IN THE HIGH COURT OF FIJI (AT SUVA)
CIVIL JURISDICTION

Civil Action No. HBC 111 of 2008

BETWEEN : **ANDREW SKERLEC** of 65 Scadding Avenue, Penthouse 13, Toronto, Ontario, Canada, M5A-4LI as sole Executor and Trustee of the Estate of Frank Sebesy Skerlec

1ST PLAINTIFF

AND : **ANDREW SKERLEC** as sole beneficiary of the Estate of Frank Sebesy and majority beneficial shareholder of Union Marketing and Manufacturing Company Limited

2ND PLAINTIFF

AND : **ANDREW SKERLEC** as sole beneficiary of the Estate of Frank Sebesy Skerlec and majority beneficial shareholder of Somosomo Developments Limited.

3RD PLAINTIFF

AND : **UNION MANUFACTURING AND MARKETING COMPANY LIMITED** a limited liability company having its registered office at Suite 14, Nadi Town Council Arcade, Nadi.

4TH PLAINTIFF

AND : **SOMOSOMO DEVELOPMENT LIMITED** a limited liability company having its registered office at Suite 14, Nadi Town Council Arcade, Nadi.

5TH PLAINTIFF

AND : **CHARLES DWIGHT TOMPKINS** of Keri Keri, New Zealand, Businessman.

1ST DEFENDANT

AND : **BARCLAYS (PACIFIC) LIMITED** a limited liability company having its registered office at 214 Rewa Street, Suva

2ND DEFENDANT

AND : **TIDAL FLOWS LIMITED** a limited liability company having its registered office at 214 Rewa Street, Suva.

3RD DEFENDANT

AND : **REGISTRAR OF TITLES**

4TH DEFENDANT

AND : **REGISTRAR OF COMPANIES**

5TH DEFENDANT

AND : **ATTORNEY GENERAL OF FIJI**

6TH DEFENDANT

BEFORE : Hon. Justice Kamal Kumar

COUNSEL : Mr D. Sharma for the Plaintiff
Ms M. Drova for the Second and Third Defendants

DATE OF HEARING : 16 November 2013

DATE OF RULING : 30 April 2014

RULING

(Application to Strike Out Claim)

1.0 Introduction

1.1 On 18 March 2013 Second and Third filed Application by way of Summons seeking following Orders:-

> *"1. That the Plaintiff's Statement of Claim be struck out; and*
> *2. Alternatively, the Third and Fourth Plaintiffs be removed as parties;*

3. An Order that the First, Second and Third Plaintiffs pay costs of the application on a full indemnity basis."

1.2 Pursuant to leave granted on 4 July 2013 Second and Third Defendants on 4 July 2013 filed Amended Summons whereby Prayer 2 of the Original Summons was amended to read:-

"Alternatively, the Fourth and Fifth Plaintiffs be removed as parties to this action."

1.3 Following Affidavits were filed by the parties:-

For Applicants/Second and Third Defendants

(i) Affidavit in Support of Martha Smith sworn and filed on 18 March 2013;

(ii) Affidavit in Reply of Martha Smith sworn on 6 June 2013 and filed on 7 June 2013.

For Respondent

Affidavit of Alfred David Appleton sworn and filed on 30 April 2013.

1.4 Fourth, Fifth and Sixth Defendants did not file any Affidavits in respect to the Application.

2.0 Background Facts

2.1 At all material times Frank Sebesy Skerlec (deceased) was director and majority shareholder of Union Manufacturing and Marketing Company Limited, the 4th Plaintiff (hereinafter referred to as **"UMMC"**) and Somosomo Developments Limited, the 5th Plaintiff (hereinafter referred to as **"SDL"**) whilst Andrew Skerlec was a director of both these companies.

2.2 On or about 13 October 1998 and 26th November 1998 Frank Skerlec and Andrew Skerlec entered into Agreements with 1st Defendant, Charles Dwight Tompkins (hereinafter referred to as **"Tompkins"**) for Transfer of Skerlecs shares in UMMC and SDL to Tompkins.

2.3 In February 1989 Frank Skerlec and Andrew Skerlec resigned as directors of UMMC and SDL.

2.4 On or about 30th June 1989 Frank Skerlec and Andrew Skerlec executed and delivered transfer of their shares in UMMC and SDL to Twilight Holdings Limited, Tompkins nominee.

