

IN THE SUPREME COURT OF FIJI
CIVIL APPELLATE JURISDICTION

NORTH (CIVIL APPEAL NO. CBV 0005 OF 2017)

(Fiji Court of Appeal No. ABU 0054 of 2013)

(High Court Civil Action No. HBC 18 of 2009)

BETWEEN : **GARY SCOTT MOTIL and LAURIE J MOTIL**

PETITIONERS

AND : **NORTH (FIJI) GROUP LIMITED**

RESPONDENT

Coram : **Chief Justice Anthony Gates, P**
Jayawardena, J
Quentin Loh, J

Counsel : **Mr. V. Kapadia with Mr. R. Singh for the Petitioners**
Ms. A. Ali for the Respondent

Date of Hearing : **16 August 2018**

Date of Judgment : **24 August 2018**

JUDGMENT

Gates, P

1. I have read in draft the judgment of Loh J. I share his lordship's surprise that the error was left to lie uncorrected throughout the progress of this case, though it was known. I agree with his lordship's reasoning and the orders proposed.

Jayawardena, J

1. I have read in draft the judgment of Loh J. I agree with his lordship's reasoning, conclusions and the orders proposed.

Quentin Loh, J

2. The Petitioners seek leave to appeal to the Supreme Court of Fiji under Chapter 5, Part A, Section 98 of the Constitution of the Republic of Fiji.
3. The Petitioners, Gary Scott Motil and Laurie Motil, non-residents of Fiji, (hereafter "the Petitioners"), were Plaintiffs at first instance who purchased a plot of land of 1.5369 hectares on Vanualevu for US\$400,000.00 from the Respondent, the Defendant below, North (Fiji) Group Limited, (hereafter "the Respondent").
4. The facts have been set out in the judgments of the Brito-Mutunayagam, J at first instance and Calanchini, P who delivered the judgment of the Court of Appeal. For the purposes of this application, there is no need to rehearse the same save to set out facts germane to the issues at hand.
5. The Petitioners alleged the Respondent made certain representations to induce the Petitioners to enter into the Sale and Purchase agreement to buy the plot of land from the Respondents. These representations, amongst others, included promises that the plot of land would be served by a road to be constructed by the Respondents, that there would be provision for electricity, water, drainage, telephone and other utility services. The Petitioners say none of these promises were kept or fulfilled.
6. In addition, the Petitioners, who were avid surfers, alleged that the Respondent told them they would be developing a unique integrated resort development, to be called the Narewa Club, with access to the Great Sea Reef which produced one of the best surf waves in the world. The Respondent claimed to have exclusive access to the twin

passages to the Great Sea Reef off Narewa; there would be a private marina and there was a company-owned Islander 28 boat available for day trips out to the reef. There was to be a world class golf course and hotel and the Petitioners would have uninterrupted access to the resort's amenities.

7. It was further represented that villas on the purchased plot of land could be used as hotel accommodation and the Petitioners would receive a portion of the revenue. Gary Motil, who had the relevant experience, would be engaged in operating and running a life guard service and would train local staff as life guards and surfers. Laurie Motil, who was a keen horticulturalist, would run and train local staff for a plant nursery which would be set up in the resort precincts. It is alleged the Respondents represented that the resort would be up and operating on or about December 2007.
8. The Petitioners claim all these plans were fictitious, there were no or little work carried out for the Narewa Club and the Respondents did not have any means or financial resources to undertake such developments. The consideration of US\$400,000.00 did not represent a genuine value for this plot of land. The Petitioners sued the Respondents.
9. At first instance, the Petitioners largely prevailed. In a judgment dated 27 August 2013, they were awarded damages of \$683,966.10 with interest at 3% per annum. The Petitioners' claims for special damages (which included items for the Petitioners' move from Hawaii to Fiji) and their claim for exemplary damages were dismissed. The Counterclaim by Respondent was also dismissed and the Petitioners' were awarded costs.
10. Being dissatisfied with the decision, the Respondent appealed. The Petitioners, also dissatisfied with the decision, filed a Respondent's Notice.
11. The appeal was heard on 9 September 2016. During the course of the hearing, Justice Calanchini, P asked, with good reason, to see the sale and purchase agreement and Mr.

