IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CONSOLIDATED APPEALS:

CIVIL APPEAL NO: ABU 0148 OF 2018
[On appeal from a Decision by the High Court, Lautoka in Civil Action No. HBC 14 of 2015 on 28th August 2018]

CIVIL APPEAL NO: ABU 0103 OF 2020
[On appeal from a Decision by the High Court, Lautoka in Civil Action No. HBC 14 of 2015 on 22nd day of October 2020]

CIVIL APPEAL NO: ABU 0090 OF 2019
[On appeal from a Decision by the High Court, Lautoka in Civil Action No. HBC 14 of 2015 on 18th day of April 2019]

BETWEEN : **RAJNEEL KARAN SINGH**

First Appellant

: **SAMUEL K RAM trading as SAMUEL K RAM LAWYERS**

Second Appellant

AND : **NAINASO I RA HOLDING LIMITED**

First Respondent

: **MATAQALI NAINASO HOLDINGS LIMITED**

Second Respondent

: **YASAWA PROJECTS COMPANY LIMITED**

Third Respondent

: **<u>CAPITAL GROUP INVESTIMENTS (FIJI) LIMITED</u>**

<u>Fourth Respondent</u>

: **<u>ANWAR KHAN</u>**

<u>Fifth Respondent</u>

: **<u>KELEVI NABA</u>**

<u>Sixth Respondent</u>

: **<u>PATIMIO BACAIVALU</u>**

<u>Seventh Respondent</u>

: **<u>WAISEA RATUBUSA</u>**

<u>Eighth Respondent</u>

<u>Coram</u> : **Qetaki, RJA**
Heath, JA
Winter, JA

<u>Counsel</u> : **Mr. S Krishna for the first and second Appellants**
Mr. A Rayawa for the first Respondent.

<u>Date of Hearing</u> : **11 July 2025**

<u>Date of Judgment</u> : **25 July 2025**

<u>JUDGMENT OF THE COURT</u>

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<u>Qetaki, RJA</u>

[1] I have considered the judgment in draft, I agree with it, the reasoning and the orders.

<u>Heath, JA</u>

[2] I agree with the judgment delivered by Winter, JA.

<u>Winter, JA</u>

Introduction

[3] Nainaso is a village located on Nanuya Lailai Island in the Yasawa Islands of Fiji. It is known for pristine beaches, turquoise waters, and vibrant coral reefs, making it a popular tourist destination. It is home for Mataqali Nainaso, specifically one of the four clans that make up the Yavusa Yasawa. The Yasawa-i-rara area has many families of the Mataqali Nainaso, and they are involved in the use, ownership, and development of the land.

[4] The beachside in this beautiful setting was ripe for development. With the backing of some Nainaso landowners a 'development' company was formed, and, on the 29 August 2007, it obtained a tourism lease. The first respondent Nainaso I Ra Holding Limited is that company.[1] ('NIR') One hope given the landowners, was for a high-class resort to be built along the beachfront in the expectation that would provide lease income and work with long term benefits to the people for generations to come.

Background to the primary case

[5] The iTaueki Land Trust Board ('The Board') issued a 99-year lease from 1 July 2006 of 115.9111 hectares owned by Mataqali Nainaso located in the District of Yasawa, Province of Ba to NIR for tourism purposes.[2]

[1] Record Vol 4 p1073
[2] Ibid but note 'TLTB' replaced the originally named Native Land Trust Board.

[6] NIR, apparently, did little between signing that agreement to lease on 28 August of 2007 and 23 May 2011 to fulfil the terms of the lease. That much is clear from a letter and notice of re-entry sent by The Board to NIR dated 23 May 2011 telling the company after a recent inspection little progress in the development could be found. The letter reminded NIR of the company's obligations under the lease including resort construction commencement and completion dates between 1 July 2008 and 1 July 2011. [3] There followed throughout July 2011 negotiations to extend the deadline for NIR to comply with these obligations. The company was worried as early as 11 July 2011 that their 'breaches of lease condition' might affect their development plan.[4]

[7] Some landowners, by November 2011, then unhappy with these delays, instructed a lawyer the second appellant, Mr Ram who employed a law clerk, the first appellant, Mr Singh ('the clerk'). These clients were advised to form a new company Mataqali Nainaso Holdings Limited('MNH') to take over the land and resort development. They did so.

[8] MNH or its promoters and some others were advised by their lawyer Mr Ram to file a winding up petition against NIR. They instructed their lawyer to do so. They authorised the clerk to swear any affidavit to give effect to that petition[5].

[9] Paragraph 5 of the petition to wind up records that MNH was formed to protect the interests of the landowners, many of whom wanted NIR dissolved so that MNH could take responsibility for the lease as that would enable the land to be developed for the benefit of all the owners. MNH specifically wanted the lawyers to recover the land leased to NIR by renegotiating a new tourist lease from the Board allowing MNH to replace NIR and so fulfil the promises made to the people so long ago.

[10] However, it is clear by then family loyalties for the support of NIR or the promoters of MNH were divided. NIR pleads some landowners of Nainaso say they were coerced

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[3] Ibid clause 2 and notice dated 23 May 2011.Record vol 1 page 322
[4] Record letter NIR to TLTB Record Vol 1 p 327
[5] Record Vol 2 page 905

into instructing Mr. Ram. Some, say in writing their signatures were forged[6] or that they gave their signatures as they only thought supporting that cause would release monies to them from The Board. The primary case may resolve whether that is so and if they were told their signatures might be used to support a winding up petition against NIR.

