IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 27 of 2016

BETWEEN : **KENTO (FIJI) LIMITED** a limited liability company having its registered office at P O Box 124, Nadi.

PLAINTIFF

AND : **NAOBEKA INVESTMENT LIMITED** a limited liability company having its registered office at P O Box 1719, Nadi.

1st DEFENDANT

AND : **SOUTH SEAS LIMITED** a limited liability company having its registered office at P O Box 718, Nadi.

2nd DEFENDANT

AND : **iTAUKEI LAND TRUST BOARD** formerly known as NATIVE LAND TRUST BOARD a statutory body registered under the provisions of the Native Land Trust Act having its head office at Suva, Fiji

3rd DEFENDANT

AND : **MATAQALI NAOBEKA** by their representatives and members **ILIASERI VARO, JOELI VATUNITU** and **MANOA DRIUVAKAMAKA GADAI.**

4th DEFENDANT

Mr. Inoke Sosefo Sikuri for the Plaintiff.
Mr. Kitone Vuetaki with (Ms) Patricia Valesasa Mataika for the First and Fourth Defendant.

Date of Hearing : - 13th July 2016.
Date of Ruling : - 18th November 2016.

RULING

(A) INTRODUCTION

(1) The matter before me stems from the Inter-Parte Summons filed by the First and Fourth Defendant, pursuant to **Order 18, rule 18 of the High Court Rules, 1988 and the inherent jurisdiction of the Court** seeking the grant of the following Orders;

The First Defendant prays;

Para 1. *That the Plaintiff's Statement of Claim and action herein be struck out.*

2. *That Plaintiff pays costs of this application.*

3. *Any other orders or directions as the honourable court deems just.*

This application is made under Order 18 Rule 18 of the High Court Rules and in the inherent jurisdiction of the honourable court on the grounds that;

a) ***The Plaintiff's Statement of Claim discloses no reasonable cause of action and is frivolous as being barred on an illegal activity of the Plaintiff in entering into a purported sub-lease.***

b) *Where the honourable court is bound not to assist the Plaintiff in enforcing such illegal activity.*

c) *The Plaintiff had sued 1st Defendant in Civil Action No. 100 of 2012 where it had asked the honourable Court to join the cause of action now being pleaded in this action and on being refused filed a separate writ to vex the 1st Defendant and has also thereby abused process.*

(Emphasis added)

The Fourth Defendant prays;

Para 1. *That the Plaintiff's claim against 4th Defendant be struck out.*

2. *That the names of Iliaseri Varo, Joeli Vatunitu and Manoa Driuvakamaka Gadai be struck out from the writ and claim in this action.*

3. *That Plaintiff pays costs of this application.*

4. *Such other Orders or directions as the honourable Court deems just. The above application is made under Order 18 Rule 18 (1) (a), (b) and (d). Order 15 rule 6(2) (a) and Order 15 Rule 14 (1) of the High Court Rules and in the inherent jurisdiction of the honourable Court on the grounds:*

   a. *That the 4th Defendant is a Mataqali whose members are Tokatokas Nasoso, Yavulo and Natuamata.*

   b. *Mataqali Naobeka does not own any land or lease or nexus to termination of purported sublease except that 1st Defendant has name "Naobeka" in it and shareholders of 1st Defendant are Trustees of said three Tokatokas.*

   c. *The 1st and 3rd named persons cited by Plaintiff as representing 4th Defendant are Directors of 1st Defendant.*

   d. *The 2nd named person cited by Plaintiff as representing 4th Defendant is Secretary of 1st Defendant.*

   e. *The 1st, 2nd and 3rd named persons cited as representing 4th Defendant being officers of 1st Defendant have different interest from that of Mataqali Naobeka.*

   f. *The 1st, 2nd and 3rd named persons cited as representing 4th Defendant being involved in the proceedings for 1st and 3rd Defendant is vexatious as they are being inundated with legal costs and time in what is now four (4) proceedings in this honourable Court.*

   g. *The Mataqali has babies and children as members and these children cannot in any event have counselled 1st Defendant to terminate purported sub lease and in any event the Mataqali holds no shares to be able to cause termination by 1st Defendant.*

   h. *The Plaintiff therefore has no reasonable cause of action and abuses process by claiming Mataqali Naobeka encouraged, counselled, assisted and caused 1st Defendant's averred termination of purported sub lease.*

   i. *That the Plaintiff's claim is therefore also frivolous and vexatious.*

   j. ***The Plaintiff's claim is based on a purported sublease entered into by it illegally contrary to its Foreign Investment Certificate and the present claim is tainted by such illegality.***

(Emphasis added)

(2) The First Defendant relied on an Affidavit sworn by 'Asiveni Lutumailagi', the Manager of the First Defendant Company sworn on 18th March 2016, in support of its application for striking-out.

The Fourth Defendant relied on an Affidavit sworn by 'Iliaseri Varo', the first named Fourth Defendant, sworn on 22nd April 2016, in support of its application for striking out.

(3) The application for striking-out is strongly opposed by the Plaintiff. The Plaintiff filed an **"Affidavit in Opposition"** sworn by Michael Clowes, a Director of the Plaintiff Company, sworn on 26th April 2016, opposing the application for striking-out. The Defendants did not file an **"Affidavit in Reply".**

(4) The Plaintiff and the Defendants were heard on the Summons. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff and the Defendants filed a careful and comprehensive written submission for which I am most grateful.

(B) THE FACTUAL BACKGROUND

(1) What is this case about? What are the circumstances that give rise to the present application for striking out?

(2) On 16th February 2016, the Plaintiff issued a Writ against the Defendants primarily seeking damages for unlawful termination of a sublease agreement by the first Defendant and unlawful interference with contractual relations by the other Defendants.The allegation is denied by the Defendants.

(3) To give the whole picture of the action, I can do no better than set out hereunder the averments/ assertions of the Pleadings.

The Plaintiff in its Statement of Claim pleads *inter alia*;

Para *1.* *The Plaintiff is a limited liability company registered and carrying on business in Fiji providing day trips for tourists.*

2. *The 1st Defendant is a limited liability company registered in Fiji and is a trustee company for the traditional landowners (the 4th defendants) of an island off the coast in Nadi known as Malamala Island.*

3. *The 2nd Defendant is a limited liability company registered in Fiji and is engaged in the business of providing day trips and other tourism activities.*

4. *The 3rd Defendant is a body corporate incorporated under the **iTaukei Lands Trust Act** responsible for the control of all iTaukei lands, including the said Malamala Island.*

5. *The 4th Defendants are members and representatives of the traditional landowners of the said Malamala Island and are being sued collectively together with the other members as Mataqali Naobeka.*

6. *The said Malamala Island is formally described as "Malamala Island in the Tikina of Nadi, Province of Ba containing an area of 2.4260 hectares" (hereinafter referred to as "**Malamala Island**").*

7. *On 22 **August 2007**, the 1st Defendant (as lessee) and the 3rd Defendant, (as lessor) signed an agreement for lease of Malamala Island for a term of 99 years commencing from the **1st day of July 2007** (hereinafter referred to as the "**head lease**").*

8. *In about August 2007, the 1st Defendant (as sub lessor) and the Plaintiff (as sub lessee) signed an agreement for sublease of Malamala Island for a term of 25 years commencing from the 1st day of August 2007 (hereinafter referred to as the "**sublease**" or the "**Plaintiff's sublease**").*

9. *The Plaintiff paid for and otherwise assisted the 1st and 4th Defendants in obtaining the issue of the head lease and the sublease.*