I. Fa, counsel for the current Respondents, (the Appellants in the appeal below), identified an agreement in the Supplementary Bundle of Documents whereupon Justice Calanchini, P noted that it was unsigned. Mr. Fa confirmed that it was not signed. Leaving aside the discussion in court of whether the documents in the Supplementary Bundle of Documents comprised documents that were properly admitted by the Trial Judge into the evidence, Mr Fa then referred the Court of Appeal to a document entitled "Preliminary Agreement" dated 25 January 2007 and added that it was for the Director of Lands to consent to the Transfer. No doubt what Mr. I. Fa meant was that the Preliminary Agreement was subject to the parties obtaining the Minister's consent to the sale, as somewhat loosely expressed in the recitals. It was at that point, (at page 16 of the 46 page Transcript), that the Court of Appeal became aware that the Minister's consent to the purchase was a pre-requisite as the Petitioners were non-resident purchasers. Justice Calanchini, P then queried Mr. Fa, *inter alia*, about when the Minister's consent was given and where it could be found in the record. Mr. Fa had to admit he did not know when it was given and it was not in the record. Mr. Fa attempted to persuade the Court of Appeal that the consent must have been given. Justice Calanchini, P, quite rightly, was not prepared to make that assumption and made it clear at page 18 of the Transcript that he wanted sight of that consent to the sale:

Justice Calanchini: Well, we need to know. That's a pre-requisite for going anywhere in this matter. The Minister gives his consent in writing, where is it?

12. Justice Calanchini, P then asked Mr. A. Sen, counsel for the Petitioners, (the Respondents below) about the conveyancing aspects of the sale and Mr. A. Sen could not help the court except to say that he received the documents from the Petitioners and assumed the Minister's consent must have been obtained. Justice Calanchini, P made the court's position quite clear at page 19 of the Transcript:

Justice Calanchini: I want to see the ministerial consent in writing, please.

Mr. Sen: Very well, My Lord.

Justice Calanchini: Yes, you may continue for the time being but there are problems if there is no document and I don't care what you say about Titles Office doing all sorts of things for all sorts of reasons. I wouldn't be satisfied on that assumption, Mr. Sen, under any circumstances.

13. We pause to note that the evidence and the documentary record before the Court of Appeal was in a very unsatisfactory state of affairs. Mr. Sen confirmed to the Court of Appeal that he had not seen the Documents in the Supplementary List of Documents until Mr. Fa handed them to him and they were never in evidence at trial (pages 20 and 21 of the Transcript). Mr. Fa on the other hand insisted that, (presumably some), of the documents were referred to in the judgment of the learned Trial Judge and “referred to in the Agreed Bundle of Documents. [a]nd ... in the Pre-Trial Conference Minutes, (see page 25 of the Transcript). At the conclusion of the hearing, (at pages 45 and 46 of the Transcript) the Court of Appeal again made clear that it wanted to see the Ministerial consent and set a time limit for counsel to do so:

Justice Calanchini: ... Alright, well as I've indicated we'll need the ministerial consent. The Order has been made concerning the copy of the written ministerial consent being provided to the Court. That is a pre-requisite for any ... transaction relating to the purchase of land by a ... non-resident ...

...

It's a document that should have been in the record. It is a pre-requisite for anything to happen.

...

It is inexcusable that a copy of it has not been made available. ... It's something the learned Trial Judge should have asked to see at the very beginning.

14. When the Minister's Consent was finally produced, it was for Lot 1 on DP 9307 (part of CT 36452), *not* a plot of land that was part of Certificate of Title No.36452 DP no. 9306 and 9305.

15. In the Application for Consent to Dealing pursuant to section 6 and 7 of the Land Sales Act Cap 137 (hereafter "the Application for Consent"), the following, *inter alia*, was stated:

(a) under the notation: "Legal description of property, tenure and where located (sketch should be attached)" the following response was typed :

"Lot 1 on DP 9307 of CT 36452."

and,

(b) under the "Purchase Price" it was typed in:

"\$250,000.00 for purchase of CT Nos.31377 to 31381 inclusive which were then amalgamated into one CT 35810 which was then cancelled for issue of one CT 36452 which is now being subdivided via DP Nos. 9306 and 9307".

