CIVIL JURISDICTION

CIVIL ACTION NO. HBC 29 OF 2014

BETWEEN: **SMITHFIELD LIMITED** a limited liability company with registered office at P O Box 1042, Lautoka

PLAINTIFF

AND : **LATROBE LIMITED** (trading as Safe Landing Resort) a duly incorporated company having its registered office at Votualevu, Nadi, Fiji

2nd PLAINTIFF

AND : **CAVACOLA COMPANY LIMITED** a duly incorporated company having its registered office at Lot 13 Ladrusasa Sub-division, Votualevu, Nadi

1ST DEFENDANT

AND : **TEVITA VOLAVOLA and NAI DAUNABOU** of Koromakawa, Nacula, Director and Hotel Worker respectively.

2nd DEFENDANT

AND : **iTAUKEI LAND TRUST BOARD** a statutory body duly constituted under the iTaukei Land Trust Act

3rd DEFENDANT

Appearances : Mr K Vutaki for Plaintiffs
Mr S. Nacolawa for 1st and 2nd Defendants
Mr P. Nayare for 3rd Defendants

Date of Hearing 27th March, 2014

RULING

1. By Inter Parte Notice of Motion dated 4th March 2014 supported by an affidavit sworn by David Danos sought the following orders;

   i) That the 2nd Defendants vacate Safe Landing Resort until further orders;

   ii) That 1st and 2nd Defendants by themselves, their servants, agents or whosoever be restrained by injunction from interfering with plaintiff's

management of Safe Landing Resort by David Danes or Bill Rawalai until further order;

iii) That the 3rd Defendant be restrained by itself, its servants and or agents from representing that it does not recognise Joint Venture Agreement between 1st Plaintiff and 1st Defendant as well as the management Agreement of 2nd Plaintiff;

iv) That the 1st Defendant be served by substituted service upon Nacolawa and Company's office 11 Vitogo Parade, Lautoka if it cannot be served at its registered office.

v) The cost of this application be in the cause.

2. The plaintiff also instituted proceedings against the defendants via a writ of summons dated 4th March 2014 seeking declaration and Orders that the Joint Venture Agreement dated 3rd March 2008 between 2nd plaintiff and 1st defendant and the Management Agreement dated 3rd December 2010 between 2nd plaintiff and 1st defendant were not dealings in land and did not need the consent of 3rd defendant to be valid, binding and enforceable agreements, general damages for losses suffered during 1st and 2nd defendants management of Safe Landing Resort, costs on indemnity basis and any other Order the Court deems fit.

3. The 1st and 2nd defendants filed their statement of claim and an affidavit in opposition sworn by the 1st named 2nd defendant on 19th March 2014 and the 3rd defendant filed an affidavit sworn by its Legal clerk on 21st March 2014.

4. Plaintiffs filed three affidavits sworn on 21st, 25th and 26th March 2014 respectively in response to the affidavits filed on behalf of the defendants.

5. When the matter was taken up for hearing on 27th March 2014 Counsels made oral submissions based on the written submissions filed earlier.

Background

6. David Danes in his affidavit in support of the Inter Parte Notice of Motion deposed inter alia that:

(i) He is a director and major share holder of the plaintiff companies namely Smithfield Ltd [SF] and Latrobe Ltd [LL] and he was approached in or about November 2007 to assist finance the

renovation and building of a resort named "Safe Landing Resort" at Nakoromakawe in Nacula, Yasawa.

(ii) He came to know from the first named 2nd defendant that the first defendant Cavolaia company Ltd [CCL] was registered by the said defendant and his brother as shareholders and Directors in or about April 2007 and that the 3rd defendant iTaukei Land Trust Board [TLTB] issued an Agreement to Lease to the 1st defendant [CCL] the land for Tourism purpose.

(iii) As the 1st defendant had no capital to restart the resort 1st named second defendant and his brother invited 1st plaintiff [SF] to renovate and rebuild the resort in consideration of which the 1st defendant will acquire necessary consent for 1st defendant to sublease the land to the 2nd plaintiff [JVC] as the Joint Venture company [JVC] for which purpose a joint venture agreement [JVA] was entered on 3rd March 2008 marked **DD**1.

