

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 25 of 2008

BETWEEN : ESAVA CAKAUNITAVUKI of Garden of Joy, Navua, in the Republic of Fiji and
Melbourne, Australia, District Sales Manager

PLAINTIFF

AND : COLONIAL FIJI LIFE LIMITED and COLONIAL HEALTH CARE (FIJI)
LIMITED companies duly incorporated in Fiji and having its registered office at Level
10, Suva Central Building, Corner of Renwick Road and Pratt Street, Suva being successor
in title to the Colonial Mutual Life Assurance Society Limited pursuant to the Colonial Fiji
Life Act 1999.

DEFENDANTS

BEFORE : Master Vishwa Datt Sharma

COUNSEL : Mr. Emmanuel Narayan for the Plaintiff
Mr. John Apted for the Defendant

Date of Hearing : 13th June, 2016

Date of Ruling : 26th July, 2016

RULING

*[Summons for Further and Better Discovery by the Defendant pursuant to Order 24 Rule 7
of the High Court Rules, 1988 and under the inherent jurisdiction of this Court]*

A. INTRODUCTION

1. The Defendant filed this Summons for Further and Better Discovery and sought for the following Orders-
 - (i) A further and better list of the documents which are or have been in his possession, custody or power relating to any matter in question in this action;

- (ii) **An Affidavit-**
- (a) Verifying the said list;
 - (b) Stating whether he has or has at any time had in his possession, custody and power any document specified in the Schedule hereto, and
 - (c) If the said documents or any of them (whether on the list or specified in the Schedule hereto) has or have been but are now not in his possession, custody or power stating when he parted with the same, what has become of the same, and in whose possession they now are.
- (iii) AND for a further Order that the Plaintiff does within 7 days thereafter make available copies of such documents contained in the further and better list and as specified in the Schedule hereto for inspection on behalf of the Defendants.
- (iv) AND that the proceedings to be stayed until the Plaintiff complies with such Orders as the Court makes.
- (v) AND that the costs of and occasioned by this application be paid by the Plaintiff.
2. This application is made pursuant to *Order 24 Rule 7 of the High Court Rules, 1988 and the Inherent Jurisdiction of this Honourable Court.*
3. The application was argued in court on 13th June, 2016 at 11.30 am.

B. BACKGROUND

The Defendant's case

4. The Defendant filed an affidavit in support of Madonna Lania Fong deposed on 09th March, 2015 wherein she stated the following:-
- (i) The Plaintiff claims inter alia that he was wrongfully dismissed from employment.
 - (ii) The Plaintiff claims damages and losses from 2002 to 2014.
 - (iii) The Plaintiff has pleaded that he made numerous applications to find alternative employment, and that he was employed as a Purchasing Officer part-time.
 - (iv) The Plaintiff pleads that he would give credit for remuneration in similar occupation and tax deductions.
 - (v) The Plaintiff's claim and his entitlement to relief sought is denied by the Defendants.
 - (vi) The Plaintiff has not disclosed all necessary information relating to his endeavours in finding alternative employment, remuneration from similar employment and direct taxes on the same.

- (vii) The Plaintiff's solicitors were informed that the Plaintiff's list of documents were deficient, but were advised by the Plaintiff's solicitors that the Plaintiff did not have any of the additional documents requested.
 - (viii) The Plaintiff has or had the said documents, since he would have filed tax statements, would have kept documents relation to his application for employment.
 - (ix) The Plaintiff has to specify the dates in which the documents were last in his possession, custody or power, and where they are now.
5. The **Defendant** in his written submissions stated that the Plaintiff's Affidavit Verifying List of Documents filed on 18th July, 2014 only referred to the copy pleadings and a copy of the **Plaintiff's District Sales Manager's Agreement** in Schedule One Part One and a **few documents** between the Plaintiff and the First Defendant on or around January, 2002 in the Second Schedule. Further, the Plaintiff made no mention of any documents of his engagement by the First-named Defendant or his tax returns.
6. Upon making a further request for further and better discovery from the Plaintiff, the Plaintiff filed a Supplementary Affidavit Verifying List of Documents on 12th December, 2014 listing his **Fiji Tax statements for 1993-2001** and provided **only 2 lists of earning summaries from 2003-2014** and a list of employers from which he allegedly sought employment.
7. The Defendant was of the view that the documents so far discovered and furnished by the Plaintiff was still inadequate and that the Plaintiff has declined to provide any further documents therefore prompted the Defendant to file this application and seek for further and better discovery.

