

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 226 of 2013

BETWEEN : **SAFARI LODGE (FIJI) LIMITED** a limited liability company
having its registered office at c/- G H Whiteside & Co, 211 Ratu
Sukuna Rd, Suva.

PLAINTIFF

AND : **THE TIKI (FIJI) LIMITED** a limited liability company having its
registered office at Level 8, Dominion House, Thomson Street, Suva.

1st DEFENDANT

AND : **MICHAEL HARVEY** Upper Mt Gravatt, P O Box 6196,
Queensland, Australia.

2nd DEFENDANT

AND : **ATTORNEY GENERAL OF FIJI** as representative of
MINISTRY OF LANDS & MINERAL RESOURCES and
DEPARTMENT OF ENVIRONMENT

3rd DEFENDANT

Mr. Niven Ram Padarath for the Plaintiff
(Ms.) Mary Lynn Muir for the First and Second Defendants

Date of Hearing: - Monday, 18th April 2016
Date of Ruling : - Wednesday, 22nd June 2016

RULING

(A) INTRODUCTION

- (1) The matter before me stems from the Summons filed by the first and second Defendants pursuant to Order 24, rule (3) and (7) of the High Court Rules and the

inherent jurisdiction of the Court seeking an Order for discovery and production of documents.

- (2) The Summons is supported by an Affidavit sworn by (Ms) "Ana Tuiwawa", a Barrister & Solicitor employed by Messers "Siwatibau & Sloan", Solicitors for the First and Second Defendants.
- (3) The Summons is strongly resisted by the Plaintiff. The Plaintiff filed an 'Affidavit in Opposition' sworn by one "Warren Francis", a Director of the Plaintiff Company, followed by an 'Affidavit in reply' sworn by "Michael Harvey", the Second Defendant and a Director of the First Defendant Company.
- (4) At the oral hearing of the matter, the First and the Second Defendants sought to read and rely on the following Affidavits in Support of the application:-

'Affidavit in Support' by (Ms) Ana Tuiwawa (sworn on 24th June 2015 and 28th August 2015 respectively ;)

Second Defendant's 'Affidavit in Reply' sworn on 27th August 2015.

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

(B) THE FACTUAL BACKGROUND

- (1) What is the case before me? What are the circumstances that give rise to the present application?
- (2) On 31st December 2013, the Plaintiff issued a Writ of Summons against the Defendants claiming;
 - (i) *Judgment in the sum \$2,554,280.00 (Two Million Five Hundred and Fifty Four Thousand Two Hundred and Eighty Fijian Dollars)*
 - (ii) *Damages for nuisance inclusive of all damages suffered from the date of this claim to the date of removal of the nuisance.*
 - (iii) *Damages under the Environmental Management Act 2005.*
 - (iv)
 - (v)

- (3) To give the whole picture of the action, I can do no better than set out hereunder the assertions/averments in the pleadings;
- (4) The Plaintiff in its Statement of claim pleads *inter alia*; (As far as relevant)

- Para (1) *The Plaintiff is the registered proprietor of Certificate of Title No. 20497 land known as Nananu Island (part of) containing two acres and three perches situated in the province of Ra in the island of Nananu being Lot 6 on the deposited plan no. 4773.*
- (2) *The Plaintiff owns and operates a watersports focused resort on the Nananu-i-ra island in the South Pacific Ocean operated in the name of Safari Lodge Fiji Adventure Island (referred to as "Resort" in this Claim)*
- (3) *The Plaintiff markets its resort as lying on a pristine beach with tropical waters ensuring perfect conditions for watersports such as windsurfing and kite surfing. The Plaintiff also offers PADI Scuba Diving with quality dive sites, sailing, kayaking, snorkeling, fishing adventures and stand up paddling (referred to as "Resort Activities" in this claim).*
- (5) *The First Defendant and/or the Second Defendant are the owners of property referred to as "The Bungalows" on Lomanisue Beach and which is built on a neighboring land to Plaintiff on land comprised in Certificate of Title No. 33161 [referred to as "Bungalows Fiji" in this claim].*
- (6) *The Plaintiff purchased the resort and land on or about the year 2000.*
- (12) *On or about the 14th of June 2007, the first and/or the Second Defendant commenced excavation work on a reef directly in front of the Lomanisue Beach.*
- (13) *The digging works caused damage to the reef and left dangerous debris on top of the reef.*
- a) *The digging and/or excavation works by the First and Second Defendant left a rock wall and protruding rocks from the ocean.*
 - b) *The digging and/or excavation works also left dangerous obstruction in the path of the Plaintiffs customers partaking in the resort activities.*
 - c) *The First and Second Defendants also left steel rods protruding from the sea which could cause damage to life and limb of the customers of the Plaintiffs.*

- (14) *Despite several notices from the Plaintiff, the iTaukei Land Trust Board, Land owners and relevant authorities, the First and Second Defendants have refused and/or neglected to remove the nuisance.*
- (15) *The First and Second Defendant have directly or indirectly introduced a waste or pollutant into the sea and/or ocean and/or beach front near the Plaintiffs land.*
- (16) *The said waste or pollutant is a hindrance to the marine activities and other legitimate use of the sea by the Plaintiff.*
- (18) *As a result of the pollution incident and the breaches mentioned in this claim the Plaintiff has suffered loss and damages.*
- (25) *As a result of the breaches mentioned the Plaintiff has suffered economic loss and damages.*

Particulars

- a) *Damage to water sport equipment \$20,000.00*
 - b) *Loss of income at the rate of AUD\$27,000.00 (Twenty Seven Thousand Australian Dollars) [being sum of FJ\$45,255.00 (Forty Five Thousand Two Hundred and Fifty Five Fijian Dollars) converted as at the date of this claim) per month for 8 months (water sporting season) of every year since 2007 making a total loss sum of FJ\$2,534,280.00 (Two Million Five Hundred and Thirty Four Thousand Two Hundred and Eighty Fijian Dollars).*
 - c) *In addition to the above the Plaintiff company will continue to loss revenue at the rate of FJ\$362,040.00 (Three Hundred and Sixty Two Thousand and Forty Fijian Dollars) per annum until the nuisance and/or pollutant incident is removed.*
- (5) The First and Second Defendants in their Statement of Defence allege that; (As far as relevant)

Para (3) At all material times to this action there has been a coral reef:

- a. *In the sea which is in front of the land described in Certificate of Title No. 33161;*
- b. *In and around the reef area where the alleged excavation works referred to in the Statement of Claim were commenced.*

- (4) *The area in and around the reef area where the alleged excavation works were commenced immediately prior to the alleged works were:*
- a. *not suitable for watersports activities;*
 - b. *dangerous to anyone who sought to use the area for watersports activities*
- (5) *In the premises, the Plaintiff has not suffered any loss or damage caused by any alleged excavation works.*
- (6) *If, which is denied, the Plaintiff has suffered any loss or damage, the Defendants deny that any such loss or damage was caused by the Defendants.*
- (37) *As to paragraph 25 of the Statement of Claim, the Defendants deny the matters pleaded and say:*
- a. *if, which is denied, the Plaintiff has suffered any loss or damage, any loss of income or revenue requires a deduction for costs of sale and other business expenses incurred, Value Added Tax, company income tax and other taxes and charges properly payable by the Plaintiff;*
 - b. *if, which is denied, the Plaintiff has suffered any loss or damage arising out of the First Defendant's minor excavation works, the Plaintiff is put to proof of same.*
 - c. *that in June, 2007, the Plaintiff's Resort consisted of a small number of buildings used for accommodation which the Plaintiff has added to over the years of renovated without lawful and proper approvals;*
 - d. *the resort operated by the Plaintiff since relevantly on or about 14 June 2007, has been poorly:*
 - i. *operated and managed;*
 - ii. *maintained, resulting in a loss of business and potential customers;*
 - e. *that the Plaintiff's watersports activities at the resort:*
 - i. *have not been affected by the First Defendant's minor excavation works;*
 - ii. *will not be affected by the First Defendant's minor excavation works.*

(C) THE STATUS OF THE SUBSTANTIVE MATTER

- (1) The action was instituted by the Plaintiff on 31st December 2013, by way of Writ of Summons and Statement of Claim.
- (2) The pleadings were closed on 30th March 2014.
- (3) The Plaintiff and the Defendants have filed their Affidavit verifying list of documents.
- (4) The matter is at the discovery stage.