[11] NIR alleges that the defendants conspired to harm NIR and so deprive NIR of their tourism lease and so cause the company a permanent loss of their leased land at a value of $20 million. The defendants are sued as the plaintiff alleges; they caused that loss. They are also sued for libel, slander, and defamation

[12] Although largely irrelevant to these appeals, however, to better understand the background to the primary case the allegations about the alienation of three acres of prime beach front land out of NIR's tourism lease should be understood.

[13] NIR alleges that the sixth defendant (Mr Anwa Khan) entered an arrangement with the seventh, eighth and ninth defendants (the promoters of MNH Kelevi Naba, Patimio Bacaivalu and Waisea Ratubusa) to have three acres of land severed from NIR's leasehold and then separately re-leased to Yasawa Products Co Ltd (the fourth defendant), a company of which Mr Khan was a director. These 'negotiations' took place, as pleaded, after The Board's demand letter of 23 May 2011, sometime in June 2011.

[14] It is alleged by the plaintiff that: "after several meetings NIR was finally coerced" into that separate agreement[7]. The Board issued the 3-acre lease eventually, it is pleaded, to the 5th defendant, Capital Groups Investments (Fiji) Limited.

[15] This discrete consolidated appeal is but a part of that primary case. This appeal only concerns NIR and MNH, the lawyer Mr Ram and his clerk Mr Singh. By order of the court on 25 August 2021 all other respondents were excused from this appeal.

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[6] Record affidavit annexures Volume 4 pages 1113 to 1196
[7] The statement of claim, V3 page 709

[16] The one sad truth about the primary case, for hearing before the High Court in September this year, is the dashed hopes for a better life caused by this dispute.

The relevant pleadings

[17] At its simplest, the pleaded claim[8] is based on an allegation by NIR that the lawyer Mr Ram and his Clerk, in conjunction with all the then named defendants, including The Board, formed an intention to harm NIR's interests by depriving it of the 99-year lease it had obtained from The Board. Leaving aside the statutory overlay for the granting of such leases, the allegation seems to be that a decision was made to bring a winding up proceeding against NIR in the name of a fictitious company, MLH, to obtain a liquidation order which would have the effect of providing a basis for the TLDB to terminate NIR's lease and, presumably, grant a fresh one in favour of the company, MLH, that had by now, come into existence before the petition order was made.

[18] In procuring the winding up, it is alleged that Mr Ram, the clerk and three other defendants forged the signatures of MNH members and/or misrepresented the purpose of obtaining their signatures from some landowners by claiming it was for the release of funds from The Board rather than the filing of a petition to wind up NIR.[9]

[19] It is also alleged that Mr Ram and his clerk, along with the other defendants, as a part of this conspiracy, at the time of filing and then verifying the winding up petition made false representations to the High Court by naming MNH, then a non-existent company to be the petitioner on their behalf. At that precise time while all the necessary documents had been filed to incorporate MNH the promoters and Mr Ram awaited the issue of a certificate of incorporation. The certificate issued before the petition was granted.

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[8] The statement of claim, V 3 page 709

[9] Statement of claim, V 3 page 709 below paragraph 21

[20] As to defamation, it is alleged that all defendants made false allegations in support of the petition that NIR was insolvent and its substratum had failed, causing loss in standing and trust for the company and its directors. It is alleged that the then directors of NIR have since been removed from positions of trust in their community and subjected to ridicule.

[21] As NIR did not appear at the petition hearing a winding up order was granted, by default.[10] Subsequently the winding up was set aside on appeal[11].

[22] So far as the winding up order is concerned, NIR alleges that alone caused the permanent deprivation of their twenty-million-dollar tourism lease.

[23] The relevant pleadings are found in paragraphs 38,39 and 41 of the statement of claim:

"<u>PARTICULARS OF FRAUD INDUCING THE ISSUE OF IRREGULAR WINDING UP ORDER</u>

38. That the 1st, 2nd, 7th, 8th and 9th Defendants knew that the third defendant was non-existent yet they agreed to file a Winding Up Petition in the 3rd Defendants name at the High Court in Lautoka thus causing the High Court to mistakenly and innocently issue a Winding Up Petition by mistake against the Plaintiff and eventually the issue of an irregular Winding Up Order, which has resulted in the permanent deprivation of the Plaintiffs $20,000.000.00 leasehold Tourism Property from a irregularly issued Winding Up Order. These Defendants are jointly and severally liable.

<u>PARTICULARS OF FRAUD VIA FORGERY AND DECEPTION</u>

39. That the 1st, 2nd, 7th, 8th, and 9th defendants knowingly filed in the High Court, forged documents and documents that contained signatures obtained by these Defendants from Mataqali Nainaso members through falsely pretending to these members that their signatures were to be used for the release of funds from the 10th Defendant. Our signatures

[10] Record V 3 page 1015
[11] Record V 4 page 1405 and 1415

presented were simply forged. The members were not informed that their signatures were to be used for winding up the Plaintiff company. The 1st and 2nd Defendants swore affidavit and filed them in the High Court in furtherance of the fraud. This has resulted in the issue of the irregular Winding up Order against the Plaintiff causing the loss of its $20,000,000.00 Tourism Leasehold property. These Defendants are jointly and severally liable.

PARTICULARS OF DEFAMATION

41. *That the 1st, 2nd, 3rd, 4th, 6th, 7th, 8th, and 9th Defendants in filing false and fraudulent documents and falsely alleging the Plaintiff Company was insolvent and falsely alleging that the Plaintiffs substratum had failed and having these statements published in the newspapers and in the Government, Gazette has caused the Plaintiff Company and its Directors great loss in standing and trust. The Directors of the Plaintiff Company have since been removed from positions of trust in their community and subjected to ridicule. These Defendants are jointly and severally liable."*

The Decisions

[24] The appellants applied to strike out the claim against the clerk as he was merely acting at the direction of his employer Mr Ram and on the instructions of his client. As the court found Mr Ram was conflicted the Judge of his own motion, restrained Mr Ram from continuing to act for his clerk.[12]The clerk's strike out application was refused[13].