2.5 Twilight Holdings Limited subsequently changed its name to Barclays (Pacific) Limited (hereinafter referred to as **"Barclays"**).

2.6 On or about 17 February 1989 UMMC entered a loan Agreement with Barclays and UMMC and SDL executed Mortgage over their properties to secure the loan to UMMC.

2.7 Barclays mortgage was subsequently assigned to Yovindra Investments Limited and then to Tidal Flows Limited, the 3rd Defendant.

2.8 On 19 June 1989, Reserve Bank of Fiji (**"RBF"**) gave permission for transfer of shares on condition that consideration for transfer of shares be paid in Fiji.

2.9 On 23rd October 1990, RBF withdrew its approval on the ground that conditions for grant of approval have not been complied with.

2.10 In 1994, Civil Action No. 52 of 1994 was instituted by Frank Sebesey Skerlec as Plaintiff and 1st and 2nd Defendants as Defendants.

2.11 On 19 May 1999 Judgment was delivered in Civil Action No. 52 of 1994 by his Lordship Justice Fatiaki (as he then was).

2.12 On 9 April 2008, Plaintiffs filed this action by way of Originating Summons.

2.13 Pursuant to Order made on 5th July 2010 this action was converted to Writ Action.

2.14 On 13 July 2010, Plaintiffs filed Writ of Summons with Statement of Claim.

2.15 On 14 September 2010, Plaintiffs obtained Judgment by Default against the 2nd and 3rd Defendants which Judgment was set aside on 26 April 2012.

2.16 On 22 May 2012, 2nd and 3rd Defendants filed Statement of Defence.

2.17 On 6 June 2012, 4th, 5th and 6th Defendants filed their Statement of Defence.

2.18 On 20 June 2013, Plaintiff filed Reply to Defence to 2nd and 3rd Defendants Statement of Defence.

2.19 On 26 July 2012, Order on Summons for Direction was made by the Court.

2.20 On 24 July 2013, Plaintiff filed Affidavit Verifying List of Documents.

2.21 Thereafter no other documents were filed until filing of the present Application to strike out the claim and alternatively for removal of 4th and 5th Plaintiffs as Plaintiffs.

3.0 <u>Application To Strike Out Claim</u>

3.1 The Applicants seek to strike out the claim pursuant to Order 18 Rule 18(1) (a), (b) and (c) of the High Court Rules 1988 which provides:-

> *"18(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that -*
>
> *(a) it discloses no reasonable cause of action or defence, as the case may be; or*

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

3.2 It is well established that jurisdiction to strike out claim or pleadings should be used very sparingly and only in exceptional case **Timber Resource Management Limited *v.* Minister for Information and Others** [2001] FJHC 219; HBC 212/2000 (25 July 2001).

3.3 In **National MBF Finance (Fiji) Ltd *v.* Buli** Civil Appeal No. 57 of 1998 (6 July 2000) the Court stated as follows:-

"The Law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the Courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the Court...."

No Reasonable Cause of Action

3.4 In **Razak *v.* Fiji Sugar Corporation Ltd** [2005] FJHC 720; HBC 208. 1998L (23 February 2005) his Lordship Justice Gates (current Chief Justice) stated as follows:-

*"A reasonable cause of action means a cause of action with "some chance of success" per Lord Pearson in **Drummond-Jackson v British Medical Association** [1970] 1 All ER 1094*

at p.1101f. The power to strike out is a summary power "which should be exercised only in plain and obvious cases", where the cause of action was "plainly unsustainable"; Drummond-Jackson at p.1101b; ***A-G of the Duchy of Lancaster v London and NW Railway Company*** *[1892] 3 Ch. 274 at p.277.*

3.5 Plaintiffs claim arise out of alleged breach of Agreements dated 13 October 1998 and 26 November 1998 for sale and purchase of shares in UMMC and SDL, fraudulent control and mismanagement of UMMC and SDL by the Defendants and the validity of mortgage given by UMMC and SDL to Barclays.

3.6 It is apparent from the Statement of Claim and other pleadings filed that Plaintiffs do have reasonable cause of action.