(iv) Acting upon the JVA 1st plaintiff rebuilded, refurbished and restarted the run down Resort in September 2008.

(v) That he went to Australia in November 2008 and the 1st named 2nd defendant managed the Resort in his absence.

(vi) On his return in February 2010, he found out that the resort was managed poorly as the 1st named 2nd defendant has not paid taxes, EPF Contributions to FNPF and staff being paid poorly resulting in theft and loss of Resort items. In disappointment he went back to Australia.

(vii) After the some time he came back and had discussions with 1st named 2nd defendant and one Peter Kelly as Directors of 2nd Plaintiff [JVC] and signed management agreement [MA] marked **DD2** for 1st plaintiff company [SF] to manage the Resort and 1st named 2nd defendant be paid $1,500.00 within 20 days and further $2,000.00 later.

(viii) He then entered into an agreement with 1st plaintiff [SF] that he manage the Resort at $400 a week and after taking over the Management he had to pay unpaid rent, loans taken from Fiji Development Bank and Taxes to FRCA, amounts no. paid within the 1st named 2nd defendants management period.

(ix) Once he had the Resort up and running he checked on the fulfilment of 1st and 2nd named defendants promise or undertaking that the land will be subleased to the 2nd plaintiff [JVC]

(x) He hired one Bill Rawalai in or about March 2013 to manage the resort in his absence.

(xi) That by letter dated 6th June 2013 the 1st defendant's solicitors wrote to the 3rd Defendants [iTLTB] and in response 3rd defendant advised that it does not recognise the Joint Venture Agreement and Management Agreement.

(xii) That the 1st defendants lawyer sent him a letter dated 3rd July 2013 when 1st named 2nd defendant was advised by the Commissioner, Western office, to get a Court order and not threaten him in such manners.

(xiii) Acting on the advice of the 3rd defendant [iTLTB] and resolution of 1st defendant company [CCL] and stating his lawyer has approved for them to take over the Resort the 2nd defendants went to the Resort on 25th February 2014 and took over the Resort from Bill Rawalai.

(ix) That he has invested about $600,000 via the two plaintiffs into the Resort and will stand to lose all this investment if 1st defendant does not give a sublease to 2nd plaintiff [LI] as promised.

7. The 1st named 2nd defendant in his affidavit deposed inter alia that;

(i) "Safe Landing" Ltd which operates Safe Landing Resort started in 2006 through an agreement reached between Richard Evans and him and started operating it from 2001 until the year 2006.

(ii) The Resort had full and complete infrastructure before he parted amicably with Mr Evans in 2006.

(iii) The valuation of the Resort made in 2007 estimated at $1.65 million dollars Fijian and his company Cavecola [CCL 1st Defendant] was registered in the same year.

(iv) During the operation from 2001 to 2005 they submitted financial reports prepared by their Accountants.

(v) The 2nd Plaintiff "Latrobe Ltd" T/A as "Safe Lancing Resort" is not in existence that only "Latrobe Ltd" is registered and he has resigned his directorship of the company.

(vi) That he applied for a registered lease and fully paid the offer of the iTLTB amounting to $35,595.38 in June 2007 and also applied for a loan to the Fiji Development Bank for the sum of $750,000.00 and it had been approved by the bank.

(vii) That at paragraph 8 of the agreement 1st plaintiff [SF] wanted to share ownership with the lease and operate the Resort which had to be sanctioned by the Board – and the Board was left in the dark.

(viii) That the 1st defendant OCL is the Lessee of Native Land named Nakoromakowa, NLTB Ref No50037405, the iTLTB consent is totally missing out which is making the whole agreement or operation illegal.

8. The Litigation Assistant of the 3rd defendant iTLTB in his affidavit states inter alia that:

i) iTLTB was not privy to the events that had taken place and the lease was issued by them to the first defendant for tourism purpose.

ii) That they admit a Joint Venture Agreement was executed between the parties in 2008, however 3rd defendant was never privy to the said joint venture nor was its consent for sublease sought first as is the proper procedure. The parties to the JVA acted on their own volition and iTLTB has no legal obligations to the plaintiffs for unauthorised dealings.

iii) 1st named 2nd defendants requested from 3rd defendant to transfer of lease to 2nd plaintiff by letter marked DD5. But it is not the proper procedure to transfer a lease. A proper transfer documents must be prepared with the attached consent form with approval displayed.

iv) That the plaintiffs agents or otherwise are not supposed to be operating any activity in relation to the lease property without the 3rd defendants prior consent.

v) Address on the lease statement of 1st defendant attached marked DD8 is the postal record which is amendable and does not give any legal recognition of the plaintiffs claim to the lease nor any justification to joint venture agreement.

vi) iTLTB has never provided any legal advise for anyone to take over the resort.