[25] As the primary case progressed NIR negotiated a settlement with The Board. Presumably because of that agreement the claim against The Board was discontinued and The Board was removed as a defendant. The appellants sought disclosure of that agreement and any related documents from NIR, nothing was disclosed. They sought better particulars ('amendment') of the claim, nothing was particularised the appellant's claimed interlocutory relief for both matters. Those applications, for particulars of claim and better discovery were also dismissed.[14]

[12] Appealed decision V 6-page 1934, 28 August 2018
[13] Appealed decision V 6-page 2083, 18 April 2019
[14] Appealed decision V 5-page 1671, 04 March 2020

The Appeals

[26] There are three interrelated appeals. The appeals have been consolidated for this one hearing.[15] The law clerk and Mr Ram seek reversal of the decisions.

[27] The three appeals, are:

(a) An appeal against a ruling given on 28 August 2018 by Ajmeer J. The Judge in exercise of inherent powers and of his own motion restrained Mr Ram from continuing to act for his law clerk employee, Mr Singh[16].

(b) An Appeal against an order, made on 18 April 2019, by Ajmeer J, dismissing an application by the law clerk/Mr Singh to strike out the claim against him on the grounds that no reasonable cause of action had been pleaded[17].

(c) An Appeal from an order made on 4 March 2020 by Ajmeer J, by which he dismissed an application by Mr Ram in which he sought further particulars of NIR's claim against him. The precise order sought was that the Court direct NIR to amend its claim, under rule 18(c) of the High Court Rules. This application and related applications for discovery were dismissed[18].

A preliminary issue: recusal

[28] When asked by the court if there were any preliminary matters we should consider before commencing the appeal Mr. Rayawa for NIR first advised he had not pre-filed written submissions however, counsel had a paper copy with him in court for our consideration. We were assured counsel was briefed and stood ready to submit the respondent's case.

[29] However, Mr Rayawa then raised a 'concern' over Justice Qetaki's membership of the Court in this appeal. He broadly contended that as Justice Qetaki held a leadership role for The Board at the time, specifically around the time the re-entry of NIR's leased land and any extension of time was in issue, then any actions of The Board must have

[15] Guneratne RJA on 4 August 2022 V1 page 2
[16] Ruling of 28 August 2018, V 6-page 2083
[17] Ruling of 18 April 2019, V 6-page 1956
[18] Ruling of 04 March 2020, V 6-page 1086

involved him. Counsel alleged but made no reference to, nor did he have at the ready for us to peruse, any document from the record he relied upon for that 'concern'.

[30] The primary case is set for hearing in September 2025. This appeal had been called over in anticipation of three earlier available fixtures. The cause list nominating the panel was published. Counsel made no recusal application. Rather counsel thought it appropriate to casually raise this 'concern' in response to the court's enquiry over any preliminary matters that should be attended to before the appeal hearing commenced. Counsel initially said he did so as a matter of 'courtesy' as he didn't want Justice Qetaki surprised or embarrassed by any references to his Honour's involvement because of his earlier position with The Board. No specifics about counsel's 'concern' nor reasons for this last minute 'courtesy' were submitted to the court.

[31] We adjourned to give counsel time to locate any relevant documents and take instruction. It was agreed His Honour Justice Heath would preside over any recusal application once the court reconvened.

[32] In the end nothing turned upon the law, however, we note that in Fiji the test for determining whether a judge should be disqualified is only met: "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide".[19]

[33] Recusal of any judicial officer is a very serious application for counsel to make. It is not to be taken lightly. We merely observe the need for counsel to file any recusal application in our Appeal cases as early as possible. They should file a written application only after mature consideration about any conflict they are instructed to

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[19] See *Prakash v FICAC* [26 July 2024] AAU 0013 of 2023 discussion paragraphs 47-49 citing the following cases
Koya v State [1998] FJSC 2; CAV0002.1997 (26 March 1998).
Webb v The Queen (1994) 181 CLR 41 (HCA).
R v Gough [1993] AC 646 (HL).
Auckland Casino Ltd v Casino Control Authority [1995] 1 NZLR 142 (CA).
Koya v State [1998] FJSC 2; CAV0002.1997 (26 March 1998) at pp 6-7.
Ibid, at p 6, citing s 23(1)(b) of the Court of Appeal Act.
Saxmere Company Ltd v Wool Board Disestablishment Company Ltd [2010] 1 NZLR 35 (SC).
Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No. 2) [2010] 1 NZLR 76 (SC).
Ebner v Official Trustee in bankruptcy (2000) 205 CLR 337 (HCA).

rely upon. Further, these types of application must preferably be well supported by detail drawn from evidence and the appeal record. That detail must then be succinctly supported by legal submissions addressing the test for recusal.

[34] Upon our return to court Heath J presiding recorded Mr Rayawa's withdrawal of any formal objection or concern over Justice Qetaki's adjudication of the appeal in this way:

> *Mr. Rayawa raised an issue this morning as to the possible need for Justice Qetaki to recuse himself based upon his involvement with the I Taukei Land Trust Board at the time of the re-entry onto the relevant land. We adjourned for approximately 15 minutes to allow Counsel to consider any documents in the record that might support or allay the fears expressed in relation to the ability of the judge to sit. After we returned, I asked to be referred to the relevant documents. Mr. Rayawa then took instructions from his client who is in court. He indicated that no objection was formally pursued and withdrew the concern expressed. In those circumstances, there can be no objective person who could reach the decision that there were any justifiable concerns about Justice Qetaki 's impartiality. On that basis, the judgment will provide these reasons as to why the court continues to sit in its current constitution.*

[35] There being no relevant detail of any 'concern' drawn to our attention. There being no information or evidence of conflict placed before the court. And noting no objection or application for recusal was earlier made and that any concern expressed even as a matter of 'courtesy' was withdrawn on the instruction of his client, by counsel, in open court. We rule that a fair-minded lay observer would not reasonably apprehend that Justice Qetaki might not bring an impartial mind to the resolution of any question in this appeal Justice Qetaki is required to decide.