Frivolous or Vexatious

3.7 At paragraph 18/19/15 of Supreme Court Practicec1993, Vol 1 (White Book) it is stated:-

> ***"By these words are meant cases which are obviously frivolous or vexatious or obviously unsustainable per Lindley LJ in Attorney General of Duchy of Lancaster v. L. & N.W.Ry [1892] 3 Ch. 274, 277;.... The Pleading must be "so clearly frivolous that to put it forward would be an abuse of the Court" (per Juene P. in Young v. Halloway [1895] P 87, p.90; ...."***

3.8 The Oxford Advanced Learners Dictionary of Current English 7th Edition defines "frivolous" and "vexatious" as:-

frivolous: *"having no useful or serious purpose"*
vexatious: *"upsetting" or "annoying"*

3.9 Therefore for claim to be frivolous or vexatious the Appellants must establish that the claim lacks merit (i.e. has no useful purpose) and is only to upset or annoy the Applicants.

3.10 Plaintiffs claim is for failure by the 1st and 2nd Defendants to pay for transfer of shares in UMMC and SDL and the illegality of the transaction for transfer of shares for want of RBF approval under the Exchange Centre Act.

3.11 The allegations against the 1st and 2nd Defendants were already subject to litigation in Civil Action No. 52 of 1994.

3.12 There is no dispute that the Plaintiffs have not been paid full consideration for transfer of shares to 2nd Defendant as 1st Defendant's nominee and that RBF withdrew the approval granted for transfer of shares in UMMC and SDL to the 2nd Defendant.

3.13 Since the basic facts on which Plaintiff's claim is based on issues that are relevant for determination by the Court the claim cannot be said to be frivolous and vexatious.

Scandalous

3.14 At paragraph 18/19/14 of Supreme Court Practice 1993 (White Book) Vol. 1 it is stated as follows:-

> ***"The Court has a general jurisdiction to expunge scandalous matter in any record or proceeding (even in bills of costs, Re Miller (1884) 54 L.J.Ch. 205). As to scandal in affidavits, see O.41, r.6.***
> ***Allegations of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the issue (Everett v. Prythergch (1841) 12 Sim. 363; Rubery v. Grant (1872) L.R. 13 Eq.443).***
> ***"The mere fact that these paragraphs state a scandalous fact does not make them scandalous" (per Brett L.J. in Millington v. Loring (1881) 6 Q.B.D. 190, p.196). But if***

degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (Blake v. Albion Assurance Society (1876) 45 L.J.C.P. 663).”

3.15 The allegation of improper conduct and fraud against the 1st and 2nd Defendants have been subject to scrutiny in Civil Action No. 52 of 1994. Applicants have failed to point as to which part of the claim is scandalous.

3.16 Mere fact that Plaintiff alleges mismanagement of UMMC and SDL and fraud in acquiring shares in these companies on the part of the Defendants does not of itself make the claim scandalous.

Abuse of Court Process

3.17 The Applicants have for some reasons/ or the other omitted to include this ground as provided in the High Court Rules (Order 18 r-(1)(d) to strike out Plaintiff’s claim.

3.18 In any event it is well settled that this Court has inherent jurisdiction to strike out the claim or pleadings for abuse of Court process, paragraph 18/19/18 of Supreme Court Practice 1993 Vol. 1.

3.19 At paragraphs 18/19/17 and 18/19/18 of Supreme Court Practice 1993 (White Book) Vol 1 it is stated as follows:-

“Abuse of Process of the Court”- Para. (1) (d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be “an abuse of the process of the Court.” This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see Castro v.

Murray (1875) 10 P. 59, per Bowen L.J. p.63). See also "Inherent jurisdiction," para.18/19/18."

"It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the issue of fraud after the self-same issue has been tried and decided by the Irish Court (House of Spring Gardens Ltd. v. Waite [1990] 2 E.R. 990, C.A)."

"Inherent Jurisdiction - Apart from all rules and Orders and notwithstanding the addition of para.(1)(d) the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process (see Reichel v. Magrath (1889) 14 App.Cas. 665). (para 18/19/18)

3.20 Applicants main contention is that the Plaintiffs are attempting to re-litigate the issues arising out of the Agreement which was subject to High Court Civil Action No. 52 of 1994 and relies on principles of res-judicata.

