288-301 in volume 1 of the Record of the Supreme Court, and pages 325-338, 376-389, 462-478 and 625-637 in volume 2 of the Record of the Supreme Court.
[2] Pages 29-31, 84-86, 240-242 and 303-305 in volume 1 of the Record of the Supreme Court, and pages 340-341 and 391-392 in volume 2 of the Record of the Supreme Court.
[3] Pages 66-68, 89-91, 207-209, 255-257 and 307-309 in volume 1 of the Record of the Supreme Court, and pages 355-356 and 479-481 in volume 2 of the Record of the Supreme Court.

the Record simply because a bundle containing these documents had been separately filed.[4] That was unnecessary. Care should be taken in future to ensure that the unnecessary duplication of documents is avoided.

[87] The third problem relates to the exhibits which were produced at trial. More often than not, the only exhibits included in the Record of the Supreme Court are those exhibits which were exhibited to affidavits. But those exhibits may well not include many of the exhibits produced at trial. Some of those exhibits may be important for the Supreme Court to see. Some may not be. It will depend on what the grounds of appeal are. In the present case, it was not necessary for the Supreme Court to see many of the exhibits to the affidavits, whereas it would have been helpful to see some of the exhibits produced at trial but which had not been exhibited to any of the affidavits. I refer in particular to the original Crown lease granted to Josefa which expired on 31 December 1995, and the petitioner's letter of 10 April 2010 to the Department of Fisheries seeking consent to carry on the business of prawn farming on the land. Care should be taken in future to ensure that copies of any relevant exhibits produced at trial (by relevant I mean exhibits which are relevant to any ground of appeal) should be included in the Record of the Supreme Court.

Orders of the Court:

1. *Leave to appeal granted.*
2. *The judgment in the High Court in favour of the 1st respondent is set aside.*
3. *The orders for damages of $60,000 payable by the 1st defendant [petitioner] with 6% interest from the date of the writ summons till the date of the judgment are set aside.*
4. *A declaration that the directive issued to the Director of Lands to cancel Crown Lease No. 18766 being Lot 5 ND 5176 containing an area of 8 acres 1 rood 24p land known as Vutisa in the District of Nadi Province of Ba was made in excess of jurisdiction and was unlawful.*
5. *The costs order in the High Court of $3,500 against the petitioner is set aside.*

[4] See pages 525-555 and 558-594 in volume 2 of the Record of the Supreme Court.

6. *The costs orders in the Court of Appeal for the petitioner to pay $3,000 to the 1st respondent and $1,500 to the 2nd respondent are set aside.*

7. *Costs in this Court to be paid to the petitioner by the 1st respondent in the sum of $4,000.*

The Hon. Mr. Justice Salesi Temo
President of the Supreme Court

The Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court

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

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