(D) THE LAW

1. Against this factual background, it is convenient to indicate something of the relevant law.
2. Rather than refer in detail to the various authorities, I propose to set out, with only very limited citations what I take to be the principles in play.

Provisions relating to “**Specific Discoveries**” are contained in **Order 24, rule 7** of the High Court Rules.

Order 24, rule 7 provides;

Order for discovery of particular documents (O.24, r.7)

7.-(1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not than in his possession, custody or power, when he parted with it and what has become of it.

(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavit under rule 2 or rule 3.

(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified or described in the application and that it relates to one or more of the matters in question in the case or matter.

Discovery can be sought at any stage of a proceeding even after a judgment or order in an action has been made. [See; **Singh v Minjesk Investment Corporation Ltd & Anor**, High Court Civil Action No:- HBC 148 of 2006, **Korkis v Wer & Co.** (1914) LT 794.]

Courts have a wide jurisdiction to order discovery and inspection.

In **Singh v Minjesk** (*supra*) Master J. Udit canvassed the applicable principles and case law authorities in some detail. From his analysis, what emerges clearly is that the onus initially is on the applicant to establish the following by way of affidavit evidence:

- (i) *Identify clearly the particular document or documents or class of documents that he seeks from to be discovered by the opposing party (see Order 24 Rule 7 (1)).*
- (ii) *Show a prima facie case that the specific document or class of documents do in fact exist or have existed (see Order 24 Rule 7 (1)).*
- (iii) *Establish that these documents are relevant in the sense that they relate to the matter in question in the action. In other words, the information in the document must either directly or indirectly enable the applicant either to advance his own case or to damage the case of his or her adversary. Alternatively, it is sufficient if the information in the document is such that it may fairly lead to a train of enquiry which may have either of these consequences. The relevance of a document is to be tested against the issues and/or questions raised by the pleadings (see **A.B. Anand (Christchurch) Ltd v ANZ Banking Group Limited** (1997) 43 FLR 22 30 January 1997).*

*It is important to note that whether or not any particular document is admissible or inadmissible is immaterial to its discoverability. It is enough if the document is likely to throw some light on the case (see Volume 13 paragraph 38 of Halsbury's Laws of England – 4th Edition) page 34 cited in **Singh v Minjesk***

- (iv) *Show that these documents were in the physical possession, custody (i.e. the mere actual physical or corporeal holding of the document regardless of the right to its possession) or power (i.e. the enforceable right to inspect it or to obtain possession or control of the document from one who ordinarily has it in fact) of the opposing party (see Order 24 Rule 7 (3)).*

In **Westside Motorbike Rentals (Fiji) Limited v Toganivalu Civil Action No, 55 of 2008** Master Tuilevuka (as he was then) said;

*“[7]. Discovery can be sought at any stage of a proceeding even after a judgement or order in an action has been made (see **Singh v Minjesk Investment Corporation Ltd & Anor- High Court Civil Action No. HBC 148 of 2006** where Master Udit cited Korkis –v- Wer & Co. [1914] LT 794 as authority for this position).*

[8]. The following principles emerge from Singh v Minjesk Investment Corporation Ltd & Anor- High Court Civil Action No. HBC 148 of 2006. The onus initially is on the applicant to establish the following by way of affidavit evidence:

- (i) identify clearly the particular document or documents or class of documents that he seeks from to be discovered by the opposing party (see **Order 24 Rule 7 (1)**).
- (ii) show a *prima facie* case that the specific document or class of documents do in fact exist or have existed (see **Order 24 Rule 7 (1)**).
- (iii) Establish that these documents are *relevant* in the sense that they relate to the matter in question in the action. In other words, the information in the document must either directly or indirectly enable the applicant either to advance his own case or damage the case of his or her adversary. Alternatively, it is sufficient if the information in the document is such that it may fairly lead to a train of enquiry which may have either of these consequences. The relevance of a document is to be tested against the issues and/or questions raised by the pleadings (see A.B Anand (Christchurch) Ltd -v- ANZ Banking Group Limited (1997) 43 FLR 22 30 January 1997).

It is important to note that whether or not any particular document is admissible or inadmissible is immaterial to its discoverability. It is enough if the document is likely to throw some light on the case (see *Volume 13 paragraph 38 of Halsbury's Laws of England- 4th Edition*) page 34 s cited in *Singh v Minjesk*).

- (iv) show that these documents were in the physical possession, custody (i.e. the mere actual physical or corporeal holding of the document regardless of the right to its possession) or power (i.e. the enforceable right to inspect it or to obtain possession or control of the documents from one who ordinarily has it in fact) of the opposing party (see **Order 24 Rule 7 (3)**).

[9]. Courts will not allow the discovery process to be used towards assisting a party upon a fishing expedition such as to fish for witnesses or a new case (see Martin and Miles Martin Pen Co. Ltd v Scrib Ltd [1950] 67 RPC 1-7 as cited in Singh v Minjesk), Calvet -v- Tomkies [1963] 3 All ER 610.

Nor will discovery be ordered in respect of documents which are not related to or may not affect the actual outcome of the action: Martin and Miles Martin Pen Co. Ltd.- v- Scrib Ltd. [1950] 67 RPC 1-7. Furthermore, discovery will also be prohibited if it is for a general purpose of enabling a party."

In Wakaya Ltd v Nusabaum HBC 256 of 2010 Master Amartunga (as he was then) set out the requisite test under Order 24, i.e.

1. *Supreme Court Practice (1999) at p 471*
24/7/2 state as follows:

'...the present rule an application may be made for an affidavit as to specific document or classes of documents. This must be supported by an affidavit stating that in the belief of the deponent other party has or has had prima facie case is made out for (a) possession, custody or power and (b) relevance of the specified documents (Astra National Production Ltd v neo Art productions Ltd [1928]W.N. 218. This case may be base merely on the probability arising from the surrounding circumstances or in part on specific facts deposed to.

See too Berkeley administration v McClelland [1990] F.S.R. 381 where at p 382 the Court restated the principles as follows:

- (1) *There is no jurisdiction to make an order under RSC 024 r 7 for the production of documents unless*
 - (a) *there is sufficient evidence that the documents exist which the other party has not disclosed.*
 - (b) *the document or documents relate to matters in issue in the action.*
 - (c) *there is sufficient evidence that the document is in the possession, custody or power of the other party.*
- (2) *When it is established that those three prerequisites for jurisdiction do exist, the court has discretion whether or not to order disclosure.'*

(Emphasis added).

(E) ANALYSIS

- (1.) Let me now turn to the merits of the application bearing in my mind the above mentioned legal principles and factual background uppermost in my mind.
- (2.) Before dealing with the merits of the application, let me record that the Counsel for the Plaintiff and the Defendants in their written submissions has 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 both counsel as well as to the helpful written submissions and the judicial authorities referred to therein.