9. In reply to the affidavit of the 3rd defendant David Danes by his affidavit sworn on 25th March 2014 deposed inter alia that:

i) That he believes the Joint Venture Agreement is not a dealing in land on the advice of the Lawyers who prepared it.

ii) That he believes the management rights bestowed on the 1st Plaintiff and in turn to Tim and Bill Rawalai in his absence to manage the Resort is not a dealing in land.

iii) 3rd defendants was aware from its inspection of the Resort of the upgrading work done by the plaintiffs and by having 2nd plaintiff as the addressee for its correspondence it was aware of the management of the Resort by the plaintiff and Joint Venture Agreement was shown to its officer of its tourism department Nadi and that he has dealt with the officers there.

10. In reply to the affidavit of 1st and 2nd defendants plaintiffs have filed an affidavit sworn by David Danes dated 21st March 2014, and a supplementary affidavit sworn by him in reply to the affidavit of Kevani Naiduki of iTLTB.

Law and Analysis

11. Counsel in their written submission relies on the principles laid down in **American Cynamid Co V Ethicon [1975]AC 396** to substantiate their respective positions.

12. Accordingly the three principle questions which must be answered in determining whether to exercise the discretion to grant an injunction or not are:

i) Is there a serious question to be tried?

ii) Are damages an adequate remedy?

iii) Where does the balance of convenience lie?

Is there a serious question to be tried?

13. In respect of the 2 agreements, the following facts are revealed by the affidavits filed.

i) Safe Landing Resort was started in 2001 by joint venture partnership of Richard Evans and Tevita Volavola (1st named 2nd defendant) and Evans parted with the defendant in 2006.

ii) In March 2007 Tevita formed the 1st defendant Company Cavacola (CCL) and it was issued with a tourism lease over the land from 3rd Defendant (iTLTB) over iTaukei land known as Nakoromakawa (Part).

iii) 1st Plaintiff Smithfield Company (SL) entered into a joint venture agreement marked DDI with 1st defendant (CCL) and Safe Landing Ltd

(SSL) on the conditions that 1st plaintiff to renovate and rebuilt the resort in consideration of which the 1st defendant will acquire necessary consent for 1st defendant to sub lease the land to 2nd plaintiff "Latrobe Ltd" the Joint Venture company in which 1st Plaintiff and the defendants each owned 50% of the shares.

iv) Acting upon JVA DD1 1st plaintiff SF rebuild, refurbished and restarted the Resort which was opened in September 2008 and it was managed by 1st named 2nd defendant Tovita.

v) On 3rd December 2010 Tovita and one Peter Kelly as Directors of 2nd Plaintiff Joint Venture Company signed a management agreement marked DD2 for 1st plaintiff SF to manage the Resort and for Tovita be paid $1,500.00 within 30 days and a further $2,000.00 later.

vi) David Danes a shareholder of 1st Plaintiff SF entered into an agreement with the 1st plaintiff to manage the Resort at $400.00 a week.

vii) David Danes hired Bill Rawalai to manage the Resort in his absence.

viii) 1st defendant lawyer then sent a letter dated 3rd July 2013 to David Danes to vacate the Resort.

ix) The 3rd defendant iTLTB by its letter dated 20th July 2013 adviced the 1st defendants solicitors that it does not recognise the joint venture agreement and management agreement.

x) That on 25th February 2014 2nd defendant took over possession of the Resort from Bill Rawalai.

xi) That David Danes has personally invested about $660,000 via the plaintiff companies into the Resort and will stand to lose all this investment if 1st defendant does not give a sub lease to 2nd Plaintiff [JVC] as promised.