3.21 In **Razak *v.* Fiji Sugar Corporation Ltd** [2005] FJHC 720; HBC 208.1998L (23 February 2005) case his Lordship Justice Gates (current Chief Justice) stated as follows:-

"To raise the doctrine of res judicata the defendant must be able to show that the same parties have been before a court of competent jurisdiction and had a decision on the same issues, or at least had had an opportunity of raising related issues. "

3.22 His Lordship further went on to say that:-

"For operation of the doctrine of res judicata there must be also an identity of subject matter between the proceedings. The identity may arise from a cause of

action or from issue estopple: Green v Hampshire CC [1979] 1 CR 86 at p.864."

3.23 Counsel for the Applicants also relied on the rule in **Henderson *v.* Henderson** (1843) Hare 100 which is stated in following terms:-

> ***"In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in , and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or eve accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties for form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."***

3.24 At the opening paragraph of the Judgment delivered by his Honourable Justice Fatiaki (as he then was) (annexed as Annexure A of Smith's Affidavit) he stated as follows:-

> ***"This action concerns the circumstances surrounding the transfer and acquisition of the shares in the plaintiff companies namely, Union Manufacturing and Marketing Company Limited ('Union') and Somosomo Developments Limited ('Somosomo') and is brought by Frank Sebesy Skerlec a retired businessman who also claims to be the majority shareholder of the plaintiff companies."***

3.25 This proceeding also relates to the transfer of shares in UMMC and SDL pursuant to the Agreement that was subject to Civil Action No. 52 of 1994.

3.26 In Halsbury's Laws of England 4th Edition (Volume 16) **"res judicata"** is defined as follows:-

> ***"The doctrine of res judicata is not a technical doctrine applicable only to records: it is a fundamental doctrine of all courts that these must be an end of litigation. It will therefore be convenient to follow the ordinary classification and treat it as a branch of the law of estoppels." (para. 1527)***

3.27 In **Barrow *v.* Bankside Members Agency Ltd. & Anor** [1996] 1 AllER 981 Sir Thomas Bringham MR adopted the rule in Henderson and stated as follows:-

> *"The rule in **Henderson v. Henderson** [1843] 3 Hare 100 [1843-60] 1 AllER 387 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in Court of competent jurisdiction, bring their whole case before the Court so that all aspects of it may be finally decided (subject of course to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the Court to advance arguments, claims or differences which they could have put forward for decision on the first occasion, but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppels. It is a rule of public policy based on the desirability in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a Defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed." (at 983)*

3.28 In **Arnold *v.* National Westminster Bank Plc** [1991] 3 AllER 41 Lord Keith stated:-

> *"Cause of action estoppels arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment.*
>
> *The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened."*

3.29 Rule in **Henderson** was applied, adopted and affirmed by English Courts in **Barber *v.* Staffordshire CC** [1996] 2 AllER 748; **Hoysted *v.* Federal Commissioner of Taxation** [1925] 37 CLR 290, at p 303 [1926] AC 155, at p 170; **Kok Hoong *v.* Leong Cheong Kweng Mines Ltd.** [1964] AC 993, at pp 1010-1011; **Yat Tung Investment Co. Ltd. *v.* Dao Heng Bank Ltd.** [1975] AC 581 and **Brisbane City Council *v.* Attorney-General (Q.)** [1979] AC 411, at p 425.

3.30 Their Honours, Chief Justice Gibbs, Justices Mason and Aickin and in **Port of Melbourne Authority *v.* Anshun Pty Limited** (1981) 147 CLR 589 stated that the rationale for the rule as follows:-

> *"is a broad rule of public policy based on the principles expressed in the maxims 'interest reipublicae ut sit fini litium' and 'nemo debet bis vexari pro eadem cause'. (at 531)*

3.31 Their Honours also quoted the comment of Justice Dickson in **Blair** and **Curran** (1939) 62 CLR, 464 where they stated as follows:-

A judicial determination directly involving an issue of fact or of law disposes once for all of the issues so that is cannot afterwards be raised between the same parties or their privies. (at p.597)

3.32 The Plaintiffs at paragraph 22 of their submission quoted the following passages from **Nagan Engineering (Fiji) Ltd *v.* Raj** [2010] FJHC 47.