- (3.) As I said earlier, the First and Second Defendants have filed Summons pursuant to Order 24, rr.3 and 7 of the High Court Rules, 1988 for 'Specific Discovery' as follows;

A. Business financial records

- (a) *All financial statements [including Profit and Loss Statement and Balance Sheet] of the Plaintiff since the year 2000 to present date (showing separate figures for each activity i.e. windsurfing / kite / surfing / diving / sailing / kayaking / snorkeling / fishing adventures / stand up paddling etc.), audited by an independent auditor, or if no audited financial statements are available, all unaudited financial statements of the Plaintiff since the year 2000 to present date;*
- (b) *All tax returns, showing income received and VAT paid, from the beginning of Safari Lodge (Fiji) Limited in 2000 to present;*
- (c) *Copy of all bank statements for the Plaintiff from 2000 to present;*
- (d) *A copy of all the Plaintiff's Australian Bank Accounts;*
- (e) *Evidence of all bank deposits for the Plaintiff to Westpac Bank Rakiraki;*
- (f) *Copies of all cheque books for the Plaintiff from 2000 to present;*

B. Business records

- (g) *All the business, guest/tourist booking sheets and reservations and or any cancellations thereof for the Plaintiff's water sports activities, including windsurfing from 2000 to present (showing separate figures for each activity i.e. windsurfing / kite surfing / diving / sailing / kayaking / snorkeling / fishing adventures / stand up paddling etc.);*
- (h) *Copy of all complaints made by guests of Safari Lodge (Fiji) Limited.*

- (4.) Before determining against the Plaintiff, the real issue and the only issue which this Court has to consider at the outset is whether the Defendants have surmounted the **threshold criteria** in Order 24, rule (7) of the High Court Rules, 1988.

Let me have a closer look at Order 24, rule (7).

Provisions relating to “**Specific Discoveries**” are contained in Order 24, rule (7) of the High Court Rules, 1988.

Order 24, rule (7) provides;

Order for discovery of particular documents (O.24, r.7)

7.-(1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power, when he parted with it and what has become of it.

(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavit under rule 2 or rule 3.

(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified or described in the application and that it relates to one or more of the matters in question in the case or matter.

In **Halsbury’s, Laws of England, 4th Edition** at pg. 78 the authors aptly described the documents which are capable of being discovered as follows:-

8. Documents required to be disclosed.

The obligation of a party to make discovery necessarily involves that he must make a full and frank disclosure of all relevant documents which are or have been in his possession, custody of power. Apart from any order limiting the scope of the discovery of particular documents or class of documents, or to particular issues, there are two general and essential conditions as to what documents are required to be disclosed, namely:-

- (i) they must be relevant; that is they must relate to some matter in question in the action or other proceedings; and*
- (ii) they must be or have been in possession, custody or power of the party required to make discovery”, (see to Atkins Volume 15, (2nd) addition page 78-80).*

In Re Barlow Clowes Gilt Managers Ltd. [1991] 4 All E.R. 385 Millet J. said at p. 393:

“It is a feature common to both systems of justice, civil and criminal that there is a strong public interest that the court should have all relevant information made available to it. But the courts have never assumed or been granted the power to compel the production of all such information regardless of its nature and source. That would amount to an intolerable invasion of privacy. Statute and rules of court made under statutory power have long established the circumstances in which production can be compelled in the interests of justice and have thereby resolved the conflict between the two competing public interests.”

(5.) What is the rule of conduct of this Court in an application such as this?

Courts have a wide jurisdiction to order discovery and inspection.

As noted above, in **Ram Kumar Singh v Minjesk Investment Corporation Ltd, Civil Action No – 148/2006 (05-05-2008)** Master J. Udit canvassed the applicable principles and case law authorities in some detail. From his analysis, **what emerges clearly is that the onus initially is on the applicant to establish the following by way of affidavit evidence:**

- (v) *Identify clearly the particular document or documents or class of documents that he seeks from to be discovered by the opposing party (see Order 24 Rule 7 (1)).*
- (vi) *Show a prima facie case that the specific document or class of documents do in fact exist or have existed (see Order 24 Rule 7 (1)).*
- (vii) *Establish that these documents are relevant in the sense that they relate to the matter in question in the action. In other words, the information in the document must either directly or indirectly enable the applicant either to advance his own case or to damage the case of his or her adversary. Alternatively, it is sufficient if the information in the document is such that it may fairly lead to a train of enquiry which may have either of these consequences. The relevance of a document is to be tested against the issues and/or questions raised by the pleadings (see **A.B. Anand (Christchurch) Ltd v ANZ Banking Group Limited** (1997) 43 FLR 22 30 January 1997).*

*It is important to note that whether or not any particular document is admissible or inadmissible is immaterial to its discoverability. It is enough if the document is likely to throw some light on the case (see **Volume 13 paragraph 38 of Halsbury’s Laws of England – 4th Edition**) page 34 cited in **Singh v Minjesk***

(viii) *Show that these documents were in the physical possession, custody (i.e. the mere actual physical or corporeal holding of the document regardless of the right to its possession) or power (i.e. the enforceable right to inspect it or to obtain possession or control of the document from one who ordinarily has it in fact) of the opposing party (see Order 24 Rule 7 (3)).*

(6.) Therefore, the **threshold criteria** in relation to “**Specific Discovery**”, as I understand it, is this;

“In order that any document may be discoverable it must **firstly, be shown “... to relate to (some) matter in question in the cause...”** In other words the document must be relevant to a question or issue in the proceedings in so far as the same may be deduced from the pleadings in the action. **Secondly, the document(s), must be shown to exist and ‘... are or have been in (the) possession, custody or power ...’ of the party against whom discovery is being sought.”**

What is meant by the phrase “**a relevant document?**”

“... the matter in question in the action if it contain information which – not which must – either directly or indirectly enable the party requiring the discovery either to advance his own case or to damage the case of his adversary, or which may fairly lead to a train of enquiry which may have either of this consequences. Documents relate to matters in question in the action whether they are capable of being given in evidence or not, so long as they are likely to throw light on the case. The expression ‘matter in question’ means a question or issue in dispute in the action and not the thing about which the dispute arises”. See; Volume 13 paragraph 38 of Halsbury’s Laws of England (4th Edition) page 34.

In the leading authority of **Compagnie Financière du Pacifique v. Peruvian Guano Co. (1882) 11 Q.B.D. 55 Brett L.J.** stated of the above first requirement at p.63:

“It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in, the words ‘either directly or indirectly’ because, it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.”

(7.) Returning back to the case before me, the Plaintiff has no objections to discover and disclose document number (a) and (b) under category 'A' in the First and Second Defendants Summons for 'Specific Discovery'. They are;

- (a) *All financial statements [including Profit and Loss Statement and Balance Sheet] of the Plaintiff since the year 2000 to present date (showing separate figures for each activity i.e. windsurfing / kite / surfing / diving / sailing / kayaking / snorkeling / fishing adventures / stand up paddling etc.), audited by an independent auditor, or if no audited financial statements are available, all unaudited financial statements of the Plaintiff since the year 2000 to present date;*
- (b) *All tax returns, showing income received and VAT paid, from the beginning of Safari Lodge (Fiji) Limited in 2000 to present;*

(8.) The Plaintiff resisted to discover and disclose document numbers 'c' to 'f' under category 'A' and document number 'g' and 'h' under category 'B' in the Summons for 'Specific Discovery'. They are;

- Category A
 - (c) *Copy of all bank statements for the Plaintiff from 2000 to present;*
 - (d) *A copy of all the Plaintiff's Australian Bank Accounts;*
 - (e) *Evidence of all bank deposits for the Plaintiff to Westpac Bank Rakiraki;*
 - (f) *Copies of all cheque books for the Plaintiff from 2000 to present;*
- Category B
 - (g) *All the business, guest/tourist booking sheets and reservations and or any cancellations thereof for the Plaintiff's water sports activities, including windsurfing from 2000 to present (showing separate figures for each activity i.e. windsurfing / kite surfing / diving / sailing / kayaking / snorkeling / fishing adventures / stand up paddling etc.);*
 - (h) *Copy of all complaints made by guests of Safari Lodge (Fiji) Limited.*

(9.) As I understand the evidence, the Plaintiff's grounds for objections to produce the documents sought are as follows;

Reference is made to paragraphs (6) to (10) of the Plaintiff's 'Affidavit in Opposition.'