10. *The Plaintiff began operations on Malamala Island on 3 August 2007.*

Unlawful Termination of the Plaintiff's sublease

11. *On various dates in 2011 and 2012, the 1st Defendant purported to terminate the Plaintiff's sublease for alleged breaches of the sublease agreement.*

12. *In 2012, the Plaintiff sued the 1st and 3rd Defendants in this Court in Civil Action HBC 100 of 2012 (which action remains pending) for injunction and other relief on the grounds that the purported termination was unlawful and ineffective and claims that the sublease agreement remained on foot and legally binding on the parties.*

13. *Despite the unlawfulness of the purported termination and the filing of the Civil Action HBC 100 of 2012, the 1st Defendant purported to issue another sublease to the 2nd Defendant in 2015.*

Damages for unlawful interference with contractual relations

14. *The 2nd, 3rd and 4th Defendants knew of the existence of the Plaintiff's sublease agreement with the 1st Defendant.*

15. *Despite that knowledge, the said Defendants encouraged, counselled, assisted and caused the 1st Defendant to unlawfully terminate the Plaintiff's sublease.*

Particulars

(a) *The 2nd, 3rd and 4th Defendants encouraged and otherwise interfered with the decisions of the majority of the members of the landowning unit and the decisions of the directors of 1st Defendant and caused the 1st Defendant to renege on the exercise of the Plaintiff's rights under the sublease agreement, including the right of transfer under Special Condition B (1) of the First Schedule of the sublease agreement (hereinafter the "Sale Condition").*

(b) *The third named 4th Defendant wrote to the Prime Minister to "intervene on the matter" and "the Prime Minister directed his investigators to investigate this dealing".*

(c) *The 2nd Defendant paid moneys to, encouraged, counselled and otherwise assisted the 1st, 3rd and 4th Defendants to stop the Plaintiff exercising its rights under the sublease agreement and the Sale Condition and to ensure that the 1st Defendant terminated the Plaintiff's sublease and issue it to the 2nd Defendant.*

(d) *Certain employees of the 3rd Defendant took steps to ensure that the Plaintiff's sublease was "torn up" and the Plaintiff could not exercise its rights under the sublease agreement and the Sale Condition and to facilitate the termination of the Plaintiff's sublease and its re-issue to the 2nd Defendant.*

16. *Sometime in 2015 the 1st Defendant purported to enter into another sublease agreement over Malamala Island with the 2nd Defendant.*

17. *Sometime in 2015 the 3rd Defendant purported to give its consent to the issue of a sublease agreement to the 2nd Defendant.*

18. *The actions of the Defendants as pleaded in paragraph 15, 16 an 17 were intentional and calculated to interfere with and did interfere with the Plaintiff's rights under the Plaintiff's sublease agreement and are unlawful.*

19. *The Plaintiff has suffered loss and damage as a result thereof and claims special damages.*

Particulars of Special Damages

(a) *Loss of business opportunity of $0.5m per annum over the remaining term of the Plaintiff's sublease of 20 years, that is to say $10.0m*

20. *The Plaintiff also claims aggravated damages of $1.0m because the Defendant's actions were deliberate and intended to cause the Plaintiff harm, loss and damage.*

21. *The Plaintiff also claims general damages and costs.*

Wherefore, the Plaintiff seeks the following reliefs;

(a) *A Declaration that the purported termination of the Plaintiff's sublease is unlawful and of no effect.*

(b) *An injunction restraining the 1st, 3rd and 4th Defendants, their servants and agents from issuing a sublease of Malamala Island to the 2nd Defendant.*

(c) *An injunction restraining the 2nd Defendant, its servants and agents from going on to Malamala Island.*

Or, in the alternative, against the Defendants jointly and severally

(d) *Special Damages in the sum of $10.0m*

(e) *Aggravated Damages in the sum of $1.0m*

(f) *General Damages*

(g) *Interest on Damages at 5% pa*

(h) *Costs.*

(4) Upon being served with the Plaintiff's Writ of Summons and the Statement of Claim, First and the Fourth Defendant filed the Summons herein to strike-out the Plaintiff's claim.

(C) THE LAW

(1) Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing **"striking-out"**. Rather than refer in detail to various authorities, I propose to set out hereunder important citations, which I take to be the principles in play.

(2) Provisions relating to striking out are contained in **Order 18, rule 18 of the High Court Rules, 1988 .** Order 18, rule 18 of the High Court Rule reads;

18. – (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action or anything in any pleading or in the indorsement, 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) No evidence shall be admissible on an application under paragraph (1) (a).

Footnote 18/19/3 of the 1988 Supreme Court Practice reads;

"It is only plain and obvious cases that recourse should be had to the summary process under this rule, per Lindley MR. in Hubbuck v Wilkinson(1899) 1 Q.B. 86, p91 Mayor, etc., of the City of London v Homer (1914) 111 L.T. 512, CA). See also Kemsley v Foot and Qrs (1952) 2KB. 34; (1951) 1 ALL ER. 331, CA. affirmed (195), AC. 345, H.L .The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable " (Att – Gen of Duchy of Lancaster v L. & N.W. Ry Co (1892)3 Ch 274, CA). The summary remedy under this rule is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process or the case unarguable (see per Danckwerts and Salmon L.JJ in Nagle v Feliden(1966) 2. Q.B 633, pp 648, 651, applied in Drummond Jackson v British Medical Association(1970)1 WLR 688 (1970) 1 ALL ER 1094, (CA) .

Footnote 18/19/4 of the 1988 Supreme Court Practice reads;

"On an application to strike out the statement of claim and to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues are in dispute ***(Wenlock v Moloney) [1965] 1. WLR 1238; [1965] 2 ALL ER 87, CA).***

It has been said that the Court will not permit a plaintiff to be "driven from the judgment seat" except where the cause of action is obviously bad and almost incontestably bad (per Fletcher Moulton L.J. in ***Dyson v Att. – Gen [1911] 1 KB 410 p. 419).***"

(4) In the case of **Electricity Corporation Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641,** it was held;

> *"The jurisdiction to strike out a pleading for failure to disclose a cause of action is to be sparingly exercised and only in a clear case where the Court is satisfied that it has* ***all the requisite material to reach a definite and certain conclusion****; the Plaintiff's case must be so clearly untenable that it could not possibly success and the Court would approach the application, assuming that all the allegations in the statement of claim were factually correct"*

(5) In the case of **National MBF Finance (Fiji) Ltd v Buli [2000] FJCA 28; ABU0057U.98S (6 JULY 2000),** it was held;

> *"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".*

(6) In **Tawake v Barton Ltd** [2010] FJHC 14; **HBC 231 of 2008 (28 January 2010),** Master Tuilevuka (as he was then) summarised the law in this area as follows;

> *"The jurisdiction to strike out proceedings under Order 18 Rule 18 is guardedly exercised in exceptional cases only where, on the pleaded facts, the plaintiff could not succeed as a matter of law. It is not exercised where legal questions of importance are raised and where the cause of action must be so clearly untenable that they cannot possibly succeed (see* ***Attorney General –v- Shiu Prasad Halka 18 FLR 210*** *at 215, as per Justice Gould VP; see also New Zealand* ***Court of Appeal decision in Attorney –v- Prince Gardner [1998] 1 NZLR 262*** *at 267."*

(7) His Lordship Mr Justice Kirby in **Len Lindon –v- The Commonwealth of Australia (No. 2) S. 96/005** summarised the applicable principles as follows:-

a) *It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the court, is rarely and sparingly provided.*

b) *To secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action ... or is advancing a claim that is clearly frivolous or vexatious...*

c) *An opinion of the Court that a case appears weak and such that is unlikely to succeed is not, alone, sufficient to warrant summary termination... even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and arguments and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.*

d) *Summary relief of the kind provided for by O.26 r 18, for absence of a reasonable cause of action, is not a substitute for proceeding by way of demurrer.... If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.*

e) *If, notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a Court will ordinarily allow that party to reframe its pleading.*

f) *The guiding principle is, as stated in O 26 r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit.*