> *"[43] A party who wishes to set up res judicata by way of estoppels must establish six ingredients according to Spencer0Bower & Turner: The Doctrine of Res Judicata, 2nd Edn., 1969, pp. 18,19.*
>
> *"(i) 'that the alleged judicial decision was what in law is deemed such.*
> *(ii) that the particular judicial decision relied upon was in fact pronounced, as alleged.*
> *(iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf.*
> *(iv) that the judicial decision was **final** **(my emplasis)***
> *(v) that the judicial decision was **or involved, a determination of the same question** as that sought to be controverted in the litigation in which the estoppels is raised.*
> *(vi) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppels is raised, or their privies, or that the decision as conclusive in rem."*

3.33 In present proceeding Plaintiffs claim the following relief:-

> "[a] A **Declaration** that Frank Sebesy Skerlec remains the majority shareholder in Union Manufacturing and Marketing Company Limited and Somosomo Developments Limited.

[b] A **Declaration** that any purported sale of shares in Union and/or Somosomo to the Defendants is null and void for non performance.

[c] An **Order** that the Defendants and their agents immediately resign from all directorships in Union and Somosomo and return all assets belonging to Union and Somosomo to the Plaintiffs [including titles to properties own by Union and/or Somosomo].

[d] General Damages against the Defendants for mismanagement of Union and Somosomo.

[e] A Declaration that the Barclay Mortgage No. 271616 and the Equitable Mortgage is illegal and/or invalid and/or null and/or void and/or unenforceable.

[f] An Order that the Registrar of Titles immediately discharge Mortgage No. 271616 currently registered over CT 2395.

[g] Interest on any damages awarded.

[h] Costs on an indemnity basis.

[i] Such further relief as the Court may deem just and equitable."

3.34 The opening paragraphs of the Judgment in Civil Action No. 54 of 1999 as quoted at paragraph 3.24 of this ruling clearly shows that Court dealt with disposal and acquisition of shares in UMMC and SDL between the Plaintiffs and 1st & 2nd Defendants.

3.35 Plaintiffs in the instant proceeding claim that the Transfer of Shares are void for failure to comply with the conditions imposed by Reserved Bank of Fiji ("RBF") and subsequent withdrawal of RBF's approval.

3.36 At paragraphs 39 to 42 of the Statement of Claim the Plaintiff states as follows:-

> *"39. that the Reserve Bank had conditionally approved the sale of the shares on 19th June 1989 but this was conditional on Skerlec receiving monies as consideration in Fiji for his shares.*
>
> *40. that the Reserve Bank withdrew its permission to the transfer of shares under the Exchange Control Act on 23rd October 1990 stating that the seller (Skerlec) did not receive any funds in Fiji for the proceeds of sale in Union.*
>
> *41. that Reserves Bank consent to transfer of shares was a statutory requirement and the withdrawal of its consent annulled any purported transfer to Barclay.*
>
> *42. that as from 23rd October 1990 the Defendants could no longer claim be the owners of Union or Somosomos shares."*

3.37 At paragraphs 25 to 27 of the Statement of Claim filed in Civil Action No. 52 of 1994 of which the court takes judicial notice the Plaintiffs stated as follows:-

> *"25. That unknown to the firs plaintiff until after his return to Fiji from overseas, the first and/or second and third defendants obtained conditional approval from the Fiji Reserve Bank and the condition (inter alia) was that the second and/or third defendants must produce evidence of $900,000.00 and $860,000.00 brought into Fiji from overseas, and the conditional approval was to become effective on compliance and fulfilment of this and other conditions set out in Fiji Reserve Bank's conditional approval. It is axiomatic fact and/or implied in the conditional approval of Fiji Reserve Bank that the conditional approval was to remain ineffective, no force and validity.*

26. That the first and/or second and third defendants obtained the conditional approval from the Fiji Reserve Bank but deliberately concealed it and did not notify the first plaintiff. They led the first plaintiff to believe that no approval has been granted but on returning to Fiji in October 1988 the first plaintiff, and the first, second and third defendants fraudulently and/or furtively without payment of purchase price of $900,000.00 to the first plaintiff or paying off the debts had the share certificates of the plaintiff signed by plaintiff in blank but it was not to be filled with transferee's name or anything done to it except to hold it in escrow and good faith purported to transfer the first plaintiff's shares to the third defendant.