The Plaintiff's Case

8. The Plaintiff filed an affidavit in opposition deposed by Cakau Esava Cakaunitavuki and stated as follows-
- (i) He has filed the affidavits verifying list of documents on 18 July 2014 and 12 December 2014.
 - (ii) He has moved houses and misplaced or lost most of his documentary possessions.
 - (iii) He had given some documents to his previous solicitors but was advised by the said previous solicitors that those documents have not been retained by them. He has been unable to retrieve documents stored electronically in his computer.
 - (iv) He has provided the tax returns made available to him for the material years from the tax authorities.
 - (v) He has not kept documents relating to his applications for employment.

- (vi) He does not have specific recollection of all the documents that he possessed regarding his claim.
9. The Plaintiff's Writ action was filed on 22nd January, 2008 and amended on 07th December, 2010. The Plaintiff made claims for **damages** of approximately \$1.5 million plus interest for the alleged wrongful termination of the Plaintiff's contract for services 6 years before on 22nd January, 2002.
10. The Plaintiff was **employed** by the First Defendant in his capacity as the **District Sales Manager** during the period 1996 and 1999. On or about **24th January, 2002**, the First Defendant purported to **terminate the services of the Plaintiff** effective immediately purportedly acting to pursuant **Clause 18 (c)** of the District Sales Manager's Agreement dated 08th April, 1999.
11. The Plaintiff says that the said **termination of his services** was in all the circumstances unfair, wrongful, harsh, over the top, unlawful, invalid, null and void.
12. That by reason of the matters aforesaid, the Plaintiff has been deprived of the **compensation and commission and other benefits** he would otherwise have earned during the continuance of the said agreement and in particular the 1999 Agreement and he has thereby **suffered loss and damage**.

C. PRINCIPLES OF DISCOVERY

13. The general principal governing discovery of documents was stated by Brett LJ Compagni Fianciere -v- Peruvian Guano Co. (1882) 11 QBD 55 at pg 63. His Lordship Mr. Justice Byrne in Parvati Manilal Lallu Ranchod -v- Sundar Lal Lallu Suva High Court Civil Action No. HBC 488 of 1991 at page 3 of the judgment after referring to the above case summarise the principle as follows :-

"This text was applied by Menzies J. in Mulley -v- Manifold [1959] 103 CLR 341 at 345 where His Honour stated that discovery is a procedure directed towards a proper examination and determination of the issues between the parties as disclosed in the pleadings and not towards assisting a party upon a fishing expedition."

His Honour continued:-

"Only a document which relates in some way to a matter in issue is discoverable but it is sufficient if it would or if it would lead to a train of enquiry which would, either advance a parties own case or damage that of his adversary".

14. An application for discovery ordinarily falls into the following two distinct categories-

- (i) Firstly, there is the discovery of documents which are disclosed in the affidavit verifying list of documents; (O. 24, rule 2); or mutual discovery (O. 24, rule 1(2)). Largely they are disclosed voluntarily in the ordinary course of the pre-trial discovery.
- (ii) The second category falls into discovery of specific documents, or those which are not disclosed; (O. 24 rule 4). This may include documents which are not listed in schedule A, Part 2 of the affidavit verifying list of documents.

15. The rule permits the discovery of documents. *Order 24, rule 4(2)* provides:-

(2) Where in an action begun by writ an order is made under this rule for the determination of an issue or question, Order 25, rules 2 to 7, shall, with the omission of so much of rule 7(1) as requires parties to serve a notice specifying the orders and directions which they desire and with any other necessary modifications, apply as if the application on which the order was made were a summons for directions.

16. A fundamental prerequisite to discovery of specific documents is that the Summons must be supported by an affidavit. The affidavit must specify the particular document or documents or class of documents sought to be discovered. An applicant must establish a prima-facie case that the specific documents or class of documents do exist or have existed, and are relevant. Further they were in "possession, custody or power of the opposing party".

17. In *Halsbury's Laws of England* 4th Edition at pg. 78 the authors aptly describe 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 or 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 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 necessary discovery'.*

18. *Hid Lordship, Mr. Justice Fatiaki (as he then was) in A.B Annand (Christchurch) Ltd. v Australia and New Zealand Banking Group Ltd (1997) 43 FLR 22 30 January 1997* as follows:-

"...pre-requisites: the document must be relevant to a question or issue in the proceedings in so far as the same may be deducted 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”.

19. A relevant document is one which relates to:-

“...the matter in question in the action if it contains 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.

20. Custody, power and possession, is contextually defined as follows:-

“...“possession” means the physical or corporeal holding of the document pursuant to the right to its possession, as in the case of an agent or a bailee.; “custody” means the mere actual physical or corporeal holding of a document regardless of the right to its possession, as in the case of a servant or employee; and “power” means an enforceable right to inspect it or to obtain possession or control of the documents from the person who ordinarily has it in fact”. (See Halsbury’s Laws of England Vol. 13 at page 35 paragraph 39).

Further, it is trite law that for the purposes of the rule, the words possession, custody or power are interpreted as disjunctive.