(emphasis in italics and bold added).

There was no reference to DP 9305. The Minister's Consent was dated 25 January 2007.

16. In its judgment, the Court of Appeal pointed out a crucial fact, *viz.*, the pleaded claim and the defence that was before the court:

(a) the Petitioner's claim, as pleaded in paragraph 4 of their Statement of Claim, rested entirely upon their purchase of a 1.5369 hectare plot of land that was part of the Respondents' land contained in *CT 36452 DP no. 9306 and 9305*, situated in the District of Dreketi on the Island of Vanua Levu for the purchase price of US\$400,000;

(b) the Respondent's defence to that claim, contained in paragraph 4 of their Amended Defence, agreed that there was an agreement for the purchase of part of the land as contained in CT 36452 "...but further add that the actual

lot sold is *Lot 1 on DP 9307* and apart from the above admission makes no further admissions in respect to paragraph 4”; and

- (c) the Petitioner’s Reply to paragraph 4 of the Amended Defence was to join issue by pleading: “As to paragraph 4, the [Respondents] say that they will refer to the agreement dated 28th October 2006 for full terms and the true purport at trial.”
(emphasis added)

- 17. It is not in dispute that pursuant to section 6 of the Land Sales Act Cap 137 no non-resident can enter into a contract to purchase or take on lease any land without the prior written consent of the Minister for land matters unless that land is under one acre. As the plot of land the Petitioners purchased amounted to some 3.8 acres, prior written Ministerial consent is essential failing which the contract is *void ab initio*. Section 6 of the Land Sales Act Cap 137 provides:

6.-(1) No non-resident or any person acting as his agent shall without the prior consent in writing of the Minister responsible for land matters make any contract to purchase or to take on lease any land.

Provided that nothing contained in this subsection shall operate to require any such consent or prevent a non-resident from making any such contract if the land together with any other land of such non-resident does not exceed in the aggregate an area of one acre.

- 18. The Court of Appeal accordingly issued its judgment dated 23 February 2017 and made the following orders:

- (a) The appeal against the award of damages by the learned Trial Judge was allowed;
- (b) The Respondent’s (the Petitioners’ before us) notice was dismissed;
- (c) The Orders of the Court below were set aside;
- (d) The Respondent’s (the Petitioners’) writ was dismissed;
- (e) The Appellants (the Defendants at first instance) counter claim was dismissed; and,

- (f) The parties were to pay their own costs in the Court of Appeal and at first instance.
19. It is settled law that under section 7 of the Supreme Court Act 1998, the Supreme Court “...must not grant leave to appeal unless the case raises”:
- (a) a far-reaching question of law;
 - (b) a matter of great general or public importance; or
 - (c) a matter that is otherwise of substantial general interest to the administration of justice.

Authoritative case law has interpreted this provision as laying down the rule that special leave is not granted unless the case is 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; see *eg.*, *Bulu v. Housing Authority* [2005] FJSC; CBV 11 of 2004 (8 April 2005); *Dr Ganesh Chand v. Fiji Times Ltd*, (31 March 20); *Praveen’s BP Service Station Ltd v. Fiji Gas Ltd* (6th April 2011) *Star Amusement Ltd v. Prasad* [2013] FJSC 8; CBV 11 of 2012 (23 August 2013) and *Jubilee Juice Distributors v. Jai Dhir Singapore* Civil Petition No. CBV 0006 of 2014.

20. The Petitioners’ grounds for special leave to appeal are as follows:
- (a) First, the Court of Appeal erred in law and in fact in determining the appeal on its own motion, formulating its own issues upon matters which were neither pleaded nor were for determination either on questions of law, part of pre-trial conference minutes or argued before the Trial Judge in the High Court.
 - (b) Secondly, that the Court of Appeal erred in law and in fact in holding that the Petitioners had to obtain consent of the Minister under the Land Sales Act in respect of DP Nos. 9305 and 9306 which was neither necessary nor a requirement as the Petitioners claim was premised upon purchasing part of CT 36452 which was being subdivided.