(8) In **Paulo Malo Radrodro v Sione Hatu Tiakia & others, HBS 204 of 2005,** the Court stated that:

> *"The principles applicable to applications of this type have been considered by the Court on many occasions. Those principles include:*
>
> *a) A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered – Lord Pearson in* ***Drummond Jackson v British Medical Association*** *[1970] WLR 688.*
>
> *b) Frivolous and vexatious is said to mean cases which are obviously frivolous or vexatious or obviously unsustainable – Lindley Li in* ***Attorney General of Duchy of Lancaster v L.N.W Ry*** *[1892] 3 Ch 274 at 277.*
>
> *c) It is only in plain and obvious cases that recourse would be had to the summary process under this rule – Lindley MR in* ***Hubbuck v Wilkinson*** *[1899] Q.B 86.*
>
> *d) The purpose of the Courts jurisdiction to strike out pleading is twofold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice; defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.*
>
> *e) "The first object of pleadings is to define and clarify with position the issues and questions which are in dispute between the parties and for determination by the Court. Fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that the opposing parties can bring evidence on the issues disclosed –* ***ESSO Petroleum Company Limited v Southport Corporation [1956] A.C at 238" – James M Ah Koy v Native Land Trust Board & Others – Civil Action No. HBC 0546 of 2004.***
>
> *f) A dismissal of proceedings "often be required by the very essence of justice to be done"..... – Lord Blackburn in* ***Metropolitan – Pooley [1885] 10 OPP Case 210 at 221-*** *so as to prevent parties being harassed and put to expense by*

frivolous, vexatious or hopeless allegation – Lorton LJ in ***Riches v Director of Public Prosecutions*** *(1973) 1 WLR 1019 at 1027"*

g) *A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered – Lord Pearson in* ***Drummond Jackson v British Medical Association*** *[1970] WLR 688.*

h) *Frivolous and vexatious is said to mean cases which are obviously frivolous or vexatious or obviously unsustainable – Lindley Li in* ***Attorney General of Duchy of Lancaster v L.N.W Ry*** *[1892] 3 Ch 274 at 277.*

i) *It is only in plain and obvious cases that recourse would be had to the summary process under this rule – Lindley MR in* ***Hubbuck v Wilkinson*** *[1899] Q.B 86.*

j) *The purpose of the Courts jurisdiction to strike out pleading is twofold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice; defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.*

k) *"The first object of pleadings is to define and clarify with position the issues and questions which are in dispute between the parties and for determination by the Court. Fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that the opposing parties can bring evidence on the issues disclosed –* ***ESSO Petroleum Company Limited v Southport Corporation*** *[1956] A.C at 238" –* ***James M Ah Koy v Native Land Trust Board & Others*** *– Civil Action No. HBC 0546 of 2004.*

l) *A dismissal of proceedings "often be required by the very essence of justice to be done"..... – Lord Blackburn in* ***Metropolitan – Pooley*** *[1885] 10 OPP Case 210 at 221- so as to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless allegation – Lorton LJ in* ***Riches v Director of Public Prosecutions*** *(1973)1 WLR 1019 at 1027"*

(9) **In Halsbury's Laws of England ,Vol 37, page 322** the phrase "**abuse of process**" is described as follows:

> *"An abuse of process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexatious or oppression or for ulterior purposes, or, more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of an abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court."*

(10) The phrase "**abuse of process**" is summarised in **Walton v Gardiner (1993) 177 CLR 378** as follows:

> *"Abuse of process includes instituting or maintaining proceedings that will clearly fail proceedings unjustifiably oppressive or vexatious in relation to the defendant, and generally any process that gives rise to unfairness"*

(11) In **Stephenson –v- Garret [1898] 1 Q.B. 677** it was held:

> *"It is an abuse of process of law for a suitor to litigate again over an identical question which has already been decided against him even though the matter is not strictly res judicata".*

(D) ANALYSIS

(1) Let me now turn to the application bearing in my mind the above mentioned legal principles and the factual background uppermost in my mind.

(2) Before I pass to consideration of submissions, let me record that counsel for the Plaintiff and the Defendants in their written submissions have done a fairly exhaustive study of judicial decisions and other authorities which they considered to be applicable.

I interpose to mention that I have given my mind to the oral submissions made by counsel, helpful written submissions and the judicial authorities referred to therein.

(3) The Defendants in this application are relying on **Order 18, Rule 18 of the High Court Rules of Fiji, 1988** and **the inherent jurisdiction of the court**. Order 18, rule 18 states that:

> *"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 that the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be..."*

The striking-out application of the First Defendant is made on the following grounds;

> *a) The Plaintiff's Statement of Claim discloses no reasonable cause of action and is frivolous as being barred on an **illegal activity** of the Plaintiff in entering into a purported sub-lease.*
>
> *b) Where the honourable court is bound not to assist the Plaintiff in enforcing such **illegal activity**.*
>
> *c) The Plaintiff had sued 1st Defendant in Civil Action No. 100 of 2012 where it had asked the honourable Court to join the cause of action now being pleaded in this action and on being refused filed a separate writ to vex the 1st Defendant and has also thereby abused process.*
>
> (Emphasis Added)

The striking-out application of the Fourth Defendant is made on the following grounds;

a. *That the 4th Defendant is a Mataqali whose members are Tokatokas Nasoso, Yavulo and Natuamata.*

b. *Mataqali Naobeka does not own any land or lease or nexus to termination of purported sublease except that 1st Defendant has name "Naobeka" in it and shareholders of 1st Defendant are Trustees of said three Tokatokas.*

c. *The 1st and 3rd named persons cited by Plaintiff as representing 4th Defendant are Directors of 1st Defendant.*

d. *The 2nd named person cited by Plaintiff as representing 4th Defendant is Secretary of 1st Defendant.*

e. *The 1st, 2nd and 3rd named persons cited as representing 4th Defendant being officers of 1st Defendant have different interest from that of Mataqali Naobeka.*

f. *The 1st, 2nd and 3rd named persons cited as representing 4th Defendant being involved in the proceedings for 1st and 3rd Defendant is vexatious as they are being inundated with legal costs and time in what is now four (4) proceedings in this honourable Court.*

g. *The Mataqali has babies and children as members and these children cannot in any event have counselled 1st Defendant to terminate purported sub lease and in any event the Mataqali holds no shares to be able to cause termination by 1st Defendant.*

h. *The Plaintiff therefore has no reasonable cause of action and abuses process by claiming Mataqali Naobeka encouraged, counselled, assisted and caused 1st Defendant's averred termination of purported sub lease.*

(4) The allegations of the Statement of Claim are; (Reference is made to paragraph 01 – 21 of the Statement of Claim)

Para 1. *The Plaintiff is a limited liability company registered and carrying on business in Fiji providing day trips for tourists.*

2. *The 1st Defendant is a limited liability company registered in Fiji and is a trustee company for the traditional landowners (the 4th defendants) of an island off the coast in Nadi known as Malamala Island.*

3. *The 2nd Defendant is a limited liability company registered in Fiji and is engaged in the business of providing day trips and other tourism activities.*

4. *The 3rd Defendant is a body corporate incorporated under the **iTaukei Lands Trust Act** responsible for the control of all iTaukei lands, including the said Malamala Island.*

5. *The 4th Defendants are members and representatives of the traditional landowners of the said Malamala Island and are being sued collectively together with the other members as Mataqali Naobeka.*