14. It is apparent from the summary of facts stated in the above paragraph that the plaintiffs are relying on the two agreements DD1 and DD2 to justify their possession and management of the Resort.

15. The defendants takes up the position that the said agreements are void for lack of consent from the 3rd defendant iTLTB.

16. In deciding whether there is a serious question to be tried in this matter I must first determine whether the said agreements are valid, legally binding agreements or not.

17. Section 12 (1) of the iTaukei Land Act states

"Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void."

18. In order to determine whether the two agreements needs consent of the iTLTB I mus. consider whether agreements deal with .he land leased out to the 1st defendant.

19. The plaintiffs counsel has contended that the management agreement was only a license to occupy and not for exclusive possession; Joint Venture agreement was for 1st defendant to provide a sublease subject to all approvals being obtained and plaintiffs are on the process of getting approvals; iTLTB and the 1st defendant had consented to the plaintiffs joint venture and management agreements with 1st defendant by requiring Plaindiffs to pay 1st defendants lease and not evicting plaintiff from the Resort.

20. In drawing attention to the clauses of the Joint Venture agreement DDJ find that the following clauses have a bearing on this issue. In the Preamble of the agreement it is stated as follows:

B. **"CCL is the lessee of the land which the Resort occupies under NLTB contract 50037405 at Nakoromakawa, Nacula, Yasawa ("the lessee")**

C. **SL wishes to enter into joint venture with CCL to share the ownership of the lease and the operation of the Resort.**

D. **CCL and SL wish to form a joint venture company in which CCL and SL will each own 50% of the share ("the JVC") for the purpose of this agreement.**

Clause 1of the agreement states that:

In consideration of CCL sub-leasing to the JVC the lease for a nominal rental of $1.00 (one dollar) per annum and in consideration of CCL transferring to the JVC all its

rights and interests in the Resort SL hereby undertakes to:

a) Completely re-furbish, re-fit and renovate the Resort at its own cost.....

Clause 2 states that:

In consideration of SL providing the services and assistance as hereinbefore stated CCL will

a) Sub-lease the lease to the JVC and seek all necessary Government, Local Body and other consents required to do this.

b) Ensure that SLL transfers ownership of the Resort, its fixtures and fittings to the JVC at value to be agreed between CCL and SL.

Clause 3 states that

In consideration of SL providing the services and assistance as hereinbefore stated and in consideration of CCL doing the things it is to do as hereinbefore stated SLL will;

a) Transfer to the JVC all its rights and interests in the Resort at a price to be agreed between the parties herein

21. In the Management Agreement clause C states:

C. SL entered into joint venture with CCL to share the ownership of the lease and operation of the Resort.

Clause E states:

E In consideration of SL providing the services and assistance as hereinbefore stated CCL did:

a) Sub-lease the lease to the JVC and seek all necessary Government, Local Body and other consents required to do this.

b) **Ensured that CCL transferred ownership of the Resort, its fixtures and fitting to LL.**

Clause F states:

F **In consideration of SL providing the services and assistances hereinbefore stated and in consideration of CCL doing the things it was to do hereinbefore stated SLL will**

a) Transferred to the JVC all its rights and interests in the Resort.

22. In examining the contents of the above mentioned clauses in the two agreements DD1 and DD2 it is abundantly clear that the agreements deal with the land and the Resort.

23. I cannot accept the submissions made on behalf of the Plaintiffs that the agreements do not deal with the ir land because DD1 clearly states the agreement is entered into **share the ownership of the lease and the operation of the Resort. In consideration of sub-leasing the lease to the 2nd Plaintiff** JVC, 1st Plaintiff company has agreed to provide the services.

24. Furthermore, in the management agreement DD2 it is stated as mentioned above that the 1st defendant company CCL did sub lease the lease to the JVC and seek all necessary Government, Local Body and other approvals required to do that. It says further that CCL transferred ownership of the Resort its fixture and fittings to 2nd Plaintiff Joint Venture Company.

25. The Management Agreement DD2 cannot be taken in isolation because it deals with the Resort which is on the land transferred to the Joint Venture Company by Joint Venture Agreement DD1.