- Para 6. *I have no objection to discover the Plaintiff's unaudited financial records that is all documents listed under category A (a) only. However, I object to the discovery of the rest of the documents as the financial records are sufficient to prove the claim of loss.*
7. *The rest of the documents are not relevant to these proceedings. Further, the rest of the documents are confidential as it contains pertinent information in relation to the Plaintiffs business and its operations.*
8. *The First and Second Defendant were my competitors and as such, I verify believe they are only seeking discovery of these documents to gain access to confidential information.*
9. *If the injunctions orders are uplifted and the First and Second Defendant's business is sold, the documents can be used against the interest of my business.*
10. *The business financial records are enough proof to evidence loss caused by the said excavation works carried out by the First and Second Defendant.*

(10.) In *adverso*, the first and Second Defendants deposed *inter alia*;
(Reference is made to paragraphs (6) to (32) of the 'Affidavit in reply' of the Defendants)

- Para 6. *As director of the Tiki (Fiji) Limited I am aware that the documents listed in the First and Second Defendants' Summons are very likely to exist as they are business and financial records required by such resort/tourist businesses to operate.*
7. *The Plaintiff has not complained that the documents requested to be discovered don't exist or aren't in the Plaintiff's possession or control, but rather, the Plaintiff alleges that any documents other than its unaudited financial records are (i) not relevant and or (ii) confidential.*
8. *I strongly disagree and dispute this. The Plaintiff's unaudited financial records are not sufficient to prove its claim of loss as the Plaintiff alleges, and the other documents requested are relevant.*
9. *Further, since the onus of proof is on the Plaintiff to prove its claimed loss, it can waive privilege with respect to any documents otherwise privileged from disclosure such as tax returns.*

10. *In this regard, I remind that the Plaintiff is claiming for the following economic loss and damages, allegedly caused by the First and Second Defendants' 2007 excavation works on the portion of the beach and foreshore in front of the First Defendant's property (the Bungalows Fiji), some distance down the beach from the Plaintiff's resort, which are alleged to be a nuisance to the Plaintiff:*

- i. *Damage to water sports equipment of \$20,000;*
- ii. *Loss of income at the rate of AUD \$27,000 per month for 8 months (water sporting season) of every year since 2007 for a total of FJ\$2,534,280.00; and*
- iii. *Loss of revenue at the rate of FJ\$362,040.00 per annum from the date of the Writ until the alleged nuisance is removed.*

Proving Damage to Water Sports Equipment

11. *Addressing the first category of claim, it can be easily discerned or inferred that it will be necessary for the Plaintiff to prove damage to water sports equipment by bringing its internal reports or records showing when and how an item of water sports equipment was damaged, and the cost of repairing or replacing it.*
12. *The documentation produced by the Plaintiff will have to establish a link or connection between the alleged nuisance and the incident in which the equipment was damaged.*
13. *I say that information such as this will not be found in the Plaintiff's unaudited financial records. I crave leave to refer to the Affidavit of Warren Francis sworn on 17 December 2013 and filed on 31 December 2013 ('First Affidavit'), Annexure "WF-30", being the Plaintiff's unaudited financial return for 2012.*
14. *This unaudited financial return for 2012 has what purports to be the Plaintiff's balance sheet at page 3 thereof. The list of assets does not show any entry for water sports equipment. There is only an entry for fixed assets.*
15. *The related note on depreciation of property, plant and equipment on page 7 only refers to plant and equipment, and there is no break down for water sports equipment.*
16. *By the same token the statement of income and expenditure found on page 5 only refers to 'Hire of Equipment' as an expense. There is no entry relating to repair or replacement of damaged water sports equipment.*

Proving Loss of Income

17. *The Plaintiff has complained that the alleged nuisance left a “dangerous obstruction in the path of the Plaintiff’s customers partaking in the resort activities” [Plaintiff’s Statement of Claim clause 13 b)].*
18. *In paragraph 59 of his First Affidavit, Francis deposes that one week’s windsurfing or kite surfing group booking grosses approximately \$27,000 AUD in booking revenue, and apparently this is the basis or touch stone on which he calculates the Plaintiff’s loss of income as AUD \$27,000 per month for 8 months per year.*
19. *However, to prove such loss of income, the Plaintiff needs to show how many group windsurfing or kite surfing bookings were lost due to the alleged nuisance and what the net profit per booking would be.*
20. *This is best done by comparing the number of bookings in years and months prior to the alleged nuisance and those after.*
21. *This cannot be done using the Plaintiff’s unaudited financial records, as the Plaintiff’s unaudited financials only report income from ‘Dive – sales and Services’ [Annexure “WF-30” to the First Affidavit]. There is no way to discern if there was any reduction in the Plaintiff’s income at the material time due to loss of windsurfing or kite surfing bookings from such an entry.*
22. *The same objections apply to the Plaintiff’s claim for loss of revenue from the date of the writ onwards. This cannot be proven from the unaudited financial records simply because those financials do not record revenue from windsurfing and kite surfing.*

The Need to Disclose Tax Returns

23. *The Plaintiff’s unaudited financial reports [Annexure “WF-30” to the First Affidavit] clearly state at page 2 that the financial information is the representation of the Plaintiff and has not been audited or reviewed. As a result the accountants have not expressed any opinion or assurance on those statements. They have also omitted certain disclosures required by generally accepted accounting principles.*
24. *I say that unaudited financial records not prepared in accordance with generally accepted accounting principles should not be relied upon as the sole source of proof of loss of business. Disclosures have been omitted which may be relevant to the Plaintiff’s claim.*

25. *The Plaintiff's VAT and income tax returns are relevant in showing how much the Plaintiff earned before and after the alleged nuisance, and are within the power of the Plaintiff to obtain from the tax authorities if necessary.*
26. *They will also substantiate the income reported in the Plaintiff's unaudited financial records.*
27. *The bank records will also substantiate the income reported by the Plaintiff in its unaudited financial records and tax returns, particularly if the Plaintiff is accepting payments or deposits overseas.*

The Need for business Records

28. *The business records requested to be disclosed all relate to proving that the loss of income claimed by the Plaintiff relates to the alleged nuisance and not other causes, such as global financial crisis and or renovations, and are highly relevant to the Plaintiff's claim.*
29. *I say that it is the usual and normal practice in respect of claims of loss of business or income for the claimant to disclose its financial records and tax returns to establish the quantum of the loss, and that in making such a claim the Plaintiff should be prepared to make such disclosures as are necessary to prove its case.*

No Improper Use of Disclosures by Defendants

30. *I am unaware of what value the Plaintiff expects its financial records to have to the Defendants, other than for the Defendants to prepare their defence against this action. The First Defendant operates a different class of accommodation to that of the Plaintiff, and caters to a different market.*
31. *In any event, the First Defendant has closed its operations while renovating the Bungalows, and can hardly be described as competing with the Plaintiff.*
32. *I am informed by my solicitors and verily believe that under the High Court Rules, a party who obtain discovery may only use the disclosed documents for purposes of conducting his or its own case, and there is an implied undertaking not to use them for any ulterior purpose. The Defendants have no plans to use the discovery for ulterior purposes.*

- (11.) It is important to remember that, significantly as I believe, the Plaintiff did not complain that the documents requested to be discovered do not exist or are not in the Plaintiff's possession or control. For the Plaintiff it was contended that any documents other than its unaudited financial records are (i) **not relevant** and or (ii) **Confidential / Commercial Sensitive**

(12.) **Relevant**

- (i) This takes me to the substantive question (first ground of objection) as to whether the documents sought to be discovered are relevant or not?
- (ii) For the sake of completeness, the documents sought to be discovered are reproduced below in full.