21. However discovery will not 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 to fish for witnesses or a new case; *Calvet -v- Tomkies [1963] 3 ALLER 610*.
22. The overall purpose of this rule is to vest a wide jurisdiction to the court to order **discovery and inspection of documents**. Behind this robust approach, is the philosophy that, with proper discoveries, and the more discovery there is between the parties, the better disposed they are in thrashing out the issues between them in the pleadings. Ultimately, the Court will be far better disposed to determine the real issues raised in the pleadings. This is cost effective in that it saves time.
23. 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* where Master Udit cited *Korkis -v- Wer& Co. [1914] LT 794* as authority for this position).
24. In *Singh v Minjesk*, Master 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 to:

- Identify clearly the particular document or documents or class of documents that he seeks from to be discovered by the opposing party (Order 24 Rule 7(1)).
 - Show a prima facie case that the specific document or class of documents do in fact exist or have existed (Order 24 Rule 7(1)).
 - 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 s cited in Singh v Minjesk).
 - 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)).
25. An applicant will need to be heedful of accumulated case law material that 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 (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.

D. ANALYSIS AND DETERMINATION

26. The issue for this Court to determine is **whether an order be made that the Plaintiff file and serve the Defendant with Further and Better Discovery** as sought for in the Defendant's application.
27. Thus, the **Defendants** are seeking for an order that the **Plaintiff** provide the following **further and better documentary discovery-**

- (a) The Plaintiff's Income Tax Returns for each of the years ending 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014;
 - (b) The Plaintiff's Notices of Assessment for the years 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013 and 2014;
 - (c) The Plaintiff's wage or pay slips and all other evidence of income for the years 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013 and 2014;
 - (d) All contracts or letters of employment or engagement for the years 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013 and 2014;
 - (e) All application letters by the Plaintiff to various organisations and entities he sought employment or engagement with for the years 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013 and 2014, the advertisements to which he responded, as well as response letters from the respective organisations and entities; and
 - (f) All other documents relating to the earning of income/mitigation of loss from 2002 to date."
28. The Plaintiff in his written submissions **opposed** the Defendant's application for the following reasons-
- (a) *That the Plaintiff is unable to retrieve the requested documents which may have existed, since he has moved houses several times, and since he has lost items stored electronically.*
 - (b) *The Plaintiff has endeavoured to obtain the material tax documentation, as set out in the Plaintiff's affidavit filed on 20th August, 2015, and that the Plaintiff has discovered and disclosed, those material tax documentation provided to him.*
 - (c) *The Plaintiff submitted that as deposed in his Response Affidavit of 20th August, 2015, he does not have any form of payslips for remuneration received from his employment, and therefore, the Plaintiff cannot discover the same. He adds that that he has discovered all the material documents that were in his physical possession, custody or power.*
 - (d) *The Plaintiff submitted that in terms of the Response Affidavit, the Plaintiff has discovered all the material documents that were in his physical possession custody or power of the Plaintiff.*
29. An application for particular discovery is only necessitated where a mutual or even a general discovery under *Order 25 of the High Court Rules, 1988* fails.
30. The Plaintiff's Affidavit Verifying List of Documents in this case was filed on 18th July, 2014. This made reference only to the **copy pleadings** and a copy of the **Plaintiff's District Sales Manager's Agreement** in Schedule One Part One and a **few documents** between the Plaintiff and the First Defendant on or around January, 2002 in the Second Schedule. The Plaintiff did not mention about any **documents of his engagement** by the First-named Defendant or his tax returns.

31. Subsequently, the Defendant made a further request for further and better discovery from the Plaintiff. The Plaintiff filed a Supplementary Affidavit Verifying List of Documents on 12th December, 2014 listing his Fiji Tax statements for 1993-2001 and provided only 2 lists of earning summaries from 2003-2014 and a list of employers from which he allegedly sought employment.
32. The Defendant submitted that the documents so far discovered and furnished by the Plaintiff was still inadequate and that the Plaintiff has declined to provide any further documents.
33. The Defendant added that all documents applied for now and seeking discovery, do exist, are relevant to the matters in issue in this action and are in the possession, custody or power of the Plaintiff. This prompted the Defendant to file this application and seek for further and better discovery accordingly.
34. The documents applied for by the Defendant is re-stated hereunder and examined in relation to the Test in terms of the Principles of Discovery as discussed hereinabove-
- (i) *The Plaintiff's Income Tax Returns for each of the years ending 1993-2014 (inclusive).*
- (ii) *The Plaintiff's Notices of Assessment for the years 2002-2014 (inclusive).*
35. According to the Defendant, there is sufficient evidence to show these documents exist. As highlighted in paragraph 18 of Madonna Lania Fong's affidavit, the Plaintiff would have had to prepare his tax return each year as required by Law. He would have also received his tax assessments from the relevant tax authorities.
36. In relation to the relevance of these documents to a matter in issue in this action, the returns would show the Plaintiff's actual income which is relevant to assessing any lost income and any mitigation of that loss.
37. In addition to above, the Plaintiff had pleaded at paragraph 12 of his Amended Statement of Claim that credit would be provided for the deductions of tax in respect of the said salary the Plaintiff would otherwise have received, subject to the Plaintiff obtaining other employment or other appointment during the balance period.
- The Defendant submitted that for this reason these documents are relevant to this proceedings, the documents relating to the Plaintiff's tax affairs are discovered as they relate to the damages (if any) the Plaintiff might be entitled to in this action.
38. The Plaintiff submitted that he has endeavoured to obtain the material tax documentation as set out in the Plaintiff's affidavit filed on 20th August, 2015 (*response*