6. *The said Malamala Island is formally described as "Malamala Island in the Tikina of Nadi, Province of Ba containing an area of 2.4260 hectares" (hereinafter referred to as "**Malamala Island**").*

7. *On 22 **August 2007**, the 1st Defendant (as lessee) and the 3rd Defendant, (as lessor) signed an agreement for lease of Malamala Island for a term of 99 years commencing from the **1st day of July 2007** (hereinafter referred to as the "**head lease**").*

8. *In about August 2007, the 1st Defendant (as sub lessor) and the Plaintiff (as sub lessee) signed an agreement for sublease of Malamala Island for a term of 25 years commencing from the 1st day of August 2007 (hereinafter referred to as the "**sublease**" or the "**Plaintiff's sublease**").*

9. *The Plaintiff paid for and otherwise assisted the 1st and 4th Defendants in obtaining the issue of the head lease and the sublease.*

10. *The Plaintiff began operations on Malamala Island on 3 August 2007.*

Unlawful Termination of the Plaintiff's sublease

11. *On various dates in 2011 and 2012, the 1st Defendant purported to terminate the Plaintiff's sublease for alleged breaches of the sublease agreement.*

12. *In 2012, the Plaintiff sued the 1st and 3rd Defendants in this Court in Civil Action HBC 100 of 2012 (which action remains pending) for injunction and other relief on the grounds that the purported termination was unlawful and ineffective and claims that the sublease agreement remained on foot and legally binding on the parties.*

13. *Despite the unlawfulness of the purported termination and the filing of the Civil Action HBC 100 of 2012, the 1st Defendant purported to issue another sublease to the 2nd Defendant in 2015.*

Damages for unlawful interference with contractual relations

14. *The 2nd, 3rd and 4th Defendants knew of the existence of the Plaintiff's sublease agreement with the 1st Defendant.*

15. *Despite that knowledge, the said Defendants encouraged, counselled, assisted and caused the 1st Defendant to unlawfully terminate the Plaintiff's sublease.*

Particulars

(a) *The 2nd, 3rd and 4th Defendants encouraged and otherwise interfered with the decisions of the majority of the members of the landowning unit and the decisions of the directors of 1st Defendant and caused the 1st Defendant to renege on the exercise of the Plaintiff's rights under the sublease agreement, including the right of transfer under Special Condition B (1) of the First Schedule of the sublease agreement (hereinafter the "Sale Condition").*

(b) *The third named 4th Defendant wrote to the Prime Minister to "intervene on the matter" and "the Prime Minister directed his investigators to investigate this dealing".*

(c) *The 2nd Defendant paid moneys to, encouraged, counselled and otherwise assisted the 1st, 3rd and 4th Defendants to stop the Plaintiff exercising its rights under the sublease agreement and the Sale Condition and to ensure that the 1st Defendant terminated the Plaintiff's sublease and issue it to the 2nd Defendant.*

(d) *Certain employees of the 3rd Defendant took steps to ensure that the Plaintiff's sublease was "torn up" and the Plaintiff could not exercise its rights under the sublease agreement and the Sale Condition and to facilitate the termination of the Plaintiff's sublease and its re-issue to the 2nd Defendant.*

16. *Sometime in 2015 the 1st Defendant purported to enter into another sublease agreement over Malamala Island with the 2nd Defendant.*

17. *Sometime in 2015 the 3rd Defendant purported to give its consent to the issue of a sublease agreement to the 2nd Defendant.*

18. *The actions of the Defendants as pleaded in paragraph 15, 16 an 17 were intentional and calculated to interfere with and did interfere with the Plaintiff's rights under the Plaintiff's sublease agreement and are unlawful.*

19. *The Plaintiff has suffered loss and damage as a result thereof and claims special damages.*

Particulars of Special Damages

(a) *Loss of business opportunity of $0.5m per annum over the remaining term of the Plaintiff's sublease of 20 years, that is to say $10.0m*

20. *The Plaintiff also claims aggravated damages of $1.0m because the Defendant's actions were deliberate and intended to cause the Plaintiff harm, loss and damage.*

21. *The Plaintiff also claims general damages and costs.*

(5) **Submissions**

(A) It is submitted on behalf of the Defendants that the Statement of Claim discloses no reasonable cause of action and, is frivolous and vexatious. The Defendants **primary argument** runs essentially as follows;

- *THAT the two shareholders of the Plaintiff Company namely Michael Clowes and his wife are Australian citizens and they are also Directors of the Company.*
- *THAT they obtained a Foreign Investment Certificate Number 07-0104 to lease a vessel to Sun Sail Pty Limited.*
- *There existed no Foreign Investment Certificate granting permission to the Plaintiff to carry on tourism business by holding a tourism lease of an Island in Fiji.*
- *Thus, the purported agreement is illegal as infringing Section 4 (1) of the Foreign Investment Act No. 01 of 1999.*

(B) In *adverso*, Counsel for the Plaintiff submitted; (I focus on paragraph 14, 15, 16 and 17 of Plaintiff's written submissions)

Para 14. *With regards to the allegations of alleged failure to obtain a valid investment certificate, the defendants have conveniently failed to point out to the court that the FTIB had written to the Plaintiff extending the Plaintiff's activity to cover the project. See Annexure A to the Affidavit in Opposition of Michael Clowes filed herein. There is no illegality as far as the FTIB was concerned. The Defendants have deliberately produced a self serving letter to mislead the court.*

15. *In any event, this is not one of those situations in which an illegality would render the court powerless to deal with the case. The Foreign Investment Act 1999 is an Act "TO FACILITATE AND REGUALTE FOREIGN INVESTMENT IN THE FIJI ISLANDS." It is a regulatory Act. IT makes provisions for fines for non compliance (S 11), variations in the certificate (s 12), cancellation of the certificate for non compliance (s 13) and appeals to the Minister. Section 16 of the Act provides:*

A foreign investor must not –

(a) carry on business without a Foreign Investment Certificate;
(b) subject to section 8(5), carry on business in a prohibited activity;
(c) subject to subsection 8(2), carry on business in a reserved Activity; or
(d) fail to comply with the terms or conditions of a Foreign Investment Certificate.

Penalty: $50,000

16. This provision is nothing like s 12 of the iTaukei Land Trust Act which makes void arrangements which are non-compliant.

17. The second point I want to make is that the question of illegality, again cannot be determined as a preliminary point even on the affidavits because the allegation is hotly disputed. The matter should go to trial. Further, the defendants' allegation is that the Plaintiff's investment certificate did not cover the project activity – it is not that there was no certificate at all. And when taken into consideration the FTIB's letter extending the Plaintiff's activity, there is a strong argument that the Act had been complied with.

(6) **Determination**

(i) As noted above, the Courts rarely will strike out a proceeding. It is only in exceptional cases where, on the pleaded facts, the Plaintiff could not succeed as a matter of law or where the cause of action is so clearly untenable that it cannot possibly succeed will the courts act to strike out a claim.