A guide to disposition of the Appeal

[36] There are three topics that will aid the disposition of this appeal. First, the tourism lease and its essential provisions must be explained. Secondly a restatement of the law over pleading fraud by conspiracy will provide a yard stick alongside which the current pleadings may be compared, any deficiencies identified and the law clerk's

application to strike out NIR's claim against him then considered in context. This in turn will aid the disposition of Mr Ram's conflict of interest restraining order. That groundwork laid then after a brief restatement of the pleadings required for defamation any defects in the defamation claim can be considered followed by the corelated issues of further particulars or amendment of NIR's claim. Finally, this will allow the matter of discovery to be discussed. All this leading to our results and orders.

The Tourism Lease and re-entry

[37] The Agreement to lease is in a standard format with familiar terms that provide NIR with a right of exclusive possession and quiet enjoyment of the lands described during the duration of the lease.[20]

[38] The Tourism Lease Agreement with NIR also contained familiar terms and conditions used to ensure development companies acted promptly to fulfill equally familiar promises made to landowners for resort like development of their traditional land. Relevant to this appeal are those terms set out under the Lessee's Covenant with the Lessor in Clause 2 requiring detailed design plans for the resort and requiring the construction to commence and complete promptly:

> <u>Clause 2(d) – Detailed Plan</u>
>
> *"To prepare and lodge with lessor for the lessor's approval on or before the 1st day of July 2006 detail design plans, elevations and specifications of a tourist resort to be constructed of substantive materials on the land comprising of tourism, hospitality, offices, shops and accommodation unit together with central facilities, staff quarters and other building ancillary to the resort".*
>
> <u>Clause 2(e) – Construction</u>
>
> *"To commence construction on or before end of 2nd year (1st July 2008) of the Tourist Resort in accordance with the plans as approved. Construction to be completed by 1st day of July 2011."*

[20] Agreement to lease V 4 page 1073

[39] Any breaches of these conditions in Clause 2 may be enforced by the lessor's rights of re- entry and termination of the lease described in Clause 4. As lessor and trustee of itaukei land under the iTaukei Land Trust Act, following re-entry and termination of any lease then the land reverts to The Board as statutory trustee. This potentially allows The Board to grant a new lease over the same land to a new applicant for a lease on such terms and conditions as permitted under the Act. Clause 4 reads:

Clause 4 (a)-Right of Re-Entry

"………….. and it is hereby agreed and declared as follows that:

(a) If and whenever during the term of this lease-

(i) Any rent reserved or hereby payable or any part thereof shall be in arrears and unpaid for one month next after becoming payable (whether formally demanded or not.)

(ii) There shall be any breach, non-performance, or non-observance of any part of the covenants of the lease herein contained or implied by virtue of the Native Land Trust (Leases and Licenses) Regulations 1984.

(iii) The Lessee, being an individual, shall become bankrupt or, being a company, enters into compulsory or voluntary liquidation (save for the purpose of amalgamation or reconstruction of a solvent company).

(iv) A receiver of the lessee shall be appointed, or the Lessee enters into any composition or arrangement with the Lessee's creditors.

(v) The Lessee shall suffer any distress or execution to be levied on his goods.

then, and in and any such case, it shall be lawful for the lessor at any time thereafter, and notwithstanding the waiver by the lessor of any previous right of re-entry, to re-enter into and upon the land or any part thereof in the name of the whole and thereupon this demise shall absolutely cease and determine but without prejudice to any rights or remedies which may have accrued to the Lessor against the Lessee in respect of any antecedent breach of any of the covenants herein contained.

[40] In early 2011 The Board inspected the leased land and confirmed that NIR had not commenced let alone completed the resort construction as it was required to do. This was in breach of Clause 2(d) and 2(e) of the Lease Agreement. So, on 23 May 2011, The Board issued a Notice to NIR under section 105 of the Property Law Act[21], the last paragraph of the Notice warns of enforcement by re-entry, it says:

> *"__TAKE NOTICE__ that if you do not remedy the above breach within one (1) month from the date of service of this notice, nor be granted relief against forfeiture under section105 of the Property Law Act, The Board shall –enter into and upon the land and determine the lease notwithstanding the waiver by NLTB of any previous right to re-entry pursuant to clause 4(a(v) of the Agreement for Lease.*

[41] On 17 June 2011 NIR replied to The Board by letter, explaining the steps the lessee had taken towards preparation of plans in line with clause 2(d). The Lessee also sought The Board's approval for more time to facilitate the process of finalizing its survey plan.

[42] There followed throughout July 2011 negotiations to extend the deadline for NIR to comply with these obligations as the company was worried as early as the 11 July 2011 that their 'breaches of lease condition' might affect their development plan.

[43] It matters little to this discrete appeal. It is not clear from the record whether such an 'extension' was ever granted. What the status of NIR's original lease from The Board was then and is at present is not pleaded and so remains, unknown.

[44] When the Statement of Claim was filed on 30 January 2015, The Board was joined as a defendant, seemingly to suggest that it was complicit in the plan to deprive NIR of its leasehold interest in the land to be developed for tourism purposes at a claimed value of twenty million dollars. The Board has subsequently been removed as a defendant following settlement with NIR, as plaintiff. Another aspect of the appeals involves the question whether the settlement deed with The Board should be disclosed to the defendants. We deal with that separately.