26. **<u>In Charlmers V Pardoe (1963) 3 ALLER 552</u>** it was held that the friendly agreement between Pardoe and Chalmers coupled with erection of the buildings by Chalmers constituted a dealing with the land and since the consent of the Board was not obtained, the dealing was unlawful under the ordinance and the Court was precluded from landing its aid to MR Chalmers.

27. In the instant matter there is not only an arrangement between the parties it goes beyond that in executing two agreements dealing with the land and Resort. By the agreements the 1st defendant lessee, promises to sublease the land and Resort and transfer all its rights in the resort to the 2nd Plaintiff in consideration of the 1st plaintiff company refurbishing and rebuilding the

Resort. The lessee also promises to get all necessary approvals for the transfer for which no application has been made prior to the execution of the Agreement.

28. Furthermore the 1st plaintiff has constructed new dining and amenities block according to paragraph 8(a) and (b) of the 1st affidavit sworn by David Danes. Therefore, the agreements cannot only be regarded as licence to occupy. Possession is coupled with license to occupy.

29. From the above facts it is clearly established that; the parties have dealt with the land and resor. by agreements DD1 and DD2 and acted upon the agreements by 1st plaintiff constructing buildings on the land and taking over exclusive possession of the Resorts without the consent of iTLTB.

30. In applying the principle laid down in **Chalmers V Pardoe** to the present case I am of the view the court cannot lend its aid to the Plaintiffs who have acted in the aforesaid manner without obtaining the consent of the iTLTB.

31. **Native Land Trust Board V Subramani [2010] FJCA 9; ABC 0076, 2006 (25th February 2010)** and **Manadan V Kulamma [1965] 11 FLR 141** were referred by the Plaintiffs counsel in support of his submissions.

32. In **NLTB V Subramani** the NLTB Board and the Landowning Matagali member encouraged Subramani to apply for extension of lease and some money paid to landowning representative and there was an application by Subramani to apply for a new lease. The court found that the NLTB's conduct was unconscionable and sufficient to give rise to an estoppel preventing it from denying the Plaintiffs right to renewal of his case. The court held that unlike Chalmers case the plaintiff had an equity in the land in accordance with the general principle.

33. In this matter the plaintiffs have acted on the assurance of the defendants that the sublease will be granted to the Joint Venture Company and entered into the land to have exclusive possession.

34. The plaintiff's produced document DD5 written by 1st named 2nd defendant to the iTLTB in which he has requested the Board to transfer the lease to 2nd plaintiff Joint Venture Company as the company has fulfilled its obligations under the Joint Venture

35. Though its not a proper application to transfer the lease it is clear from the said letter itself that the iTLTB was kept in the dark about the agreements executed in 2008 and 2010 which as I have already determined deals with the land.

36. In document DD7 produced by the plaintiff an officer of NLTB has written to David Danes to pay outstanding rental before accepting the sublease and that the application for sublease is $115.00.

37. Document DD7 proves further that prior approval has not been obtained for a sublease and the ITLTB has requested David Danes to pay the rental arrears and pay the application fee necessary for sublease long after executing DD1 and DD2.

38. Document DD8 is produced by the Plaintiff, to prove that the iTLTB has recognised the Joint Venture Company. This document is a Tax invoice issued by ITLTB which refers to the company as "**Cavacola Company Limited T/A's Safe Landing – C/Latrobe Limited"**

39. In my view mentioning the address in the said manner cannot be taken as NLTB recognising the 2nd Plaintiff Company running the Resort but it is merely a postal address for collecting mail for the defendant and also addressee being "Cavacola Co Ltd" not Latrobe. Furthermore DD7 and DD8 are documents issued after the execution of the Joint Venture agreement and the Management Agreement DD1 and DD2.

40. The Plaintiffs have filed a supplementary affidavit sworn by David Danes with document marked A to H annexed.

41. Document A is an email dated 30th August 2013 addressed to David Danes with copies to an officer of TLTB sent by Investment Fiji inviting for a meeting to resolve issues between Plaintiff and the defendants

Document B is a reply to an email of David Danes by an officer of iTLTB.

42. Both documents reveals about the dispute that had arisen between the plaintiffs and the defendants and Investment Fiji taking action to resolve it with the co-operation of iTLTB. iTLTB's knowledge on the earlier agreement DD1 and DD2 cannot be infered from these documents.