In this regard, I am inclined to be guided by the decision of the New Zealand Court of Appeal in **"Lucas & Sons (Nelson Mail) v O. Brien** (1978) 2 N.Z.L.R 289 as being a convenient summary of the correct approach to the application before the court. It was held;

> *"The Court must exercise .....jurisdiction to strike out pleadings sparingly and with great care to ensure that a Plaintiff was not improperly deprived of the opportunity for a trial of his case. **However, that did not mean that the jurisdiction was reserved for the plain and obvious case; it could be exercised even when extensive argument was necessary to demonstrate that the Plaintiff's case was so clearly untenable that it could not possibly succeed."***
>
> (Emphasis added)

Where, a claim to strike out depends upon the decision of one or more difficult points of law, the court should normally refuse to entertain such a claim to strike out. But, if in a particular case the court is satisfied that the decision of the point of law at that stage will either avoid the necessity for trial altogether or render the trial substantially easier and cheaper ; the court can properly determine such difficult point of law on the striking-out application. In considering whether or not to decide the difficult question of law, the court can and should take into account whether the point of law is of such a kind that it can properly be determined on the bare facts pleaded or whether it would not be better determined at the trial in light of the actual facts of the case; **See;** ***Williams & Humber Ltd v H Trade markers (jersey) Ltd (1986) 1 All ER 129 per Lord Templeman and Lord Mackay.***

Returning back to the instant case, in my view, the facts pleaded in the Statement of Claim are appropriate to determine a question of law.

A striking-out application proceeds on the assumption that the facts pleaded in the Statement of Claim are true. That is so even although they are not or may not be admitted. However, it is permissible to refer to Affidavit evidence where the evidence is undisputed and is not inconsistent with the pleadings.

Attorney-General v McVeagh [1995] (1) NZLR 558 at 566. The Court said:

> ***The Court is entitled to receive Affidavit evidence on a striking-out application, and will do so in a proper case.*** *It will not attempt to resolve genuinely disputed issues of fact and therefore will generally limit evidence to that which is undisputed. Normally it will not consider evidence inconsistent with the pleading, for a striking-out application is dealt with on the footing that the pleaded facts can be proved; see* ***Electricity Corporation Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641, 645-646, Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries [1993] 2 NZLR 53*** *at pp 62-63, per Cooke P. But there may be a case where an essential factual allegation is so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further.*

(Emphasis added)

One word more, as I indicated earlier, the Defendant's application is made under Order 18, Rule 18 of the High Court Rules, 1988 **and under the inherent jurisdiction of the Court.** Therefore, it is permissible to refer to Affidavit evidence.

In **Khan v Begum (2004) FJHC 430**, Hon. Justice John Connors said;

> *Quite part from the jurisdiction conferred by the Rules to strike out frivolous and vexatious pleadings and action where the cause of action is not revealed, the court also has a separate inherent jurisdiction, which is, relied on to control proceedings and to prevent an abuse of its process. Under the inherent jurisdiction, the court can, as it can under the provisions of the Rules, stay or dismissed proceedings which are an abuse of process as being frivolous or vexatious or which fail to show a reasonable cause of action.*
> *It is said that the fact the court has this inherent jurisdiction is one of the characteristics which distinguishes the court from the other institutions of the government. It is a jurisdiction, to be exercised summarily and as I have said, is in addition to the jurisdiction conferred by the Rules.*
>
> ***It is not in issue that if a party relies solely upon Order 18 Rule 18 then no evidence may be considered by the court in making its determination but that limitation does not apply where the applicant relies upon the inherent jurisdiction of the court.***

(Emphasis added)

Therefore, it is permissible to refer to Affidavit evidence, in addition to the facts pleaded in the Statement of Claim.

(ii) The issues for consideration by the Court are the same whether pursuant to the Rules or in reliance of the inherent jurisdiction. They might summarise as to whether there is a reasonable cause of action.

(iii) **Plaintiff Must Plead a Reasonable Cause of Action**

In relation to the ground of "no reasonable cause of action", paragraph 18/19//10 of the White Book states –

> *".... A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v British Medical Association [1970] WLR 688; [1970] 1 All ER 1094, CA."*

What is a "Cause of Action"?

The High Court in **Dean v Shah [2012] FJHC 1344**, defined a cause of action in the following way –

> *"A cause of action is said to be a set of facts that gives rise to an enforceable claim by a Plaintiff. In **Read v Brown 22 QBD 128** Esther M.R. States that a cause of action comprises every fact which if traversed the Plaintiff must prove in order to obtain Judgement. Lord Diplock in **Letang v Cooper (1965) I QB 232 at 242-243** states that a cause of action:*
>
> *".... Is simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person" (our emphasis)*

The High Court in **Dominion Insurance Ltd v Pacific Building Solutions [2015] FJHC 633**, defined a cause of action to mean –

> *".... Any facts or series of facts which are complete in themselves to found a claim for relief. (Obi Okoye, Essays on Civil Proceedings, page 224 Art 110, cited in **Shell Petroleum Development Company Nigeria Ltd & Anr v X.M. Federal Limited & Anr S.C. 95/2003).**"*

It is apparent from the authorities that the term "cause of action" means allegations of material facts which, if proved, will provide a complete foundation for a recognised type of claim. It is submitted that there are, therefore, two aspects to consider: **first, does the law recognise the Plaintiff's claim as one as an enforceable one, and if so, secondly do the material facts alleged if proved, give rise to a right to a remedy.**

(iv) With that in my mind, let me now move to consider the Defendants application for striking-out. The Defendants most critical argument is that the agreement was void, voidable or unenforceable on the grounds of illegality or public policy.

The Plaintiff at paragraph 1, 7, 8 and 10 of the Statement of Claim avers that;

Para 1. *The Plaintiff is a limited liability company registered and carrying on business in Fiji providing day trips for tourists.*

7. *On 22 August 2007, the 1st Defendant (as lessee) and the 3rd Defendant (as lessor) signed an agreement for lease of Malamala Island for a term of 99years commencing from the 1st day of July 2007 (hereinafter referred to as the "head lease").*

8. *In about August 2007, the 1st Defendant (as sub lessor) and the Plaintiff (as sub lessee) signed an agreement for sublease of Malamala Island for a term of 25 years commencing from the 1st day of August 2007 (hereinafter referred to as the "sublease" or the "Plaintiff's sublease").*

10. *The Plaintiff began operations on Malamala Island on 3 August 2007.*

(v) As I understand the pleadings, the proceedings arose out of an agreement entered into between the **Plaintiff** (as sub lessee) and the First Defendant (as sub lessor) for sublease of Malamala Island for a term of 25 years. On the execution of the agreement, the Plaintiff began operations on Malamala Island on 03rd August 2007. The Plaintiff alleges that the first Defendant **unlawfully terminated the agreement** in 2011 and it was also alleged that the other Defendants encouraged, assisted and caused the first Defendant to terminate the agreement. The Plaintiff's claim is based on termination of the agreement. The Plaintiff claims damages for loss of business opportunity arising out of termination of the agreement.

As I understand, the object of the agreement is to convey leasehold interest to the Plaintiff **(a foreign limited company)** on an island in Fiji to carry on business in an activity in Fiji by taking of Malamala Island on sublease. Thus, this is not a case where the Plaintiff can assert cause of action without relying on the agreement. Its cause of action stems from the agreement, and if the agreement is such that the Court must refuse its aid, the Plaintiff cannot recover damages for termination of the agreement. If an agreement is expressly or by necessary implication forbidden by statute, or if it is *ex facie* illegal, or if both parties know that though *ex facie* legal it can only be performed by illegallity or is intended to be performed illegally, the law will not help the Plaintiff in any way that is a direct or indirect enforcement of rights under the agreement; and for this purpose both parties are presumed to know the law.

Thus, **the critical question** is whether the agreement is illegal and unenforceable as a consequence of the operation of Section 4 (1) of the Foreign Investment Act No.1 of 1999. Before I consider the other grounds raised in the application, it is convenient that I should complete what I have to say on illegality. Therefore, I shall take first the ground of illegality. It is well settled that an agreement may be unenforceable either because on the face of it, it cannot be performed without breaking the law, or because, although capable of being performed legally, it was made with the object of breaking the law. With that in my mind let me now move to consider the ground of illegality.