[21] Above note 4

Pleading conspiracy and fraud

[45] Denning LJ in *Lazarus Estates Ltd v Beasley*,[22] made the famous statement that: "fraud unravels everything". The full passage in Denning LJ's judgment reads as follows:[23]

> No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. *The court is careful not to find fraud unless it is distinctly pleaded and proved* but once it is, it vitiates judgments, contracts, and all transactions whatsoever.
> (Emphasis added)

[46] During the hearing, there was much debate about the serious nature of allegations of fraud and the way in which such allegations should be pleaded We, focus first on the pleading issue.

The need to plead

[47] The need to plead (or particularise) allegations of fraud is well established. A summary of relevant principles (applicable in the United Kingdom, New Zealand and in Fiji) can be found in the judgment of the Court of Appeal of New Zealand in *Schmidt v Pepper New Zealand (Custodians) Ltd*.[24] Delivering the judgment of the Court of Appeal, Harrison J said:

> [15] Allegations of fraud or dishonesty are very serious. They must be pleaded with care and particularity. As the authors of Bullen & Leake & Jacobs *Precedents of Pleadings* emphasise*, counsel must not draft any originating process or pleading containing an allegation of fraud unless they have reasonably credible material which, as it stands, establishes a prima facie case of fraud* — that is, material of such a character which would lead to the conclusion that serious allegations could properly be based upon it. *Fraud cannot be left to be inferred from the facts — fraudulent conduct must be distinctly alleged and as distinctly proved. General allegations, however strong the words may*

22 *Lazarus Estates Ltd v Beasley* [1956] 1 All ER 341 (CA).

23 Ibid, at 345. See also, more generally, *Takhar v Gracefield Developments Ltd* [2019] All ER 283 (UKSC) at paras 43–53 (Lord Kerr, with whom Lord Hodge, Lord Lloyd-Jones and Lord Kitchin agreed).

24 *Schmidt v Pepper New Zealand (Custodians) Ltd* [2012] NZCA 565 (CA) at paras [15] and [16].

<u>be</u> (sic) *<u>appear to be, are insufficient to amount to a proper allegation of fraud.</u>*

[16] … *<u>The obligation exists for the benefit of defendants — to allow them to be fully aware of, and able to address, a serious allegation — and for the Court which will be called upon to decide it</u>*.

(Emphasis added; footnotes omitted)

Economic conspiracy torts

[48] Although not currently pleaded in this way, we apprehend from the record and counsel's submissions that the essence of the pleaded claim in fraud is that the nine defendants colluded and formed an intention to harm NIR's interests by depriving it of the 99-year lease it had obtained from The Board. Leaving aside the statutory overlay for the granting of such leases, the allegation seems to be that a decision was made to bring a winding up proceeding against NIR in the name of a fictitious company to obtain a liquidation order which would have the effect of providing a basis for The Board to terminate the lease and, presumably, grant a fresh one in favour of MLH the company that had by now, come into existence.

[49] If properly pleaded, such an allegation could come within the scope of two of the economic torts: "lawful means conspiracy" or "unlawful means conspiracy". The nature and scope of those torts have been considered recently by the Supreme Court of the United Kingdom in *JSC BTA Bank v Khrapunov*.[25] The judgment of the Supreme Court was given by Lord Sumption and Lord Lloyd-Jones, with whom Lord Mance DP, Lord Hodge and Lord Briggs agreed. The judgment discusses both the similarities and differences between the two types of conspiracy torts. In our view, Their Lordships' comments are equally applicable in Fiji.

[50] The following statements of principle are taken from the joint judgment of Lord Sumption and Lord Lloyd-Jones:

(a) the tort of conspiracy, along with other economic torts (such as unlawful interference with contractual relations), is "a major exception" to the general rule that there is "no duty in tort to avoid causing a purely economic loss unless it is parasitic upon some

[25] *JSC BTA Bank v Khrapunov* [2018] 3 All ER 293 (UKSC).

injury to person or property". The rationale for the general rule is that, contract apart, "common law duties to avoid causing pure economic loss tend to cut across the ordinary incidents of competitive business, one of which is that one man's gain may be another man's loss".[26]

(b) The successful pursuit of commercial self-interest "necessarily entails the risk of damaging the commercial interests of others". As a result, it is important to identify with precision the point at which such conduct transgresses legitimate bounds. This is described as "a task of exceptional delicacy". The elements of the established economic torts are carefully defined to avoid trespassing on legitimate business activities.[27]

(c) The tort of conspiracy takes two forms:[28]

 (i) conspiracy to injure, where the overt acts done pursuant to the conspiracy may be lawful, but the predominant purpose is to injure the plaintiff (a lawful means conspiracy); and
 (ii) conspiracy to do by unlawful means an act which may be lawful, albeit that injury to the plaintiff is not its predominant purpose (an unlawful means conspiracy).

[51] In summary, the following proposition underpins the reason why either a lawful means conspiracy or an unlawful means conspiracy can legitimately be pleaded in a proper context:[29]

> *A person has a right to advance his own interests by lawful means even if the foreseeable consequence is to damage the interests of others. The existence of that right affords a just cause or excuse. Where, on the other hand, he seeks to advance his interests by unlawful means he has no such right. The position is the same where the means used are lawful, but the predominant intention of the defendant was to injure the claimant rather than to further some legitimate interest of his own.*

[52] We refer also to a decision of the Court of Appeal of New Zealand, in *Swann v Secureland Mortgage Investment Nominees Ltd,*[30] in which the Court considered the test previously articulated by Lord Goff in *Wai Yu-tsang v R,*[31] and an earlier decision of the Court of Appeal, in *New Zealand Apple and Pear Marketing Board v Apple*

26 Ibid, at para [6].
27 Ibid.
28 Ibid, at para [8].
29 Ibid, at para [10].
30 *Swann v Secureland Mortgage Investment Nominees Ltd* [1992] 2 NLZR 144 (CA).
31 *Wai Yu-tsang v R* [1994] 4 All ER 664 (PC).