A. Business financial records

- (a) *All financial statements [including Profit and Loss Statement and Balance Sheet] of the Plaintiff since the year 2000 to present date (showing separate figures for each activity i.e. windsurfing / kite / surfing / diving / sailing / kayaking / snorkeling / fishing adventures / stand up paddling etc.), audited by an independent auditor, or if no audited financial statements are available, all unaudited financial statements of the Plaintiff since the year 2000 to present date;*
- (b) *All tax returns, showing income received and VAT paid, from the beginning of Safari Lodge (Fiji) Limited in 2000 to present;*
- (c) *Copy of all bank statements for the Plaintiff from 2000 to present;*
- (d) *A copy of all the Plaintiff's Australian Bank Accounts;*
- (e) *Evidence of all bank deposits for the Plaintiff to Westpac Bank Rakiraki;*
- (f) *Copies of all cheque books for the Plaintiff from 2000 to present;*

B. Business records

- (g) *All the business, guest/tourist booking sheets and reservations and or any cancellations thereof for the Plaintiff's water sports activities, including windsurfing from 2000 to present (showing separate figures for each activity i.e. windsurfing / kite surfing / diving / sailing / kayaking / snorkeling / fishing adventures / stand up paddling etc.);*
- (h) *Copy of all complaints made by guests of Safari Lodge (Fiji) Limited.*

- (iii) The importance of the pleadings as determining what are the matters in question between the parties appears forcefully from the judgment of "Menzies" J in **Mulley v "Manifold"** (1959) 103 CLR 341, where at p345, his Lordship said;

"I now turn to the pleadings to determine what are the matters at

issue between the parties, because discovery is a procedure directed towards obtaining a proper examination of those issues – not towards assisting a party upon a “fishing expedition”. Only a document which relates in some way to a matter in issue is discoverable, but it is sufficient if it would, or would lead to a train of enquiry which would, either advance a party’s own case or damage that of his adversary”

(Emphasis Added)

What is meant by the phrase “*fishing expedition*”?

In this regard I adopt as appropriate the statement of Chilwell J. when his Lordship said in AMP Society v Architectural Windows Ltd. [1986] 2 N.Z.L.R. 190 at p.126:

“In my view, the description of ‘fishing’ in the authorities ... comes to this: an applicant is fishing when he seeks to obtain information or documents by interrogatories or discovery in order to discover a cause of action different from that pleaded or in order to discover circumstances which may or may not support a baseless or speculative cause of action..”

“Counsel for the defendant described the application by the plaintiff as a fishing expedition. The phrase is commonly used in connection with the administration of interrogatories. As is pointed out in Odgers’ Principles of Pleadings and Practise (1981) 22nd ed, at p 278, Greer LJ, in Role v Kevorkian [1936] 2 All ER 1334 at 1337-8, described as “fishing” an interrogatory “by a man who is trying to make a case and has not already the evidence which would justify him in making the case”

In Bray on Discovery (1884) it was said at pp 13-14 that the right to discovery is limited to supporting a definite case set up, and does not extend to fishing out a case from the opponent; and therefore a party cannot have discovery before he has stated his case, whether in the claim as plaintiff or the defence as defendant. The judgment of Fry LJ in Whyte v Ahrens is cited in support of that proposition reference to Whyte v Ahrens (1884) 26 Ch D 717, shows that Fry LJ dissented from the views expressed by Cotton LJ whose judgment, upholding that of Bacon VC below, prevailed. Nevertheless, it seems that on the point of general application the judgment of Fry LJ was correct and that the decision in Whyte v Ahrens should be taken as restricted to the particular facts of the case, one of fraud alleged against agents. So much seems to appear from Leitch v Abbott (1886) 31 Ch D 374, the facts of which were much like those in Whyte v Ahrens”. Per Kelly J in ‘Hooker Corp v Commonwealth’ (1985), 61 ACTR 37

I now turn to the pleadings to determine what are the matters at issue between the parties, because discovery is a procedure directed towards obtaining a proper examination and determination of the matter in issue – not towards assisting a party upon a “**fishing expedition**”. Only a document which relates in some way to a matter in issue is discoverable, but it is sufficient if it would, or would lead to a train of inquiry which would, either advance a party’s own case or damage that of his adversary.

It is necessary to consider what are the matters at issue in the action; the Court must look, not only at the Statement of Claim and the Plaintiff’s case, but also at the Statement of Defence and the Defendant’s case.

It is essential, first to identify the factual issues that would arise for decision at the trial. Disclosure must be limited to documents **relevant** to those issues. In order to identify the factual issues which would arise for decision at the trial, I need to analyse the pleadings. As I mentioned earlier, the Court must look, not only at the Statement of Claim and the Plaintiff’s case, but also at the Statement of Defence and the Defendant’s case.

The purpose of the pleadings is to identify the factual issues which are in dispute and in relation to which evidence can properly be adduced.

- (iv) The allegations on which the Plaintiff relies and by which it is prepared to swim or sink are in these terms in the Statement of Claim.

Para (12) On or about the 14th of June 2007, the first and/or the Second Defendant commenced excavation works on a reef directly in front of the Lomanisue Beach.

(13) The digging works caused damage to the reef and left dangerous debris on top of the reef.

a) The digging and/or excavation works by the First and Second Defendant left a rock wall and protruding rocks from the ocean.

b) The digging and/or excavation works also left dangerous obstruction in the path of the Plaintiffs customers partaking in the resort activities.

c) The First and Second Defendants also left steel rods protruding from the sea which could cause damage to life and limb of the customers of the Plaintiffs.

(14) Despite several notices from the Plaintiff, the iTaukei Land Trust Board, Land owners and relevant authorities, the First and Second Defendants have refused and/or neglected to remove the nuisance.