It is common ground that the two shareholders of the Plaintiff Company namely Michael Clowes and his wife are Australian citizens and the Directors of the Plaintiff Company. **The Plaintiff is a foreign limited company.**

<u>Section 4 (1) of the Foreign Investment Act No. 1 of 1999 provides;</u>

> *"4. (1) A foreign investor must not carry on business in a relevant activity in the Fiji Islands unless the Chief Executive has granted the foreign investor a Foreign Investment*

Certificate under this Part and the certificate remains in force."

The language of Section 4(1) of the Foreign Investment Act No. 01 of 1999 is unmistakeably clear to me. When reduced to its essentials, Section says that, except with a Foreign Investment Certificate, no person in Fiji (a non-resident) shall carry on business in a relevant activity. The language of Section 4 (1) is clear and specific. The words used revealed an intention on the part of the legislature to require non-residents who wish to carry on business in Fiji to obtain a Foreign Investment Certificate. These words mean precisely what they say.

On 23rd March 2007, the Plaintiff was granted a Foreign Investment Certificate (number 07-0104) to **lease a vessel to Sun Sail Pty Ltd**. This Certificate is Annexure and marked IV-1 referred to in the affidavit of Iliaseri Varo deposed on the 22nd day of April, 2016. This is the only legal activity Plaintiff can do in Fiji. Any other activity is illegal.

I note annexure and marked IV-2, a letter dated 02nd August 2012, addressed to the Third Defendant by Investment Fiji. I also note paragraph 2 and 3 of the correspondence. For the sake of completeness the correspondence is reproduced below in full.

2 August 2012

Mr. Penieli Nayare
Legal Officer SW Region
i Taukei Land Trust Board
Private Mail Bag
Nadi Airport
Namaka

Dear Mr Nayare

RE : Kento (Fiji) Limited – Investment Fiji Registration Certificate No. 07-0104 Investment Fiji Approval

Investment Fiji acknowledges with thanks receipt of your letter dated 25 July 2012.

Kindly note Investment Fiji confirms that Kento (Fiji) Limited is registered with Investment Fiji on 23 March 2007 with FIRC No. 07-0104 to lease a vessel to Sun Sail Pty Ltd. Please be informed that Investment Fiji has not received any request from the company to amend or extend its activity.

The foreign investor must not engage in any other business activities not specified in the FIRC No. 07-0104 issued on 23 March 2007. If the Company needs to extend its business activity then they should request for extension of activity from Investment Fiji. However, if the company is

operating any other business activity then it is illegal and Investment Fiji will investigate the matter.

Please do not hesitate to contact the undersigned or Mr. Sanjesh Narayan on telephone 3315 988should you need further assistance or clairifications.

Yours sincerely

(Signed)
Ritesh Gosai (Mr.)
Manager Investment Registration, Facilitation & Monitoring
for Chief Executive Officer

(Emphasis added)

The above correspondence was issued well over five years after the Plaintiff entering into an agreement to take Malamala Island on sublease to carry on business in an activity in Fiji. The only inference which could practically arise from the above correspondence is that **there existed no Foreign Investment Certificate authorising the Plaintiff for taking of an Island in Fiji on sublease to carry on business in an activity.** The correspondence effectively nullifies the Plaintiff's assertion in the affidavit that FTIB had written to the Plaintiff extending the Plaintiff's activity to carry on business in Fiji by taking of Malamala Island on sublease.

It is therefore illegal for the Plaintiff to take an Island in Fiji on sublease to carry on business in an activity, unless and until the Chief Executive of Investment Fiji issues the Plaintiff a Foreign Investment Certificate, which satisfies the terms of Section 8 of the **Foreign Investment Act, No 01 of 1999.**

Section 7 sets out an application for a Foreign Investment Certificate. Section 8 sets out what a Foreign Investment Certificate must contain. For the sake of completeness, Section 7 and 8 are reproduced below in full.

Application for certificate

7. (1) A foreign investor may apply to the Chief Executive for a certificate under this Part.

(2) An application under subsection (1) must –

(a) ***be in the prescribed form;***

(b) contain the prescribed particulars;
(c) notify the Chief Executive of an address in the Fiji Islands for the receipt of notices by the foreign investor; and

(d) be accompanied by such documents (if any) and fee as are prescribed.

(3) If, at any time after the making of an application under subsection (1), there is a change in the address notified under paragraph (2) © or in any other information supplied to the Chief Executive under subsection (2), the foreign investor must notify the Chief Executive in writing of the change within one month of the date of the change.

(4) The Chief Executive must grant an application made under subsection (1) unless –

(a) the foreign investor proposes to carry on business in a reserved activity or in a prohibited activity;

(b) the foreign investor proposes to carry on business in a restricted activity and, in the opinion of the Chief Executive, the foreign investor does not or will not satisfy any condition imposed under subsection (5);

(c) in the opinion of the Chief Executive, the application is incorrect or misleading or does not otherwise comply with this Act or the regulations;

(d) the foreign investor or any person associated with the foreign is an undischarged bankrupt, is under management or is in receivership or liquidation under the law of the State or any other country; or

(e) the Chief Executive has reasonable grounds for believing that the application is not genuine,

in any of which cases the Chief Executive must not grant the application.

(5) If an application under subsection (1) relates to a restricted activity, the grant by the Chief Executive of the application must be made subject to relevant conditions.

(6) Written notice of the grant or refusal of an application under this section must be given to the foreign investor within 15 days of the making of the application.
(7) If an application under this section is refused, or a certificate is granted in terms other than those applied for, the notice under subsection (6) must state the grounds of the refusal, or of the grant of the certificate in terms other than those applied for, as the case may be.

Certificate

8. (1) A Foreign Investment Certificate must –

(a) be in the prescribed form;

(b) set out the name of the foreign investor and the nature of the activity in respect of which the certificate is granted; and

(c) if the certificate is granted in respect of a restricted activity – specify any conditions imposed under Section 7(5) relating to the carrying on of business in that activity.

(2) If –

(a) a foreign investor has been granted a certificate permitting the foreign investor to carry on business in an activity; and

(b) the activity subsequently becomes a restricted activity,

the foreign investor may continue to carry on business in the activity as if it were not a reserved activity.
(3) If –

(a) a foreign investor has been granted a certificate permitting the foreign investor to carry on business in an activity ; and

(b) the activity subsequently becomes a restricted activity.

the foreign investor may continue to carry on business in that activity as if it were not a restricted activity.

(4) If –

> *(a) a foreign investor has been granted a certificate permitting the foreign investor to carry on business in a restricted activity; and*
>
> *(b) a condition specified in relation to that activity is subsequently altered,*

the foreign investor may continue to carry on business in that activity in accordance with the condition or conditions specified in the certificate.

(5) If –

> *(a) a foreign investor has been granted a certificate permitting the foreign investor to carry on business in an activity; and*
>
> *(b) the activity subsequently becomes a prohibited activity*

the foreign investor must stop carrying on business in that activity within –

> *(c) 12 months after the date on which the activity became prohibited; or*
>
> *(d) such shorter period as the Chief Executive fixes, having regard to the special circumstances of the case,*

and the certificate of the foreign investor ceases to be in force at the end of that period.

The Plaintiff in the Affidavit of Michael Clowes sworn on 26th April 2016 annexes as Annexure A, a letter addressed to the deponent by the Chief Executive Officer of Investment Fiji dated 11th day of January, 2013. Much of its argument is based on this correspondence. I focus on paragraph 1, 2 and 4 of the correspondence. For the sake of completeness, the correspondence is reproduced below in full.