Fields Ltd.[32] Lord Goff's remarks bring together the elements of the allegation of fraud with the type of pleading required to establish that the conspiracy has been committed. In *Yu-tsang,* Lord Goff expressed the approach as follows:[33]

> The question whether particular facts reveal a conspiracy to defraud depends upon what the conspirators have dishonestly agreed to do, and in particular whether they have agreed to practise a fraud on somebody. For this purpose, *it is enough* for example *that*, as in *R v Allsop* and in the present case, *the conspirators have dishonestly agreed to bring about a state of affairs which they realise will or may deceive the victim into so acting, or failing to act, that he will suffer economic loss, or his economic interests would be put at risk.* It is however important in such a case, as the Court of Appeal stressed in *Allsop's* case, to distinguish a conspirator's intention (or immediate purpose) dishonestly to bring about such a state of affairs from his motive (or underlying purpose). The latter may be benign to the extent that he does not wish the victim or potential victim to suffer harm; but the mere fact that it is benign would not of itself prevent the agreement from constituting a conspiracy to defraud.
>
> (Emphasis added; footnote omitted)

[53] We extract the following propositions from the judgment of the Supreme Court of the United Kingdom, in *JSC BTA Bank*, and the Court of Appeal of New Zealand's decision in *Swann*:

1. It is necessary to prove that identified conspirators have dishonestly agreed to bring about a situation which they realise will or may deceive the victim into acting (or failing to act) in such a way that he or she will suffer economic loss or put his or her economic interests would at risk. The focus is on the *intention* of the conspirators rather than their *motives*.[34] This means that the plaintiff must plead these matters specifically against each defendant:

    (a) the names of the identified conspirators.
    (b) what they agreed to do.
    (c) whether they joined the agreement at its commencement or later.
    (d) what the named defendants did to implement their agreement.
    (e) what intention the named defendants had to harm the economic interests of the plaintiff; and,

32 *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1989] 3 NZLR 158 (CA) at 162.
33 *Wai Yu-tsang v R* [1994] 4 All ER 664 (PC) at 671-672.
34 *Swann v Secureland Mortgage Investment Nominees Ltd* [1992] 2 NLZR 144 (CA) at 147, adopting what was said by Lord Goff in *Wai Yu-tsang v R* [1994] 4 All ER 664 (PC) at 671-672.

(f) the loss that has been caused to the plaintiff because of implementation of the conspiracy.

2. In drawing a pleading, a plaintiff must have regard to the fact that the tort of conspiracy takes two forms: (i) conspiracy to injure, where the overt acts done pursuant to the conspiracy may be lawful but the predominant purpose is to injure the claimant; and (ii) conspiracy to do by unlawful means an act which may be lawful in itself, albeit that injury to the claimant is not the predominant purpose.[35] The pleading must be based on one or other of those forms.

3. A cause of action based on conspiracy to injure by unlawful means is to be determined by reference to the question "whether there is a just cause or excuse for combining to use the unlawful means". That depends on (i) the nature of the unlawfulness and (ii) its relationship with the resultant damage to the claimant.[36]

4. Although the conspiracy (in the form of an explicit or implicit agreement to harm the economic interests of the target) may be perpetrated by persons who enter and leave the conspiracy at different times, it remains necessary to identify those who are said to have been involved, when they became involved, what acts they committed during the course of the conspiracy and when they left the conspiracy (if they did).

5. Fundamentally, it is necessary to point to primary facts which both identify the conspirators and the way in which they acted at various times, and the circumstances from which their dishonest intention to injure their victim can be inferred. In short, each person must have a dishonest intention to harm the victim's economic interests, albeit that their intention may have been formed at different times.

Analysis of the Clerk's Strike out claim

[54] The general principles for striking out pivot on whether the material before the Court, in the light of the present state of evolution of the common law, demonstrates that the cause of action sought to be relied on is so clearly untenable that it cannot possibly succeed[37]. The jurisdiction is one to be sparingly applied, if the Court is left in doubt whether a claim may lie the application must be dismissed, but if the claim depends on a question of law capable of decision on the material before the Court the

[35] *JSC BTA Bank v Khrapunov* [2018] 3 All ER 293 (UKSC) at para 8.
[36] Ibid, at para 11.
[37] *Takaro Properties Ltd v Rowling* [1978) 2 NZLR 314, 317

Court should determine that question even though extensive argument may be necessary to resolve it.

[55] In the context of this strike out application by Mr Singh and Mr Ram seeking further particulars/amendment of the current Statement of Claim, the issue is not whether fraudulent conduct has been proved but whether there has been a sufficient identification of primary facts from which (if they were proved at trial) an inference of dishonest intent could be drawn. Only if such an intent could be inferred from those facts could a strike out application be refused and requests for better particulars denied. That highlights the need, in a Statement of Claim, to identify the relevant primary facts that support the allegation of fraud against each party. The facts alleged by NIR will be assumed true for the purpose of deciding whether an application to strike out should be granted or refused.

[56] It was and remains necessary for NIR to point to primary facts which both identify the conspirators and the way in which they acted at various times, and the circumstances from which their dishonest intention to injure the company can be inferred. In short, it must be demonstrated that each alleged conspirator must have a dishonest intention to harm the victim's economic interests, albeit that their intention may have been formed at different times.