27. That the second and third defendants did not produce evidence of $900,000.00 and $860,000.00 to the Fiji Reserve Bank, and on first plaintiff's return as a result of inquiries by the first plaintiff and protest the Fiji Reserve Bank rightfully withdrew and/or retracted its said conditional approval."

3.38 This court in Civil Action No. 52 of 1994 considered these facts when delivering the Judgment. Under the heading Statement of Agreed Facts his Lordship Justice Fatiaki (as he then was) noted that RBF had granted its approval for Transfer of Shares which approval was subsequently withdrawn (paragraphs 19 and 23 on pages 16 and 17 of the Judgment refers).

3.39 At last paragraph on page 12 of Judgement in Civil Action No. 52 of 1994 his Lordship states as follows:-

"In this instance Skerlec maintains not only that he has not been paid the full purchase price for his shares in Union but also, Reserve Bank of Fiji approval had not been given for the transfer of the shares to the 1st defendant, a foreign resident, and as such at least two vital 'conditions' had not been performed by the defendants and therefore the shares legally remained Skerlec's. This is clearly a question of fact that needs to be

determined on oral evidence as with the various allegations of 'fraud' regarding the same."

3.40 It is apparent and very clear that his Lordship Justice Fatiaki did consider the fact that RBF had granted conditional approval and that RBF subsequently withdrew its approval for transfer of shares.

3.41 Plaintiff also raised the issue of validity of mortgage given by UMMC and SDL in favour of Barclays.

3.42 At paragraphs 51 to 58 of the Statement of Claim in the instant proceedings Plaintiffs state that:-

"51. that Stinson and Gardiner executed a mortgage [being mortgage no. 271616] in favour of Barclay holding themselves out as officers of both Union and Somosomo.

52. that consideration for the mortgage was alleged to be $769,759.00 which monies was brought in from overseas by the Defendants.

53. that at the time the said monies were banked into Union's account Tompkins and his agents controlled the directorship of both union and Somosomo.

54. that to this day Tompkins and his agents have refused to provide details of how they utilized the $769, 759.00.

55. that from 17th February 1989 until now Union was placed in receivership in 1990 Tompkins and his agents removed cash totalling $2.1 million from Union's bank account without providing audited accounts or records of how these funds were used.

56. that the sum of $769,759.00 was part of the funds removed by Tompkins and his agents from Union's bank account.

57. that the mortgages taken by Barclay over the Union and Somosomo properties purported to secure the advance of $769,759.00 made by Barclay to Union.

58. that the Barclay mortgage [mortgage No. 271616] was upstamped on 26th September 1989 to cover alleged further advances of $5000,000.00 by Mrs Stinson who was the wife of Mr Peter Stinson mentioned elsewhere in the claim

3.43 At paragraph 55.3 of the Statement of Claim in Civil Action No. 52 of 1994 Plaintiffs stated as follows:-

"55.3 That equitable mortgage dated 17the February, 1989 in favour of third defendant from the plaintiff Union is unenforceable because of conspiracy, fraud, negligence, which caused substantial loss damage and injury to the Plaintiffs.

The Plaintiff claims:

(a) Declaration that sale agreements made with second defendants are null and void, of no force and effect;

(b) Damages against first, second and third defendants $2,555,459.00.

(c) Damages against 4th defendant $3,085.00.

(d) Injunction against second and third defendants.

3.44 In the Judgment delivered in Civil Action No. 52 of 1994 his Lordship Justice Fatiaki considered in length the giving of the mortgage by UMMC and SDL to Barclays and stated as follows:-

A fortiori in this case where the creditor concerned is the wife of the director who obtained the upstamping of the mortgage. The

upstamping of Union's mortgage (Ex.P21) and other consequential mortgage (Ex.P39B) are accordingly ordered to be set aside.

3.45 As for transfer of shares by Skerlecs as shareholders in UMMC and SDL the Court in Civil Action No. 52 of 1994 found the shares were transferred to the 2nd Defendant and that Skerlecs have resigned as directors of both these companies.