- (15) *The First and Second Defendant have directly or indirectly introduced a waste or pollutant into the sea and/or ocean and/or beach front near the Plaintiffs land.*
- (16) *The said waste or pollutant is a hindrance to the marine activities and other legitimate use of the sea by the Plaintiff.*
- (18) *As a result of the pollution incident and the breaches mentioned in this claim the Plaintiff has suffered loss and damages.*
- (25) *As a result of the breaches mentioned the Plaintiff has suffered economic loss and damages.*

Particulars

- a) *Damage to water sport equipment \$20,000.00*
 - b) *Loss of income at the rate of AUD\$27,000.00 (Twenty Seven Thousand Australian Dollars) [being sum of FJ\$45,255.00 (Forty Five Thousand Two Hundred and Fifty Five Fijian Dollars) converted as at the date of this claim) per month for 8 months (water sporting season) of every year since 2007 making a total loss sum of FJ\$2,534,280.00 (Two Million Five Hundred and Thirty Four Thousand Two Hundred and Eighty Fijian Dollars).*
 - c) *In addition to the above the Plaintiff company will continue to loss revenue at the rate of FJ\$362,040.00 (Three Hundred and Sixty Two Thousand and Forty Fijian Dollars) per annum until the nuisance and/or pollutant incident is removed.*
- (v) *The aforesaid allegations are not admitted. Thus, they are matters in question in the Court. In their Statement of Defence, the Defendants allege;*

Para (3) At all material times to this action there has been a coral reef:

- a. *In the sea which is in front of the land described in Certificate of Title No. 33161;*
 - b. *In and around the reef area where the alleged excavation works referred to in the Statement of Claim were commenced.*
- (4) *The area in and around the reef area where the alleged excavation works were commenced immediately prior to the alleged works were:*
- a. *not suitable for watersports activities;*

- b. *dangerous to anyone who sought to use the area for watersports activities*
- (5) *In the premises, the Plaintiff has not suffered any loss or damage caused by any alleged excavation works.*
- (6) *If, which is denied, the Plaintiff has suffered any loss or damage, the Defendants deny that any such loss or damage was caused by the Defendants.*
- (37) *As to paragraph 25 of the Statement of Claim, the Defendants deny the matters pleaded and say:*
- a. *if, which is denied, the Plaintiff has suffered any loss or damage, any loss of income or revenue requires a deduction for costs of sale and other business expenses incurred, Value Added Tax, company income tax and other taxes and charges properly payable by the Plaintiff;*
 - b. *if, which is denied, the Plaintiff has suffered any loss or damage arising out of the First Defendant's minor excavation works, the Plaintiff is put to proof of same.*
 - c. *that in June, 2007, the Plaintiff's Resort consisted of a small number of buildings used for accommodation which the Plaintiff has added to over the years of renovated without lawful and proper approvals;*
 - d. *the resort operated by the Plaintiff since relevantly on or about 14 June 2007, has been poorly:*
 - i. *operated and managed;*
 - ii. *maintained, resulting in a loss of business and potential customers;*
 - e. *that the Plaintiff's watersports activities at the resort:*
 - i. *have not been affected by the First Defendant's minor excavation works;*
 - ii. *will not be affected by the First Defendant's minor excavation works.*

(vi) It is against this factual background; I remind myself that the case of the Plaintiff or the Defendants respectively should be defined only by looking at the pleadings. It must be defined by reference to the Plaintiff's pleaded claim in its general sense, as distinct from its detailed exposition and by the Defendants pleaded Defence in the sense of its general refutation of the Plaintiff's claim. What matters for discovery purposes is the claim and defence to it in the broadest sense and not the detailed particulars of either claim or defence.

As to whether the documents sought to be discovered are **relevant** or not, I am much inclined to be guided by the famous judgment of Lord Justice Brett in Cie Financière

et Commerciale du Pacifique v. Peruvian Guano Co., (1882) 11 Q.B.D. 55. His Lordship submits that the test is not one of relevance to a pleaded issue, but whether the document relates to a matter in question.

The meaning of the expression 'relating to matters in question in the action' has been settled for over a century. The classical exposition of the meaning of that phrase was given by Bret LJ in Cie Financière et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55 at 62-63 as follows:

"The party swearing the affidavit is bound to set out all documents in his possession or under his control relating to any matters in question in the Action. Then comes this difficulty: What is the meaning of that definition? What are the documents which are documents relating to any matter in question in the action? In Jones v Monte Video Gas Co. (1880) 5 QBD 556) the Court stated its desire to make the rule as to the affidavit documents as elastic as was possible. And I think that that is the view of the Court both as to the sources from which the information can be derived, and as to the nature of the documents. We desire to make the rule as large as we can with due regard to propriety; and therefore I desire to give as large an interpretation as I can to the words of the rule. "a document relating to any matter in question in the action". I think it obvious from the use of these terms that the documents to be produced are not confined to those, which would be evidence either to prove or to disprove any matter in question in the action; and the practice with regard to insurance cases shows, that the Court never thought that the person making the affidavit would satisfy the duty imposed upon him by merely setting out such documents, as would be evidence to support or defeat any issue in the cause. The doctrine seems to me to go farther than that and to go as far as the principle which I am about to lay down. It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may-not which must-either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences"

As that passage makes clear, the definition of **relevance** was framed in the widest possible terms. I proceed to apply this test to the documents in respect of which discovery is sought.

Therefore, as far as the pleadings are concerned, the preliminary matters in question are;

- ❖ Whether the First and Second Defendants commenced excavation work on a reef directly in front of the Lomanisue Beach? (Paras 12 to 18 of the Statement of Claim)

If the first question is answered affirmatively,

- ❖ Whether the Plaintiff suffered economic loss and damages as a direct and natural result of the alleged excavation work? (Para 25 of the Statement of Claim)

(Or)

- ❖ Whether the Plaintiff's loss of business was due to its poor maintenance and mismanagement? (Para 37 of the Statement of Defence)

(vii) **Whether Business financial records are relevant ?**

Under the head of "**Business financial records**" the First and Second Defendants requested for;

- (a) *All financial statements [including Profit and Loss Statement and Balance Sheet] of the Plaintiff since the year 2000 to present date (showing separate figures for each activity i.e. windsurfing / kite / surfing / diving / sailing / kayaking / snorkeling / fishing adventures / stand up paddling etc.), audited by an independent auditor, or if no audited financial statements are available, all unaudited financial statements of the Plaintiff since the year 2000 to present date;*
- (b) *All tax returns, showing income received and VAT paid, from the beginning of Safari Lodge (Fiji) Limited in 2000 to present;*
- (c) *Copy of all bank statements for the Plaintiff from 2000 to present;*
- (d) *A copy of all the Plaintiff's Australian Bank Accounts;*
- (e) *Evidence of all bank deposits for the Plaintiff to Westpac Bank Rakiraki;*
- (f) *Copies of all cheque books for the Plaintiff from 2000 to present;*

For the Plaintiff it was contended that any documents other than its unaudited financial records are (i) not relevant and/or (ii) confidential.

As noted earlier, as I read the pleadings, the Plaintiff had charged at para 25 of the Statement of Claim an actual decline in its income by reason of loss of business due to the direct and natural result of alleged excavation on the reef by the Defendants. This is categorically denied by the Defendants at para 37 of the Statement of Defence. Alternatively the Defendants say that the Plaintiff's loss of business was due to poor maintenance and mismanagement.

Since large sums are attributed to the alleged loss of business as the direct and natural result of alleged excavation by the Defendants, it is plainly desirable that they should be particularised and must give discovery. This is relevant both to the quantum of general damages as well as to the cause of action.

Therefore, the Plaintiff's claim for general loss of business will have the advantage or disadvantage of a careful scrutiny, supported by documents and oral evidence from which the Court can decide whether in truth a decline of business resulted after the alleged excavation on the reef by the Defendants. The Plaintiff has to give particulars and facts and figures to support it. The Plaintiff should produce figures of turnover and graphs showing any sudden downward tendency, such, for instance, that, after the alleged excavation on the reef, business notably declined and so forth. The Defendants will have an opportunity of calling evidence to counter the Plaintiff's claim for general damages.