[57] We find the pleadings against the clerk fail to identify the primary facts from which such an inference of dishonest intent could be drawn. The failures include:

(a) to name the other conspirators Mr Singh is said to have collaborated with.
(b) to describe precisely what they agreed to do.
(c) alleging in the context of a) and b) when Mr Singh joined that agreement; was that at its commencement or later.
(d) to describe, in context, precisely what Mr Singh did to implement their agreement.
(e) to allege what intention Mr Singh had to harm the economic interests of the plaintiff; and,
(f) to describe what loss was caused to the plaintiff because of implementation of the conspiracy.

[58] The petition to wind up NIR and the client authorisation to Mr Singh make it clear that in verifying the petition as a law clerk he was merely following a client's instructions at the direction of his law firm employer under the firm's principal, Mr Ram. Mr Singh had a right to do what he was instructed to do to advance his clients' interests and more simply to just do his job, even if consequently his action in verifying the petition, judged with the benefit of hindsight, may have been careless. We say may have been careless as Mr Singh was not providing legal advice, we are satisfied any of his actions carry with them the notion of following his superiors' orders. It was for Mr Ram to advise his clients what the law was regarding the availability of MNH to file a petition against NIR before receiving a certificate of incorporation, not his clerk.

[59] While Mr Singh may have been careless in his anticipation that MIH would shortly be incorporated, and so he could verify the particulars of the petition, his carelessness does not make him a part of any conspiracy, with any dishonest intent along with others to injure the economic interests of NIR.

[60] As to the conspiracy as pleaded. NIR cannot ignore the obvious delays and breaches of the design, commencement and completion deadlines captured by clause 2 of the agreement to lease. The breaches were brought to their attention following The Board's inspection. The breaches underpinned the re-entry notice. The same breaches were even acknowledged by NIR as imperilling their development and lead the company to request extensions of time to comply with the provision of plans and for construction to commence and be completed.

[61] Not that it is correctly pleaded, we note it is naïve to suggest, as these pleadings currently invite the court to do, that a law clerk could induce The Board to re-enter NIR's leased land, terminate the lease, and transfer it on to another entity. And even if that were so, long before the petition was filed NIR must have known its development was in peril because of its admitted breaches of clause 2 in failing to commence let alone complete the resort.

[62] NIR's delays, receipt of The Board's warning letter and notice of re-entry, acknowledgement of fault in delay, request for extensions in time to comply with

clause 2 and subsequent actions to mitigate their loss in forming a reluctant agreement for severance of a prime 3-acre block; provide in combination an inevitable finding. We find that well before the petition was filed NIR had created a perilous situation where they risked a clause 4 enforcement, re-entry, and lease termination. In that sense it was the NIR company that created the circumstances that could cause a loss in value of their leased land and no one else. The promoters and MNH may well have been honestly motivated to improve the situation by replacing the dilatory NIR and so improve the prospects and hopes the Mataqali Nainaso held for a better future.

[63] While that may be a matter for another court's determination, we find in the specific context of this appeal that the law clerk, Mr Singh, was so far removed from creating the circumstances of that loss merely by verifying a petition filed after those circumstances arose that there is no tenable cause of action against him on the pleaded facts.

[64] Furthermore, although it is not for us to date at this point on a strike out claim very careful and fully particularised pleading would be required to remove the reasonable possibility that the defendants were legitimately advancing in their own interests. If the defendants' interests were legitimate, then they cannot have conspired to harm the company. Again, that is a matter for another court to determine, when the plaintiff properly pleads its case. However, if the law firms' clients had such a legitimate interest, then no matter how careless he may have been Mr Singh, as the firm's clerk cannot have entered the client's conspiracy by the simple act of verifying a petition.

[65] In summary, we find on the pleadings, that the clerk when he verified the petition to wind up NIR could not have had any, dishonest intent to harm NIR's economic interests. Any carelessness in verifying the petition was not his fault as he acted at the law firms' instructions from its clients and under Mr Ram's superior orders. Even if he was careless, that alone cannot draw him into any yet unpleaded conspiracy let alone allow any lawful inference that his verification caused NIR to suffer a twenty-million-dollar loss.

[66] Mr Singh's appeal succeeds and the claim against him is struck out.

Mr Ram's restraint redundant

[67] As a result of our order striking out the claim against his clerk, Mr Ram's appeal over the High Courts restraint of him from further representation of his law clerk is redundant. In any event since that order, we note independent counsel has represented Mr Singh and Mr Ram.

Further particulars of claim for fraud

[68] For the same reasons given for striking out the claim against Mr Singh we find the conspiracy by fraud pleadings against Mr Ram and the remaining defendants require substantial improvement. The defendants are entitled to know exactly what case the plaintiff alleges by its pleadings. It is necessary to prove that identified conspirators have dishonestly agreed to bring about a situation which they realised would make NIR suffer economic loss. The focus is on the *intention* of the conspirators rather than their *motives*.[38] At a minimum the pleadings must address the following:

(g) the names of the identified conspirators.
(h) what they agreed to do.
(i) whether they joined the agreement at its commencement or later.
(j) what the named defendants did to implement their agreement.
(k) what intention the named defendants had to harm the economic interests of the plaintiff; and,
(l) what loss that has been caused to the plaintiff because of implementation of that precisely pleaded conspiracy.

[69] Counsel is reminded of the care and precision required in pleading where succinct facts about a cause of action and not evidence is required. [39] See paras [43] – [51] above.

[38] *Swann v Secureland Mortgage Investment Nominees Ltd* [1992] 2 NLZR 144 (CA) at 147, adopting what was said by Lord Goff in *Wai Yu-tsang v R* [1994] 4 All ER 664 (PC) at 671-672.