43. Document C is an email dated 20th January 2014 sent to David Danes by an officer of the iTLTB Tourism Department requesting that the balance rental due for first six months of this year to be paid. It only indicates that the rentals were paid by David Danes after getting exclusive possession of the Resort unlawfully and communicating with iTLTB officers as Resort Manager. Therefore, iTLTB officers requesting him to pay the rentals cannot be considered ITLTB recognising his agreements. It can only be taken as a request made to the Resort Manager to pay rentals.

44. Document 'F' is a reply email by an officer of TLTB dated 20th January 2014 addressed to David Danes stating that they will like to meet David Danes, 1st named, 2nd defendant and the Lawyers of Danes to discuss the issues raised by Danes and also to finalise the dealing for sublease. It is evident from this document that the consent for the sub.ease was still under consideration.

45. Document G is an email reply to David Danes by an officer of the 3rd defendant ITLTB dated 3rd February 2014 which states inter alia that they need to hear all side of stories particularly the 1st named 2nd defendant and that they will be going to the site on Thursday.

46. All those documents reveal that the Plaintiffs were trying to get the assistance of the iTLTB in sorting out the issues that have cropped up between the Plaintiffs and the defendants subsequent to entering into agreements DD1 and DD2 without the consent of iTLTB.

47. Document marked H is an email reply sent by a former employee of iTLTB to David Danes. In this email dated 26th March 2014 he has stated **"that TLTB has recognised and though not in writing practically has approved/endorsed Latrobe has some interest with TLTB has approved."**

48. Peceli Kiliraki who has sent this email is said to be a former employee of iTLTB and he has no authority to comment about iTLTB's recognition of the Joint Venture company. There is no documentary proof of official correspondence by iTLTB prior to forming the Joint Venture Company to prove that it had knowledge about the Joint Venture Agreement. Therefore, I am of the view that document marked "H" is a last minute attempt by the Plaintiffs to get a comment favourable to them from a person who has no authority to make it. In any event this email has no evidential value as it is not an official document.

49. Though David Danes has deposed in paragraph 17(e) of his affidavit that in June 2011 the 3rd defendant gave consent for the 1st defendant to sublease the land to the 2nd plaintiff there is no document annexed to prove such consent given by iTLTB.

50. From the documents produced it is evident that the Plaintiffs have sought the assistance of the iTLTB and requested for sub lease when the disputes arose with the defendants. It is very clear from the above facts the plaintiffs have never consulted the iTLTB prior to executing the Joint Venture Agreement and therefore they have acted contrary to section 12 (1) of the iTaukei Land Trust Act.

51. In the present case there is not merely a Joint Venture Agreement but full performance on the agreements as the Plaintiffs have also admitted that they constructed buildings for the Resort. Plaintiff have also taken exclusive possession after the execution of the management agreement.

52. Under the above circumstances I find that Suhramani's case is distinguishable from the present case as the plaintiffs have not sought the consent for the Agreements from the iTLTB before executing them and the iTLTB has not taken part in the process of executing the same.

53. I have also been referred to **Manadan V Kulamma [1965] 11 FLR 141** as supporting the plaintiffs case.

In the said case sub lessee Sanapths (S) and the Appellant (A) entered into a "Share farming" agreement in relation to Farm under the terms of which S employed A to cultivate the farm, sharing the expenses and net profit. There was a provision that at a certain stage S was to use his best endeavour to obtain the consent of the Colonial Sugar Refinery Co Ltd (lessee of NLTB) to transfer of half interest in the tenancy to the appellant.

54. In Manadans case court has considered the following facts in determining whether the agreement "deals" with the land.

i) S and after his death his wife resided on the land, A continued to reside on his own land.

i) A worked the land and was repaid by a percentage of the crop he grew.

iii) S maintained the control of the land.

iv) The agreement was a mere license to enter land not a license to occupy coupled with possession of the later is exclusive, would frequently amount to a lease.

v) Expression of Intention at a later date to approach the Sugar company and if consented, to take step to effect the transfer a ½ the lease to A.

55. In considering the above facts in Manadan's case the court held that the share farming agreement was not in contravention of section 12 of the ordinance as it does not deal with the Land.