(viii) **Whether Copies of all financial statements including profit and loss statement and balance sheet are relevant ?**

This being an application for discovery of specific documents under R.H.C., O.24, r.7, the Court must first be satisfied that the class as a whole is relevant for discovery purposes and, if it is, must secondly consider whether discovery of such documents is necessary either "for disposing fairly of the cause or matter or for saving costs", in accordance with R.H.C., O.24, r.8.

Whether a class of documents as a whole is relevant for discovery purposes must depend upon what information it is reasonable to suppose the documents of the class contain.

The balance sheet of any business, ordinarily, would summarise the trading transactions of the business. It shows the business income, sales and expenditure and will show clearly the profit and loss suffered by the business for any given period.

The profit and loss statement and the balance sheet may throw light on the Plaintiff's income and turnover before the alleged excavation on the reef and after the alleged excavation on the reef. This may contain material relevant to Plaintiff's Claim for general damages as well as to the cause of action.

However, a request for the Plaintiff to discover **all of its business financial records** (viz, (a) *Copy of all bank statements for the Plaintiff from 2000 to present;* (b) *A copy of*

all the Plaintiff's Australian Bank Accounts; (c) Evidence of all bank deposits for the Plaintiff to Westpac Bank Rakiraki; (d) Copies of all cheque books for the Plaintiff from 2000 to present) is too wide and oppressive. (See; **A.G v North Metropolitan Tramways Co, (1892) 3 Ch, 70**). A request for discovery of great mass of documents, without any attempt at selection can be regarded as oppressive. The Court always has discretion to refuse to order discovery where it would operate oppressive; oppression could occur if the quantity of documents involved is large. (See; **A.G v North Metropolitan Tramways Co, 1892, 3, CH. 70.**) Therefore, I refuse to make an Order for disclosure in respect of document numbers "c" to "f" under category 'A' of Defendants Summons for discovery.

I refer also to what was said by the House of Lords in **Kent Coal Concessions Ltd v Duguid, (1910) AC 452**. In that case the House of Lords affirmed a decision of a Master ordering a further affidavit of documents where, from the inclusion in an original affidavit of discovery of a company report and balance sheet. It was inferred that the books which were the foundation of the balance sheet were also relevant. In **British Association of Glass Bottle Manufactures Ltd v Nettle fold, (1912) 1 K.B. 369**, Farwell, LJ at p. 377, stated the substance of the decision in **Kent Coal Concessions Ltd v Duguid** (*supra*) in the following passage; "It is allowable for the Court to draw inferences and to say, as in that case, 'Here is a balance sheet; a balance sheet necessarily implies the existence of books of account from which that balance sheet was made up; those books, so far as there were used to make up that balance sheet, are relevant because the balance sheet, is admitted to be relevant, and therefore they must be produced". **Therefore, under the head of 'Business financial records' only the profit and loss statement, balance sheet and the books of account from which that balance sheet was made up is discoverable but only from year 2000 to date.**

(ix) **Whether Copies of Tax Assessments issued by Fiji Revenue & Customs Authority are relevant ?**

The discovery of these documents is necessary to verify the balance sheet and profit and loss statements sought.

(x) **Whether Business Records are relevant ?**

Under the head of 'Business records' the First and Second Defendants requested for;

(g) *All the business, guest/tourist booking sheets and reservations and or any cancellations thereof for the Plaintiff's water sports activities, including windsurfing from 2000 to present (showing separate figures for each activity i.e. windsurfing / kite surfing / diving / sailing / kayaking / snorkeling / fishing adventures / stand up paddling etc.);*

(h) *Copy of all complaints made by guests of Safari Lodge (Fiji) Limited.*

For the Plaintiff it was contended that the 'Business Records' are (i) not relevant and /or (ii) confidential

As I said earlier, the Plaintiff had charged at para 25 of the Statement of Claim an actual decline in its income by reason of loss of business due to the direct and natural result of the alleged excavation on the reef by the Defendants. This is categorically denied by the Defendants at para 37 of the Statement of Defence.

In my view, the guest/tourist booking sheets and reservations may contain material, facts and figures relevant to the Plaintiff's business before the alleged excavation on the reef and after the alleged excavation on the reef. I adopt the approach taken in **Mulley v Mainfold (1959) 103 CLR 341**. Put simply, the Plaintiff's guest/tourist booking sheets and reservations would portray a more accurate portrayal of the Plaintiff's business situation before the alleged excavation and after the alleged excavation.

The Plaintiff's guest/tourist booking sheets and reservations, have, upon a reasonable view of the case, a bearing upon the question really in conflict between the parties, whether there was actually any sudden downward tendency, such as, for instance, that, in the period after the alleged excavation on the reef by the Defendants, whether Plaintiff's business noticeably declined and so forth. Therefore, I can come to no other conclusion than that a further affidavit ought to be made in respect of Plaintiff's guest/tourist booking sheets and reservations from 2000 to date.

The copies of all complaints made by guest may contain material relevant to the essence of the Defence (viz, they were not at fault, and alternatively the Plaintiff's loss of business was due to poor maintenance and mismanagement) (Para 37 of the Statement of Defence). The copies of all complaints made by guests may throw light on the Plaintiff's general management of the resort activities from which inferences could be drawn as to the Plaintiff's exercise of due diligence (if any) in respect of resort activities.

The Plaintiff is under a duty to disclose every document which it is reasonable to suppose contains information which may enable the Defendants either to advance the pleaded defence or to damage that of the Plaintiff, including documents which may fairly lead them to a train of inquiry which may have either of these two consequences.

As to 'business records', I hold that the Defendants have surmounted the threshold considered in some detail in the case of **Burmah Oil Co Ltd. V The Bank of England** (1980) AC 1090. Lord Wilberforce considered that the applicant must show a **strong positive case** that the documents might be a help to him. Lord Keith of Kinkel put the test as being one of **reasonable probability** while Lord Edmund Davies referred to **Likelihood**. A 'fishing expedition' in the sense in which the phrase has been used in the law, means, as I understand it, that a person who has no evidence that fish of a particular kind are in a pool desires to be at liberty to drag it for the purpose of finding out whether there are any there or not. Returning back to the case before me, there is material before the Court pointing to the possibility that the

Plaintiff has in its possession documents (viz, 'business records) tending to destroy its case or to support the case of the Defendants. Therefore, an application by the Defendants to inspect the said documents cannot be described as a 'fishing expedition'. I should add that there is **not** the slightest doubt in my mind of the relevance of the documents sought to be discovered under the head of "Business Records" under category "B" but also, that the balance of competing considerations is strongly in favour of maintaining and upholding the public interest that in a civil action the Court should be possessed of all relevant information to enable it to reach a just conclusion. Thus, I cannot uphold the first ground of objection as a basis for refusing discovery of 'Business Records.'

(13) **COMMERCIAL SENSITIVITY**

The Second ground of objection raises the head of "*Commercial Sensitivity*" as a basis for refusing discovery of "Business Records".

In this regard the Plaintiff deposed; (Reference is made to para (8) of the Affidavit in Opposition)

"The First and Second Defendant were my competitors and as such, I verily believe they are only seeking discovery of these documents to gain access to confidential information."