[39] See paras [43] – [51] above

Requirements for a Defamation claim

[70] The pleading requirements for a cause of action in defamation are arcane. There are very specific rules that must be followed. We agree with Mr. Krishna, for Mr. Singh and Mr. Ram, that the pleading contained in the current Statement of Claim is inadequate. Further particulars are required.

[71] In **Chand v Fiji Times Ltd [2011] FJSC 2; CBV0005.2009 (8 April 2011)**, the Supreme Court expressed its view on the purpose and nature of the particularisation of a defamation claim in this way:

> *"17. The primary question that arises for consideration is whether the pleadings contained in the Amended Statement of Claim have adequately met the standards of pleadings required in a an action for defamation. In the Republic of Fiji, Order 18 of the High Court Rules generally deals with pleadings, and Order 18 Rule 6(1) lays down that as a general rule "every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits." Order 18 Rule 11 requires that "every pleading must contain the necessary particulars of any claim, defence or other matter pleaded" except when such particulars exceed 3 folios, which may be then "set out in a separate document referred to in the pleading".*
>
> *18. The objective of pleadings is to narrow the issues between the parties and limit the scope of the trial. However, it is trite law that pleadings in a defamation action are in a special category and must be prepared with great care and scrutiny. The rationale for this difference of treatment is the recognition that libel and slander are committed primarily with the use of words, and as Oliver Wendell Holmes once put it: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used". What this means is that the meaning of a word will differ from time to time, nation to nation, culture to culture, and according to the context in which it is used, and the subtleties of such usage must be highlighted in the pleadings in a defamation suit. See, Lewis v Daily Telegraph Ltd. [1964] AC 234.*
>
> *19. Another cardinal rule of pleading in defamation cases is that the Statement of Claim generally must set out verbatim the precise words alleged to have been used by the perpetrator, and where the defamatory words are said to be contained in a lengthy document, identify the part or parts of the document that is or are alleged to be defamatory……"*

[72] From this we draw the following key elements for a correct pleading in a defamation claim:

(a) The Specific words complained of must be pleaded

(b) A statement of claim must allege that the defendant published the words complained of or caused them to be published.

(c) The plaintiff must allege that the words used referred to the plaintiff.

(d) Unless the plaintiff is named in the words complained of, it is necessary to plead facts and matters which establish reference to the plaintiff.

(e) The circumstances in which the words were published, such as date, place and medium of publication, should be specifically pleaded

(f) *The persons to whom the publication was allegedly made, unless a case of general dissemination by newspaper or broadcast is alleged.*

[73] We have highlighted the key elements of a pleading in the form required to emphasise two matters.

[74] First *a reasonable* cause of action *means a* cause of *action with* some *chance of success* when *only the allegations in the pleading are considered*. We find the Statement of Claim does not adequately meet the standards of pleadings required in an action for defamation. [40]*"(*Emphasis supplied). Secondly for the same reasons already outlined on our analysis leading to the strike out of the conspiracy fraud claim against the clerk, Mr Singh, we find an action in defamation cannot be sustained against him. The defamation claim against Mr Singh must be struck out.

[75] Furthermore, it follows, the plaintiff must amend its pleadings to meet those requirements of detail we have emphasised in the continuing defamation claim against the second appellant Mr. Ram.

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[40] *per Lord Pearson in Drummond-Jackson v British Medical Association [1970] WLR 688; [1970] 1 All ER 1094, CA).*

Discovery

[76] Mr Ram seeks discovery of the settlement agreement between the Board and NIR. The High Court declined to make an order to that effect.

[77] In our view, the Judge erred. The settlement agreement is relevant to two important points:

(a) It may establish that a sum of money was paid to NIR, which would reduce any claim for damages.
(b) It may disclose as acceptance that the Board was not at fault. Such an acceptance could undermine the conspiracy claim. The order is captured in (e).

Costs

[78] We turn to the matter of costs on the present appeal. This Court was presented with succinct grounds of appeal supported by relevant submissions from the appellant. The Court was also presented with a High Court Record comprising 6 volumes and 2091 pages. The submissions for the appellants and accompanying bundle of authorities comprised some 49 pages. The defects in the pleadings were obvious. The case for amendment or better particulars was strong. Counsel for the respondent while required to prepare and respond to the grounds of appeal filed his submissions across the bench.

[79] In the circumstances, costs will follow the cause. The Respondent must pay the first Appellant's costs on appeal which we summarily fix at $2,500. The respondent must pay the second appellants cost on appeal which we summarily fix at $1000.00.

<u>Results and Orders:</u>

a) The first appellant's appeal in ABU 090 of 2019 is granted.

b) The claims against the First appellant, Mr Singh are struck out.

c) As the claims against the first appellant are struck out and he is removed from the proceeding the second appellant's appeal against the restraining order in ABU 148 of 2018 while moot is consequentially granted.

d) The second appellant's appeal seeking further and better particulars /amendment of the claim and discovery in ABU 103 of 2020 is granted. We direct the plaintiff amend file and serve its amended claim on all defendants by 4:00pm Friday 1 August 2025.

e) The second appellant's appeal in ABU 103 of 2020 seeking discovery of any documents relevant to any settlement between the first respondent and The Board is granted in part. Any such documents are to be produced to the second respondent by 4:00pm Friday 1st August 2025. We otherwise remit the matter of discovery back to the High Court for such further directions to the parties as may be required following the amendment of the plaintiffs claim as directed herein.

f) The primary case is referred to the High Court for hearing. We request the High Court use its best endeavours to provide for a case management conference in the week of 4 August with a view to maintaining an early fixture

The Hon. Mr Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL
FIJI

The Hon. Mr Justice Paul Heath
JUSTICE OF APPEAL

The Hon. Mr Justice Gerard Winter
JUSTICE OF APPEAL