56. Contrary to the Manadans case in this matter the Joint Venture Agreement states that the Joint Venture Company is formed to share the ownership of the lease and the operation of the Resort. In consideration of the 1st

defendant company sub leasing to the JVC the lease and transferring all its rights and interest in the Resort, 1st Plaintiff undertakes to refurbish and re fit and renovate the Resort. It is also stated that in consideration of the services and assistance provided by the 1st plaintiff 1st defendant will sublease to the JVC and seek approvals required to do that.

57. It is a clear case of dealing with the land and resort unlike the case of Manadans.

58. Furthermore, by the Interparte Notice of Motion Plaintiffs are seeking injunctions to evict the 2nd defendant and 1st and 2nd defendants be restrained from interfering with plaintiffs management of the Resort by David Danes or Bill Rawalai.

59. From the relief prayed by the plaintiffs it is evident that the plaintiffs are seeking to evict the lessees and have exclusive possession and control of the Resort.

60. Therefore, I cannot agree with the submissions of the plaintiffs counsel that the Joint Venture Agreement and the Management Agreement is similar to the farming agreement of the Manadans case and it is only license to occupy.

61. In considering all of the above, I am of the view that the plaintiffs have failed to establish that there is a serious question to be tried in this matter.

Whether damages would be an adequate remedy.

62. In the 1st affidavit filed by David Danes he states that he has personally invested about $660,000.00 via the two plaintiffs and attached marked DD 13 true copy of letter from his auditors verifying this investment.

63. In paragraph 26 of the said affidavit it is stated that the plaintiffs give their undertaking as to damages based on their aforesaid investment of $660,000.00.

64. However, DD13 is not a letter from David Danes Auditors, it is a letter issued by Reserve Bank of Fiji where the bank states that they note the shareholder investment of approximately $660,000 but request a chartered accountant to verify invoices and document, to submit tax certificate, company's latest audited accounts etc. Therefore this document cannot be considered as proof of adequate undertaking for damages.

65. However, in his affidavit in reply David Danes has annexed 2nd plaintiffs bank statement showing a balance of $13,300.00 true copy of its BSP account showing a balance of $15,163.00 and Westpac $3,334.00 out of the three

documents only BSP statement gives the name of the account holder and all three documents are not certificated copies issued by the banks.

66. Even if the amounts in the three banks are taken into account its only a total of $31,397.00 not sufficient as an adequate amount to satisfy a claim for damage.

67. Document DD 37 is a Valuation of David Danes house situated in Australia. As this house is not in the name of the plaintiffs companies I cannot consider the value of it as an acequate undertaking for damages in this matter.

68. Therefore, I am of the view that the plaintiffs affidavits does not confirm sufficient information of the financial position of the plaintiff for an assessment of the value of the undertaking for damages.

Balance of Convenience

69. The burden is on the plaintiff to establish that on balance the harm that if it likely to suffer if the injunction is not granted outweighs any detriment to the defendant in the event that the injunction is granted.

70. I am of the view as the plaintiffs are seeking the injunctive reliefs depending on two agreements which as determined by me are contrary to iTaukei Land Trust Act. Therefore, court must not exercise its discretion of granting injunctions infavour of the plaintiffs. If such injunctions are granted the 1st defendant being the registered lessee of the property will be deprived of accessing the Resort and managing it. The defendants have alleged that they were deprived of any income from the Resort after the plaintiffs took over its possession and management. This will continue to happen if injunctions are granted.

71. As the 3rd defendant had no prior knowledge of the Joint Venture agreement or the management agreement which requires its consent - 3rd defendant cannot be restrained from representing that it does not recognise the Agreements. Such an injunction will be an indirect order against a statutory body forcing it to accept illegal agreements.

72. In conclusion it is my view that the plaintiffs have failed to satisfy the principles lain down in American Cynamid case for injunctive reliefs.

73. **Final Orders**

(1) The Orders prayed under 1,2,3 and 5 of the inter parte Notice of Motion of the plaintiff dated 4th March 2014 be dismissed and injunctions refused.

(2) The plaintiffs to pay the 1st, 2nd and 3rd defendants summarily assessed cost at $1,000 each.

L.S. Abeygunaratne

Judge

3/4/2014