As I understand the submissions, the Second objection by and on behalf of the Plaintiff does not create a public interest against disclosure. It is based on a private interest which must yield, in accordance with well-established principles, to the greater public interest that is deemed to exist in ascertaining the truth in order to do justice between parties to the litigation. It is important to remember that, significantly as I believe, to allow the discovery of Plaintiff's 'business records' would be giving the Defendants an opportunity of ransacking the affairs and business secrets of their rival in business. In any event, the possibility of ransacking the affairs and business secrets of the Plaintiff's, by its rival in business is not a sufficient reason for the Court to refrain from giving full effect to the intention of the legislature; the Court cannot refuse to apply the law between litigants because of threats by Plaintiff's rival in business. The fear of possible ransacks of the affairs and business secrets of the Plaintiff's, by its rival in business should not deter the Court from ordering discovery where the demand of justice requires it. There is a greater public interest in ascertaining the truth (viz, whether there was actually any sudden downward tendency, such as, for instance, in the period after the alleged excavation on the reef by the Defendants, whether Plaintiff's business noticeably declined and so forth) in order to do justice between the parties to the action. Discovery, including production of documents for inspection, is part of Court's process to enable an action to be carried to a just conclusion. It saves costs and significant Court time. It disposes of legal issues efficiently. It is potentially a vehicle which our law provides to breathe reality into the much boasted shibboleths about the rule of law. The Court's priority of concern should be to bring people to justice. It is better to go as far as possible

towards justice than to deny it. I cannot agree that the Court should approach cases such as these relating to business/trade secrets with any preconceived notion that discovery should not be ordered 'except in very rare cases' and only in the 'last resort'. I think that cases of this type should be approached with a completely open mind. The question being "is discovery of Plaintiff's business records necessary for fairly disposing of these proceedings?" As I said in the above paragraph, (viz, Para 'x') the answer to this question is in the affirmative. Therefore, discovery should be ordered notwithstanding the fear of possible ransack of Plaintiff's business secrets and commercial affairs. It is of highest importance to the administration of justice that a solicitor in possession of confidential and privileged information such as business/trade secrets should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest. I am not, however, unconcerned with the important fact that to allow the discovery of Plaintiff's 'business records' would be giving the Defendants an opportunity of ransacking the business secrets and commercial affairs of their rival in business. As I said earlier, the possibility of ransacking the business secrets and commercial affairs of the Plaintiff's, by its rival in business is not a sufficient reason for the Court to refrain from giving full effect to the intention of the legislature. I acknowledge that the parties are competitors in a highly competitive business/market. How can justice be done and at the same time effect is given to the rights of the Plaintiff and the Defendants to the greatest possible extent? It is clearly established and has been affirmed by the House of Lords that a Solicitor who, in the course of discovery in an action, obtains possession of documents belonging to his clients adversary gives an implied undertaking to the Court not to use that material nor to allow it to be used for any purpose other than the proper conduct of that action on behalf of his client. (See; Home Office v Harman , 1982, (1) All.E.R. 532.). It must not be used for any 'collateral or ulterior' purpose, to use the words of Jenkins J. in Alterskye v Scott (1948) 1 ALL. E.R. 469., approved and adopted by Lord Diplock in Home Office v Harman (supra). It has been held by Scott J. in Sybron Corp v Barclays Bank PLC (1985) Ch. 229, that the implied undertaking applies not merely to the documents discovered themselves but also to information derived from those documents whether it be embodied in a copy or stored in the mind. These sanctions are usually sufficient to procure that documents disclosed on discovery are only use for the purpose of the present action. If the Defendants make use of information obtained on discovery for improper purposes, that is to say otherwise than *bona fide* in the course of the action, they are guilty of Contempt of Court. (See; Alterskye v Scott, (supra)).

"Discovery constitutes a very serious invasion of the privacy and confidentiality of a litigant's affairs. It forms part of English legal procedure because the public interest in securing that justice is done between parties is considered to outweigh the private and public interest in the maintenance of confidentiality. But the process should not be allowed to place on the litigant any harsher or more oppressive burden than is strictly required for the purpose of securing that justice is done. In so far as that must

necessarily involve a certain degree of publicity being given to private documents, the result has to be accepted as part of the price of achieving justice. But the fact that a certain inevitable degree of publicity has been brought about does not, in my opinion, warrant the conclusion that the door should therefore be opened widespread dissemination of the material by the other party or his legal advisers, for any ulterior purpose whatsoever, whether altruistic or aimed at financial gain". **Per Lord Keith of Kinkel in Home Office v Harman (supra).**

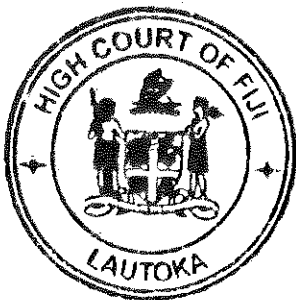
It would not be appropriate, particularly, when considering the disclosure of business/trade secrets and commercial sensitive information which would be very much important to Plaintiff's commercial rival, to leave the matter to the general situation in English law that matters disclosed on discovery may not be used of otherwise than for the purposes of the litigation in question. It is the bounden duty of this Court to take all reasonable and proper steps to procure that documents disclosed on discovery will not be used for any purpose 'collateral or ulterior to' the conduct of the action before the Court.

The dilemma of balancing the two public interests (viz, the public interest in discovering truth so the justice may be done between the parties and the public interest in preserving privacy and protecting confidential commercial sensitive information) can satisfactorily be resolved by imposing reasonable restrictions, viz, by making an order for an undertaking by the Defendants Solicitors that the said documents will not be shown to anyone other than the Defendants and that the Defendants will not use the documents for any purpose 'collateral or ulterior' to the conduct of the action before me. There are **three principles** which enable this Court to impose restrictions on the Defendants. First, the Court shall not order discovery which is not necessary for the fair disposal of the case before me. It follows that the Court has power to impose restrictions which ensure that the ambit of discovery is not wider than is necessary to dispose fairly of the action. The Second principle is that the Court may act to prevent any possibility of conduct which might constitute Contempt of Court. The third principle is that the Court may act to prevent what may be an abuse of the process of the Court. The Court has always inherent jurisdiction to restrain a threatened or likely or foreseeable abuse of the process of the Court by misusing the documents produced for inspection. Discovery, including production of documents for inspection, is part of its process to enable an action to be carried to a just conclusion. To use a document produced for inspection for a collateral or ulterior purpose is a misuse against which the Court will proceed for Contempt. Of course the Court should endeavour to ensure that the Defendants are not prejudiced by the restrictions in the reasonable conduct of their defences to the claim advanced, but in the unusual circumstances of this case I am satisfied that the Court ought to intervene and that there is jurisdiction to do so.

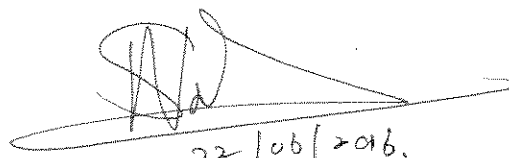
Essentially that is all I have to say!!

(F) **FINAL ORDERS**

1. I grant orders in terms of prayer (a), (b), (g) and (h) of the Defendants Summons for Specific Discovery, dated, 30th June 2015. (From the year 2000 to date).
2. As to prayer (a) of the Summons, the Plaintiff should disclose only the profit and loss statement, balance sheet and books of account from which that balance sheet was made up, from the year 2000 to date.
3. The Plaintiff be excused from disclosing the documents in prayer (g) and (h) of the Defendants Summons for Specific Discovery, **unless within seven (07) days hereof the Defendants Solicitors and the Defendants give an undertaking in writing to the Court that the said documents will not be shown nor their contents will be divulged to anyone other than the Defendants and that the Defendants will not use the said documents or permit it to be used for any purpose 'collateral' or 'ulterior' to the conduct of the action before me.**
4. I refuse to make an Order for discovery in respect of prayer "c" to "f" of the Defendants Summons for specific discovery because it is too wide and oppressive.
5. Costs in the cause.



At Lautoka
22nd June 2016


22 / 06 / 2016

Jude Nanayakkara
Master