- (c) Thirdly, that the Court of Appeal erred in law and in fact in holding that the Minister's consent was required in respect of DP No. 9305 and 9306 when the Petitioners' evidence before the Trial Judge was unequivocally clear through the pleadings and through the pre-trial conference that the Petitioners purchased part of CT 36452 which had an existing DP No. 9104 but was allocated DP 9306 and 9307 upon subdivision being completed and the Petitioners' interest was in CT No.37277 to which Ministerial consent for transfer was obtained.
- (d) Fourthly, that the Court of Appeal erred in law and in fact in holding that Ministerial consent was required in respect of D 9306 and 9305 when the Petitioners had purchased Lot 1 in DP 9307 (part of CT 36452) containing an area of 1.5369 hectares as per preliminary agreement dated 25th January 2007, memorandum of sale and the transfer memorial being the agreed documents tendered in court through consent of all parties.
- (e) Fifthly, that the Court of Appeal erred in law and in fact in allowing the appeal when the Petitioners' claim was premised upon purchase of CT No.37277 DP No.9307 to which Ministerial consent was given and the High Court had held that the Respondent had secured the sale through misrepresentation and had breached the contract of sale, in particular, had failed to comply with the terms and conditions of the sale for Lot 1 of CT 37277 containing an area of 1.5369 hectares.
- (f) Sixthly, that the Court of Appeal erred in law and in fact in allowing the appeal without giving an opportunity to the Petitioners to address the Judges of Appeal on issues which were determined by the Court of Appeal without evidence and arguments.
- (g) Seventhly, that the Court of Appeal erred in law in holding that it had powers under section 13 of the Court of Appeal Act to dismiss the Petitioners' action.

21. In their submissions, the Petitioners further raise the following issues which they say raises several major policy considerations:

- (a) should a court make determinations in an appeal without giving opportunity to the litigants to sufficiently address on issues which were not subject to determination in the trial court but becomes relevant at the time of hearing of the appeal?
 - (b) when a court takes into consideration a factor which it had no right to take into account or did not take into account factors that it should have taken into account then should its determination or decision be allowed to stand?
 - (c) should parties to an appeal be recalled and be given an opportunity to make submissions on issues which was not considered at the time of hearing of an appeal but later becomes relevant for determination of the appeal.
22. The Petitioners further complain in their submissions that the Court of Appeal determined matters that did not appear in any ground nor were the issues “propounded” before the Trial Judge and that there was no further evidence adduced by way of affidavit or otherwise. The Petitioners claim there was no issue of ministerial consent in respect of the dealings which were obtained prior to registration of the memorials. No issue on ministerial consent was taken by the Respondent at any time whatsoever either in the High Court or on appeal.
23. The Petitioners submit that this case raises issues of substantial and general interest in the manner in which appeals ought to be prosecuted and issues of non-compliance of the rules must be dealt with at the hearing of the appeal and not later in closed chambers.
24. The Petitioners submissions on the issue of ministerial consent not being in issue at first instance, or indeed that it was not disputed there *was* ministerial consent for this purchase of land during the trial or that no one raised this issue in the Court of Appeal are entirely misplaced.
25. First, as a starting point, the prohibition in section 6 of the Land Sales Act Cap 137 against entering into a contract with a non-resident for the sale and purchase of land that is in excess of one acre without the prior written consent of the Minister is absolute. The

prohibition is in clear and unambiguous terms. Any contract for the sale of land in breach of section 6 is illegal, null and void and of no effect. It is a species of statutory illegality that is well recognized in law. As the Court of Appeal stated below, such a contract is void *ab initio*. It can create no rights or obligations. This is settled law, see *Gonzalez v Akhtar* [2004] FJSC 2, [2004] FLR 156, approving *Sakashita v Concave Investment Ltd* [1999] FJHC 3; *Port Denerau Marina Ltd v Tokomaru Ltd* [2006] FJCA 27, [2006] FLR 462 and *Narayanan v Navayaanan* [2011] FJCA22. Generally, any loss arising therefrom lies where it falls.