Mr. Michael Clowes
Director
Kento (Fiji) Limited
GPO Box 855
Suva

Dear Mr. Cloves

Re : KENTO (FIJI) LIMITED
- Extension of Time

Investment Fiji acknowledges with thanks receipt of your ***letter*** *on 14 August 2012 for extension of time to implement the project.*

A request for Extension of Activity was receipted by Ms. Yvonne Ravaga, Investment Officer Lautoka in October 2010. The Lautoka Regional Office through Ms. Yvonne Ravaga ***has provided assistance****, to Mr Michael Clowes for the extension of business activity request to date.*

Please note Ms. Dianne Reddy, Manager Lautoka Office will provide you all support to comply with respective Government Agencies and fully implement the project.

Should you need any further clarification/information, please do not hesitate to contact Ms. Dianne Reddy, on telephone 6660133.

Yours sincerely

(Signed)

Mr. Ravuni Uluilakeba
Chief Executive Officer

(Emphasis added)

In the aforementioned correspondence, the Chief Executive Officer mentions an application being made on 14th August 2012 **by way of a letter.** He does not say that it was in the prescribed form which satisfies the terms of Section 7 of the Act. This is why he mentions assistance to Mr Clowes. Counsel for the Plaintiff heavily relied on this correspondence. Counsel appeared to regard the correspondence as an approval to take an Island in Fiji on sublease to carry on business in an activity. I am not prepared

to accept this. Section 7 deals with the formal application in a prescribed form for a Foreign Investment Certificate. Section 8 deals with the contents of a Foreign Investment Certificate. **The application made by way of a letter does not satisfy the terms of Section 7 of the Act. The correspondence cannot be regarded as an approval since it does not satisfy the terms of Section 8 of the Act.** One word more, the correspondence is issued well over six years after the Plaintiff entering into an agreement to take Malamala Island on sublease to carry on business in an activity.

In the aforementioned correspondence, the Chief Executive Officer does not state that he granted the application made by way of a letter. Grant of an application would have resulted in issuing a Foreign Investment Certificate which satisfies the terms of Section 8 of the Act, allowing the Plaintiff to take Malamala Island on sublease to carry on business in an activity.

To this date the Plaintiff has not been able to produce a Foreign Investment Certificate which satisfies the terms of Section 8 of the act, to establish that its activities were extended to take Malamala Island on sublease to carry on business in an activity. Moreover, it has not been able to produce a formal application made by it for a certificate to take Malamala Island on sublease to carry on business in an activity, which satisfies the terms of Section 7 of the Act. Thus, the 'agreement' made between the First Defendant (as sub lessor) and the Plaintiff (as sub lessee) in August 2007, for taking of Malamala Island on sublease to carry on business in an activity does offend Section 4 (1) of the Foreign Investment Act. A mere application by way of a letter to extend activity from leasing a vessel to holding an Island on sublease to carry on business in an activity does not mean that the Plaintiff's activity has been extended **from leasing a vessel to taking of an Island in Fiji on sublease to carry on business in an activity** .

The Plaintiff's application by way of a letter was made in October 2010 (*viz,* after lapse of three years from entering the agreement for sublease) but no Foreign Investment Certificate authorising the Plaintiff to take an Island in Fiji on sublease to carry on business in an activity has been granted. The Plaintiff's letter appears to me to be an '*after the event*' attempt to obtain the required Certificate. I already adverted to the fact that the letter does not satisfy the terms of Section 7 of the Act.

(vi) I also have adverted to the fact that the Plaintiff's action is founded upon an "agreement" signed in August 2007, made between the First Defendant (as sub lessor) and the Plaintiff (as sub lessee) for a sublease of "Malamala" Island for a term of 25 years to carry on business in an activity. It is undisputed that there existed no "Foreign Investment Certificate" to hold a sublease of an Island in Fiji to carry on business in an activity in Fiji and thus the "agreement" is entered into in contravention of Section 4 (1) of the "Foreign Investment Act" No.01 of 1999, which deals with "Foreign Investment Certificate" to a foreign Investor to carry on business in Fiji.

According to Orthodox Statements of Contract Law, a contract may be illegal because making or performing it is prohibited by statute, expressly or by implication.

A contract may also be illegal because it is contrary to public policy. Some contracts are illegal "as formed" while others are legal at their inception, but become illegal as a result of the way in which they are performed.

See:

- **Cheshire and Fifoot's Law of Contract, 2002, at pp 842 – 846.**
- **J.Beatson Anson's Law of Contract, 28th ed, 2002, at pp. 349 - 350**

What concerns me is whether Section 4 (1) of the Foreign Investment Act was intended to be prohibiting, or merely directory or regulatory in nature. If it was merely directory or regulatory, the fact that the agreement contravened the Section would not lead to its being vitiated.

I note that Section 16 contained penalties for breach of the provisions.

A distinction has to be drawn between an intention to protect the public and an intention simply to secure the revenue. When the intention of the statute was to protect public, any contract entered into in breach of the relevant provision would be regarded as prohibited. If the intention was only to protect the revenue, a contract entered into in breach of the relevant provision might still be enforceable.

In my view, Section 4 of the Foreign Investment Act No. 01 of 1999 which deals with Foreign Investment Certificate to a foreign Investor to carry on business in Fiji, is designed to facilitate and regulate the business activities of foreign residents in the Fiji Islands.

Moreover, it is designed to prevent a risk of consequential national detriment of an outward cash flow of profits to foreign residents. **Thus, the benefit of Section 4 does not fall to any individual but to the benefit of the nation as a whole.**

Section 4 of the Foreign Investment Act is part of the overall machinery adopted by parliament to achieve and maintain stability in the country's economy.

Part 5 of the Foreign Investment Act No. 01 of 1999 provides;

PART 5 - MISCELLANEOUS

Prohibition on foreign investors

16. A foreign investor must no:-

(a) carry on business without a Foreign Investment Certificate;
(b) subject to section 8 (5), carry on business in a prohibited activity;

(c) subject to section 8 (2), carry on business in a reserved activity; or

(d) *fail to comply with the terms or conditions of a Foreign Investment Certificate.*

Penalty : $50,000

The important question is what inference is to be drawn from the power to impose a fine by way of penalty. Where guilty intent is a fundamental ingredient of a statutory offence, it is reasonable to assume prohibition of the agreement between the Plaintiff and the First Defendant from the imposition of the fine.

In **Cope v Rowlands (1836), 2 M. & W. 149**, at p. 151; 150 E.R 707; at p. 710, Park J, said:

> *"It is perfectly settled, that where the contract which the Plaintiff seeks to enforce, be it express or implied is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect.* ***It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition.*** *Lord Holt* ***Bartlett v. Vinor (1692), Carth; 251.*** *And it may be safely lay down notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal,* ***it can make no difference in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object.*** *The sole question is, whether the statute mean to prohibit the contract?"*
>
> (Emphasis added)

The Foreign Investment Act No.01 of 1999 does not merely provide a penalty for Contravention of Section 4 (1) of the Foreign Investment Act. The Statute does expressly prohibit any activity or business outside of which a Certificate is granted. Reference is made to Section 07 of the Foreign Investment **(Amendment)** Act No-28 of 2016.

Section 07 provides;

> *7. Section 13A of the Principal Act is amended by –*
>
> *(a) Inserting the following new subsection after subsection (1) –*
>
> *"(1A) If a foreign investor engages in any activity or business outside of which a certificate is granted, the Attorney-General may apply to the High Court for an order forfeiting to the State any asset, interest, share or property derived from or used for the purpose of engaging in such activity or a business", and*

(b) in subsection (2), by inserting "or (1A) after "subsection (1)".