3.46 At page 39 of his Judgement in Civil Action No. 52 of 1994 his Lordship Justice Fatiaki stated as follows:-

> *"Be that as it may and before approval had been given for the sale of Skerlec's shares to Tompkins, Vishnu Prasad & Co. wrote to the RBF seeking its approval to a loan of $760,000 from Tompkins to Union through 'Twilight' in order to avoid 'the very real danger of (Union's) immediate collapse' (Exhibit P'45'). By its letter of 14th February 1989 the RBF granted 'permission under the Exchange Control Act...to Union to borrow through Twilight Holdings Ltd. $760,000 at 8% p.a. reviewable annually'.*

3.47 His Lordship further went to state as follows:-

> *"Furthermore given that the Plaintiff's shares in UMMC and Somosomo have been transferred to the second defendant company and given the undeniable fact that no monies were ever paid to Skerlec (as the vendor) under the 'Fiji Agreement', I conclude that Skerlec is entitled to an award of damages of breach of contract calculated as follows:*

Purchase Price under the 'Fiji Agreement'		
(Ex.P12)	*:*	*$900,000.00*
less Agreed understatement of liabilities		
as per Exhibit P14	*:*	*$175,000.00*
		$725,000.00
less Payment under the Terms of Settlement		
(Ex.P36)	*:*	*25,000.00*
		$700,000.00

3.48 The Court in Civil Action No. 52 of 1994 after detailed analysis of the facts and issues arising out of Transfer of Shares by the Plaintiff to the 2nd Defendant held that the shares in UMMC and SDL were transferred by the Plaintiff to the 2nd Defendant; Plaintiff resigned as director of UMMC and SDL; and the Mortgage in favour of Barclays be set aside.

3.49 As a result the Court in Civil Action No. 52 of 1994 assessed damages to the Plaintiffs for the breach of contract in the sum of $938,000.00 being balance consideration sum for transfer of shares and interest thereon.

3.50 After having completely analysed the facts, issues and reasons for Judgment in Civil Action No. 52 of 1994 and the instant proceedings it is evidently clear that the facts and issues raised in this proceeding have been subject to detailed examination and analysis in Civil Action No. 52 of 1994 by his Lordship Justice Fatiaki (as he then was).

3.51 In any event all issues (which in my view were raised in Civil Action No. 52 of 1994) relating to the transfer of shares and Barclay mortgage should have been raised in Civil Action No. 52 of 1994.

3.52 If the Plaintiffs were of the view that the Court in Civil Action No. 52 of 1994 was wrong in awarding damages for breach of contract in lieu of setting aside the transfer of shares in UMMC and SDL by Plaintiffs to 2nd Defendant because of the failure by the 1st and 2nd Defendants to comply with RBF condition then the proper course would have been for them to appeal that decision. If Plaintiffs or their legal advisors chose not to adopt this course then they did so at their own peril.

3.53 The instant proceeding in my view is to re-litigate the same facts and issues that was litigated in Civil Action No. 52 of 1994 which is against public policy and not in the interest of justice. The facts and issues raised in this proceeding is res judicata and therefore an abuse of court process.

3.54 It was also interesting to note that Plaintiffs by Deed of Assignment dated 15 September 2005, assigned the judgment debt in Civil Action No. 52 of 1994

to Farallon Holdings Limited as appear from **Farallon Holdings Limited *v.* Somosomo Developments Limited (SDL)** Civil Action No. 264 of 2007 (Annexure "B" of Martha Smith's Affidavit sworn on 18 March 2013).

3.55 The Plaintiffs have therefore acted on the Judgment in Civil Action No. 52 of 1994.

4.0 Conclusion

4.1 I find that the institution of this proceeding is an abuse of court process on the ground that the facts and issues raised herein and that determined in Civil Action No. 52 of 1994 are same and that all issues in respect to transfer of shares in UMMC and SDL and Barclays mortgage were to be raised in the said Civil Action No. 52 of 1994.

4.2 I make the following Orders:-

(i) Plaintiff's claim is struck out;

(ii) Plaintiffs are to pay 1st and 2nd Defendants costs in the sum of $2,500.00 jointly;

(iii) Plaintiffs are to pay 4th to 6th Defendant's costs in the sum of $1,000.00.

Kamal Kumar
JUDGE

At Suva
30 April 2014