25. Secondly, it is also clear and settled law of long standing that if a contract or transaction is, on its face, illegal, the court would refuse to enforce it, whether or not either or any party alleged illegality. It is often said that a court is duty bound to raise or recognize illegality on its own motion. Pronouncements to this effect can be found in many judgments throughout the Common Law world. A quick look into a Common Law advocate and solicitor's handbook, commonly called "The White Book", will reveal quotes from many of these judgments. It will suffice to mention a few. The first four cases are mentioned in the Singapore equivalent of the White Book: *Singapore Civil Procedure* 2018, Vol 1 (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2018) at para.18/8/16:

- (a) "Where a statute makes a particular contract or class of contracts invalid, the judge may refuse to entertain the action even though neither party has raised or wishes to raise the objection." *Royal Exchange Association v. Vega* [1902] 2 K.B. 384;
- (b) "It is the duty of the court when asked to give a judgment which is contrary to statute to take the point, although the litigants may not take it." *Phillips v. Copping* [1935] 1 K.B. 15, per Scrutton LJ; referred to in *R. v. Weisz & Anor., ex p. Hector MacDonald Ltd* [1951] 2 K.B. 611;
- (c) The court will itself, however, take notice of the illegality of the contract on which the plaintiff is suing, if it appears on the face of the contract or from the evidence brought before it by either party, although the defendant has

not pleaded the illegality, per Devlin, J in *Edler v. Auerbach* [1950] 1 K.B. 359; this was applied in *Snell v. Unity Finance Ltd* [1964] 2 Q.B. 203;

- (d) It was held that any illegality, once brought to the attention of the court, overrides all questions of pleadings: see Donaldson, J in *Belvoir Finance Co Ltd v. Harold G. Cole & Co.* [1969] 1 W.L.R. 1877, at 1881.

More modern authorities include the following:

- (e) In *Birkett v. Acorn Business Machines Ltd* [1999] 2 All E.R.429 it was held that if a transaction was on its face manifestly illegal, the court will refuse to enforce it, whether or not any party alleged illegality. The principle behind the court's intervention of its own motion in such a case was to ensure that its process was not being abused by an invitation to enforce *sub silentio* a contract whose enforcement was contrary to public policy; and
- (f) In *Les Laboratoires Servier v. Apotex Inc* [2014] 3 W.L.R. 1257, Lord Sumption, with whom Lords Neuberger and Clarke agreed, said, at page 1268 and 1269:

"The illegality defence, where it arises, arises in the public interest, irrespective of the rights of the parties. It is because the public has its own interest in conduct giving rise to the illegality defence that *the judge may be bound to take the point of his own motion, contrary to the ordinary principles in adversarial litigation*. In some contexts, notably the invalidity of contracts prohibited by law, the *ex turpi causa* principle can be analysed as part of the substantive law governing the parties rights. *The contract is void, and any right derived from it is non-existent*. But in general, although described as a defence, it is in reality a rule of judicial abstention. It means that rather than regulating the consequences of an illegal act (for example by restoring the parties to the status quo ante, in the same way as on the rescission of a contract) the courts withhold judicial remedies, *leaving the loss to lie where it falls*. This is so even in a contractual context, when the court is invited to determine the financial consequence of a contract's voidness for illegality. The *ex turpi causa* principle precludes the judge from performing his ordinary adjudicative function in a case where that

would lend authority to the state to the enforcement of an illegal transaction or to the determination of the legal consequences of an illegal act.”

(emphasis added)

Many cases to the same effect will be found in the law reports from countries like Sri Lanka, Singapore and Malaysia; see *eg.*, *The Attorney General v. Punchirala* 21 NLR 51 where it was held that a court is bound to apply statute law whether an issue is raised on it or not. Some of these cases would have been on appeal to the Privy Council from these countries, see *eg.*, *Keng Soon Finance Bhd v. M. K. Retnam Holdings Sdn Bhd & Anor.* [1989] 1 M.L.J. 457.