The fact that Section 07 allows forfeiture to the State any asset derived in contravention of Section 4(1) shows that a contract made in breach of Section 4 (1) was not enforceable.

Thus, it is plainly the intention of the legislature that the illegality shall avoid the transaction. The policy of Section 4(1) and 7 of the Act was to enable the government to determine which foreign investor should be allowed to carry on business in Fiji and which should not be allowed. To suggest that " *the Foreign Investment Act should be regarded as being nothing more than a revenue Statute*" stretches the judicial imagination quite unreasonably. The Plaintiff appeared to regard the Act primarily as a revenue Statute. Such proposition would be regarded as absurd, since it would signpost an infallible method of subverting the purpose and the operation of Section 4 and 7 of the Act. The ordinary principle is that, a transaction which is made illegal by statute is void. Thus, I see no way of overcoming the deficiency in the agreement for non-compliance with the Statute. I must confess a great deal of sympathy for the approach made by Counsel for the Plaintiff. It must never be overlooked that the Court will not enforce an agreement which is expressly or impliedly prohibited by Statute.

See; **St. John Shipping Corporation v Joseph Rank Ltd (1957) 1 Q.B. 267.**

Thus, the result is most unfortunate, and this case may provide further example of the need for law in the field of illegal agreements. The merits *inter parte* can have little weight when public policy has declared transactions to be illegal, for such cases the interests of the State must transcend private rights.

One word more, as I said earlier, the Plaintiff's action is founded upon an agreement which is prohibited by Section 4 of the Foreign Investment Act. The principle of public policy is this; '***ex dolo malo non oritar actio***'. No Court will lend its aid to a man who found his cause of action upon an immoral or illegal act. The Plaintiff's cause of action appears to arise '***ex turpi causa***', or the transgression of a positive law of this country. Thus, the Plaintiff has no right to be assisted.

I do not think that the law would lend assistance to anyone who has breached a Statute or positive law. If the Plaintiff's agreement is to be enforced in the Court; it would be of great assistance to those who proposed ignoring Statutes or positive law. I do not believe that the Court should or would render them assistance.

The transaction is entered into in contravention of Section 4 (1) of the Act. As the invalidity sprang from non-compliance with a Statute, the whole transaction is *'null and void ab initio'* and illegal and thus the agreement between the Plaintiff and the First Defendant being an illegal contract is unenforceable. The illegality is clearly revealed on the evidence before the Court and there is no reason to suppose that the relevant facts are not fully before the Court. The evidence unequivocally establishes the illegality.

I am satisfied that I have all the relevant material before me. Indeed, it was not suggested, that I have not or that there was any aspect of the point insufficiently exposed. I am satisfied that the evidence leads clearly and inevitably to the inferences I have set out above and I must refuse to allow the Plaintiff to enforce the agreement.

When the Court comes to know of an illegality, public policy requires that it should refuse any help to the wrongdoers, and public policy cannot be circumvented by the Court fictitiously deeming itself not to have heard that which truth it can is heard.

It is reasonable to assume that both parties knew what was contemplated between them was the commission of an unlawful act, namely taking of an Island in Fiji on sublease to carry on business in an activity, without a Foreign Investment Certificate (pursuant to Section 4 (1) of the Foreign Investigation Act No. 01 of 1999). On execution the agreement did convey leasehold interest to the Plaintiff. The Plaintiff began operations on Malamala Island on 03rd August 2007.

In "**Allexander v Rayson**" **(1936) (1) K.B. 169** the Court of Appeal affirmed the principle that where it appears that the subject matter of an agreement is intended to be used for an unlawful purpose the Court will refuse to enforce it.

Chitty on Contracts, 23rd edition at Page 808 writes;

> *"Neither party can sue on a Contract if both knew that it necessarily involves the commission of an act which, to their knowledge, is legally objectionable, that is illegal, immoral, or otherwise against public policy."*

Delvin J in **Elder v Averback (1949) 2 ALL E.R. 690, 695** said;

> *"It is well settled that an agreement may be unenforceable either because on the face of it cannot be performed without breaking the law, or because, although capable of being performed legally, it was made with the object of breaking the law."*

Notwithstanding the very high standard and precautionary test that the authorities imposed on application such as this and in applying these authorities to the facts and submissions in this matter, I am of the opinion that the application should be granted.

The Plaintiff's claim is not recognised by law and therefore unenforceable. The Plaintiff's claim is bound to fail having regard to the uncontested facts. I am of the opinion that the proceedings are vexatious and are an abuse of process of the Court.

(7) For the reasons which I have endeavoured to explain, I venture to say beyond per - adventure that the Plaintiff's Statement of Claim does not raise debatable questions of facts. Therefore, it is competent for the Court to dismiss the action on the ground that it discloses no reasonable cause of action against the First and Fourth Defendant.

Fundamentally, courts are required to determine cases on merits rather than dismissing them summarily on procedural grounds.

It is a fundamental principle of any civilized legal system that all parties in a case are entitled to the opportunity to have their case dealt with at a hearing at which they or their representative are present and heard.

At this juncture, I bear in mind the "**caution approach**" that the court is required to exercise when considering an application of this type.

I remind myself of the principles stated clearly in the following judicial decisions.

In Dev. v. Victorian Railways Commissioners[1949] HCA 1; (1949) 78CLR 62, 91 Dixon J said:

> *"A case must be very clear indeed to justify the summary intervention of the court ... once it appears that there is a real question to be determined whether of fact or of law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process."*

In Agar v. Hyde (2000) 201 CLR 552 at 575 the High Court of Australia observed that:

> *"It is of course well accepted that a court should not decide the issues raised in those proceedings in a summary way except in the clearest of cases. Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way and after taking advantage of the usual interlocutory processes."*

I am of course mindful that a case must be very clear indeed to justify summary intervention of the Court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional circumstances.

I have no doubt personally and I am clearly of the opinion that this is a case for the summary intervention of the Court. The decision of the point of law at this stage will certainly avoid the necessity for trial against the First and Fourth Defendant. This action against First and Fourth Defendant must be dismissed.

In the circumstances, I certainly agree with the sentiments which are expressed inferentially in the Defendants submissions. I must confess that I am not in the least impressed by the proposition advanced by the Plaintiff.

(8) To sum up, in view of the foregoing analysis, I venture to say beyond per- adventure that the Plaintiff has failed to disclose a reasonable cause of action against the First and Fourth Defendant and in the result the Plaintiff case is clearly untenable.

I could see nothing to change my opinion even on the basis of exhaustive work contained in "**Commentary on Litigation**" by "**Cokes**", and "**A practical approach to Civil Procedure**", by "**Stuart Sime**", Thirteenth Edition.

Accordingly, there is no alternate but to dismiss the Plaintiff's action and the Statement of Claim to protect the First and Fourth Defendant from being further troubled, to save the Plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merits.

I cannot see any other just way to finish the matter than to follow the law.

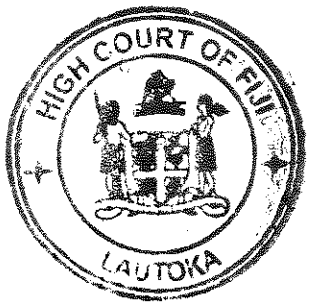
Essentially that is all I have to say!!!

(E) FINAL ORDERS

(1) The Plaintiff's Writ of Summons and Statement of Claim filed against the First and Fourth Defendant is struck out.

(2) The Plaintiff to pay costs of $500.00 (summarily assessed) to the First and Fourth Defendant within 14 days hereof.

I do so order!



18/11/2016.

.....

Jude Nanayakkara
Master.

At Lautoka.
18th November 2016.