26. On the issue of illegality, especially statutory illegality, a court cannot be constrained by what the parties choose to put in issue. As the learned Chief Justice said, during the course of oral argument before us, to do otherwise will be to put the *imprimatur* of the Court on the enforceability of an otherwise illegal contract.
27. Accordingly once the Court of Appeal's attention was drawn to the fact that Ministerial consent was required for the sale and purchase of this plot of land, and it must be *that plot* of land which was pleaded in paragraph 4 of the Statement of Claim, it very rightly took a serious view of the matter and stated, as noted above, it was not prepared to make any assumptions but wanted to see the Minister's consent before the matter could go any further.
28. What common bases the parties took before the learned Trial Judge, what issues were raised before the learned Trial Judge and the Court of Appeal, what the parties agreed to at trial are therefore irrelevant in cases of illegality, *a fortiori*, a statutory illegality. The parties may have agreed there was no issue as to Ministerial consent but that too is irrelevant. Nor does it matter that it was not a ground of appeal. The Court of Appeal was entirely correct to ask for proof of the Minister's consent. The Petitioners' complaints on this score are without any basis or validity.

29. It is also axiomatic that a court deals with the case at hand *on its pleadings*. The pleadings of the parties bind them and indeed the converse is also true, the courts do not stray into issues that are not pleaded or indeed have the right to decide cases other than on the respective pleadings before it.
30. As noted by the Court of Appeal, it *is crucial* to identify the plot of land the Petitioners' say they purchased from the Respondent and upon which their claims in misrepresentation and breaches of contract are predicated:
- (a) The Petitioners plead in paragraph 4, Statement of Claim that they purchased a 1.5369 hectare plot of land in the District of Dreketi that was part of the Respondent's land contained in CT 36452 DP no. 9306 and 9305 on Vanua Levu.
 - (b) The Respondent admits it sold a 1.5369 hectare plot of land in the District of Dreketi on Vanua Levu to the Petitioners, but states that that plot of land it sold to the Petitioners is part of the land contained in CT 36452 but is described as Lot 1 on DP 9307 and *makes no further admissions in respect to paragraph 4*.

Any lawyer receiving this defence would immediately check why there was a different deposited plan number from that claimed. Yet, the lawyer for the Petitioners proceeded to join issue and pleaded reliance on the sale and purchase agreement.

31. Before us, the Petitioners submit that this was some minor oversight or mis-description and suggested some typographical error of one numeral, presumably "9305" instead of "9307". Mr V. Kapadia, counsel for the Petitioners, urged upon us that such a minor error or mis-description of one digit cannot have such fatal consequences. Unfortunately the correct identification of the plot of land, *including* the correct deposited plan number, is vital. Any mis-description of the DP number is a fatal flaw as it does not accurately describe or identify a particular piece of land.

32. Mr Kapadia submitted it was important that the plot of land was correctly part of the land comprised in CT 34562 and not the DP number. Ms A. Ali disagreed and handed up Land Transfer Regulations 1971 and it is clear from these Regulations that deposited plans are important documents that eventually, when accepted, become part of the Land Titles Registry: see Regulation 16 and the Fourth Schedule. In fact Regulation 16.-(1) clearly provides that when a deposited plan is registered in the Titles Office covering part or the whole of a parcel of land which was the subject of a previous Deposited Plan registered in the Titles Office, the earlier plan shall be cancelled as to that part of the land which is the subject of the later subdivision.
33. It is clear to us that a plot of land, described as part of CT 34562 DP 9306 and 9305 is *not* that plot of land which the Petitioners purchased from the Respondent. The plot of land they purchased was that 1.5369 hectares plot of land properly identified and described as Lot 1 being part of CT 34562 DP 9307. The Lot 1 that they contracted to purchase was neither in DP 9306 or indeed DP 9305.
34. We also cannot accept there was some kind of mere or minor error that was inadvertently not picked up by the Petitioners' legal advisers. As noted above, once the defence was filed, the Petitioners' lawyers should have been alerted to the fact that there was some error in the DP plan contained in their Statement of Claim and therefore and error in the proper description and identification of the plot of land. The record shows there were numerous subsequent occasions when the correct description of the land surfaced and the Petitioners' lawyers would have been put on notice that there was, if at all, some error in their pleadings or that there was something wrong with their description of the land purchased by the clients in their Statement of Claim.
35. These instances include, but are not limited to:
- (a) In the signed Minutes of the Pre-Trial Conference, Agreed Facts and Issues dated 12 July 2011, the following appears:

- (i) As an agreed issue at Item 10: “WERE the [Respondent] obliged ... to provide roading, electricity ... and other utilities *to the Lots 1 through 8 on DP 9307* purchased by the [Petitioners]” (emphasis added); and
 - (ii) As an agreed issue at Item 16: “DID the [Petitioners] purchase *Lot 1 on DP 9307*, containing an area of four acres ... from the [Respondent]”. (emphasis added)
- (b) In the duly executed Transfer Form dated 31 January 2007 and 20 February 2007 respectively, recording the purchase by the Petitioners from the Respondents, the plot of land is described as follows:
 - (i) in the usual table, under the heading: “Name of the Land” the description “Lot 1 on DP 9307 ‘Narewa’ [part of]”;
 - (ii) similarly, in the First Schedule: “Lot 1 on DP 9307 containing an area of 1.5369 Ha.”
- (c) Copy of a Plan of the whole Narewa Club & Resort Development with notations in handwriting of the resort property, the integrated villa development and separate owner subdivision of which the Petitioners bought Lot 1. There were handwritten notations above the first two stating “DP 9306” and for the third, there was a handwritten notation “DP 9307” at the lower portion (“SEPARATE OWNER SUB-DIVISION”) which consisted of the Petitioner’s Lot 1 together with the other 7 plots, making 8 plots all in. This clearly shows the Petitioners’ Lot 1 fell within the subdivisions of DP 9307, *not 9306 and clearly not DP 9305*.
- (d) A receipt dated 1 November 2006 from the lawyer who handled the conveyance, Messrs. Tikaram and Associates where it is written “ON purchase of CT Lot 1 DP.9307 form North (Fiji) Group Ltd”.

- (e) An unsigned Application for Consent to a Dealing (under section 6 and 7 of the Land Sales Act Cap 137), where:
 - (i) the description of the property is stated as: “Lot 1 on DP 9307 [part of CT 36452]”; and
 - (ii) Purchase Price was stated as: \$250,000 for purchase of CT Nos. 31377 to 31381 inclusive of which were then amalgamated into one CT 35810 which was then cancelled for issue of one CT 36452 which is now being subdivided via DP Nos. 9306 & 9307”.
- (f) In an undated Memorandum of Terms of Sale where:
 - (i) under “PROERTY SOLD” there is the description “Lot 1 DP 9307 [part of CT 36452]”;
 - (ii) under “OTHER COVENANTS OR CONDITIONS” there is stated: “Lots 1 through 8 on DP 9307...”;
 - (iii) under “SCHEDULE” there is stated: “All that vacant land contained and described in Lot 1 on DP 9307 [part of CT 36452] containing an area of 1.5369 ha.”
- (g) The Respondent initially only filed a defence. They subsequently applied to include a Counterclaim. In the proposed Counterclaim, paragraph 2 stated: “The [Respondent] owned an eight (8) parcel subdivision on (DP 9307 OWNERS SUBDIVISION) from which four acres of land (Lot 1) was purchased by the [Petitioners] under written agreement.” Although the eventual Counterclaim that was filed did not include these words, the Petitioners originally objected and the Respondent had to file an application to add a counterclaim. As this was contested, it seems incredible that the Petitioners’ lawyer failed to notice these opening words in paragraph 2 of the proposed draft Counterclaim.

(h) There is also a Valuation Report on Lot 1 DP 9307 dated 12 April 2012 where there are many descriptions of the property as Lot 1 on DP 9307, and obviously by this time it had its own certificate of title, CT No.37277.

36. In their written submissions, the Respondent claims their lawyers wrote to the Petitioners' lawyers pointing out the error in the description of land. Ms A. Ali produced a copy of a letter dated 8 June 2011 from Messrs O'Driscoll & Co, the Respondent's former lawyers, to Messrs Maqbool & Co. The letter starts by referring to Messrs Maqbool & Co's letter dated 16 May 2011 which had attached a draft pre-trial conference document. It then went on to point out an error in Messrs Maqbool & Co's draft:

"We comment that paragraph 5 of the draft agreed facts is not admitted as set out in paragraph 4 of the amended statement of defence. It was Lot 1 on DP 9307 involved and not either of the DPs mentioned in the draft agreed facts that our client says was subject to the agreement. In addition there is nothing about the counterclaim in the draft facts and we will send you additions to cover the counterclaim in the next few days once the same is drafted."

(emphasis added)

37. From this document, it therefore appears that Messrs Maqbool & Co as lawyers for the then plaintiffs, sent a draft Pre-Trial Conference Minutes on Agreed Facts and Issues to Messrs O'Driscoll & Co in their letter dated 16 May 2011. Messrs. O'Driscoll & Co replied on 8 Jun 2011 pointing out the error in the description of the land as well as to the fact that there was no reference to the counterclaim in the draft. That error appears to have been corrected as noted in paragraph 35(a)(i) and (ii) above.

38. Mr. Kapadia informed us that upon reading the Respondent's submissions, he checked with Mr. Sen of Maqbool & Co but Mr. Sen did not recall receiving such a letter. As a matter of submissions, this was where the matter rested.

39. It is therefore incredible with all these references in the contemporaneous documents to the correct description of land and the Defence, the Petitioners could nonetheless proceed to trial with the wrong description of the land in the crucial paragraph of their Statement of Claim. This was not just some simple inadvertence or a minor mis-description of one digit. It formed the very basis of the claim. On this there can be no “waiver” by the parties. If, against all these events and documents to the contrary, the error in identification of the plot of land remained, then this is not a matter for the courts to redress. Much less is it a reason for special leave to appeal and most certainly not at this stage after judgments of the trial court and the Court of Appeal have been handed down.
40. The Court of Appeal did not err in law or in fact in allowing the appeal without giving an opportunity for the Petitioners to further address the court. There was nothing to address the Court of Appeal about. The Petitioners’ identification of the plot of land they bought was set out in their Statement of Claim and they could not produce the Ministerial consent for the plot as identified and described there. That was the end of the matter. The only matter they could possibly address the Court of Appeal on was why such an error was made but that would *not* have changed the outcome. We are therefore not surprised the documents were furnished to the Court of Appeal without any accompanying request for an opportunity to address the court.
41. As we have set out in paragraphs 10, 11 and 12 above, the Court of Appeal pointed out in no uncertain terms the effect of section 6 of the Land Sales Act Cap 137 and the absence of Ministerial consent. Counsel accepted that and the Court made very clear that the claim would fail *in limine* unless there was Ministerial consent. The Court of Appeal was quite correct in stating that Ministerial consent should have been in the record at trial and its absence from the record was inexcusable. The Petitioners’ ground based on section 13 of the Court of Appeal Act is erroneous. For the reasons set out above, the Court of Appeal was entitled to dismiss the Petitioners’ claim comprised in the pleaded case.

42. It is quite wrong to submit, as the Petitioners do in their Grounds of Petition at paragraph 42(f), that the Court of Appeal made the determination without evidence or arguments. First, the Petitioners do not say what other evidence or arguments they wanted to place before the Court of Appeal. Secondly, the time to do so was not at the appellate stage, *a fortiori*, as a ground for special leave to appeal to the Supreme Court.
43. There is no far reaching question of law, there is no matter of great general public importance nor is this, by any measure, a matter that is otherwise of substantial general interest to the administration of justice. There is no public interest involved. This is purely a matter which involves the immediate parties and their lawyers. It follows that this Petition is dismissed with costs. We award costs to the Respondent which we fix at \$ 6,000.

.....
Hon. Chief Justice, Mr. Anthony Gates
President of the Supreme Court



.....
Hon. Mr. Justice Jayawardena
Judge of the Supreme Court

.....
Hon. Mr. Justice Quentin Loh
Judge of the Supreme Court

Solicitors:

Petitioner Mr. V. Kapadia with Mr. R. Singh.

Ms. A. Ali for the Respondent.