affidavit) and that the Plaintiff has discovered and disclosed, those material tax documentation provided to him.

39. The Plaintiff further submitted that in terms of the Response Affidavit, the Plaintiff has discovered all the material documents that were in his physical possession, custody or power.
40. On or about 24th January, 2002, the First Defendant purported to terminate the services of the Plaintiff effective immediately. Therefore it is evident that the Plaintiff was terminated on or about the 24th January, 2002. It is also not in dispute that the Plaintiff furnished the Defendant with the Fiji Tax statements for the period 1993-2001 inclusive.

It can now be concluded that the Plaintiff has not furnished any Tax returns and Notices of Assessments for the period 2002- 2014 inclusive.

It is also noted that the Plaintiff admitted at paragraph 11 of his Amended Statement of Claim that he was then, in 2010, employed on a part- time basis as a Purchasing Officer.

41. The Defendant submitted that the Plaintiff pleads at paragraph 11 of the amended statement of claim filed on 07th December, 2010, that he made ‘ numerous applications to find alternative employment’ and that he was presently employed on a part- time basis as a purchasing Officer and at paragraph 12 of the amended statement of claim the Plaintiff stated that he would give credit herein for -

- (i) *Such remuneration as he would have earned in similar employment or engagement during the said balance period;*
- (ii) *Deduction of tax in respect of the said salary the Plaintiff would otherwise have received in the engagement by the said Defendant Company, subject to the Plaintiff obtaining other employment or other appointment during the said balance period.’*

(Highlighting is mine for deliberation)

42. Upon a careful reading of above at paragraph 41 (i) and (ii) that credit would be given on the salary earned and tax deductions on the condition that the Plaintiff obtains other employment or other appointments.

Therefore, it is for the Defendant to establish that the Plaintiff was in a part-time or full time employment after he was terminated by the First Defendant in 2002, except for the year 2010, wherein the Plaintiff admits being employed on a part- time basis as a Purchasing Officer.

43. Reference is made to *section 4 of the Income Tax Act (Cap 201)*. It is an Oath of secrecy that the said employees of the Fiji Islands Revenue and Customs Authority (FIRCA) are required to take. The officers of the Authority are under a strict statutory requirement from disclosing any documents or information pertaining to a tax payer.

44. There is no doubt that the **Tax Returns and Notices of Assessments** for the period **2002- 2014** inclusive can be extracted or requested for by the **Plaintiff** from the **Fiji Islands Revenue and Customs Authority (FIRCA)** since it belongs to them, provided that the **Plaintiff** was in employment during this period, except 2010, and that the **Plaintiff** had lodged his **Tax Returns** for this period of time. Even if the **Plaintiff** is unable to extract the **Tax returns and Notice of Assessment** for this period, then he must file and serve a **supplementary affidavit** stating the **reasons for his failure** to furnish the same. The purpose for proper **discoveries**, and the more **discovery** there is between the parties, the better disposed they are in thrashing out the issues between them in the pleadings. Ultimately, the Court will be far better disposed to determine the real issues raised in the pleadings. This is cost effective in that it saves time of all parties concerned.
- (iii) *The Plaintiff's wage or pay slips and all other evidence of income for the years 2002-2014 (inclusive).*
- (iv) *All contracts or letters of employment or engagement for the years 2002-2014 (inclusive).*
- (v) *All application letters by the Plaintiff to the various organisations and entities he sought employment or engagement with for the years 2002-2014 (inclusive), the advertisements to which he responded, as well as response letters from the respective organisations and entities.*
45. The **Defendant** submitted that all of these documents relate to the **Plaintiff's earnings and employment** for the years following his engagement with the **First Defendant** and are therefore relevant to assessing any **lost income and any mitigation of that loss**. He submitted that the **Plaintiff** said that these documents are longer in his possession, he has not denied they are within his power to obtain. The **Defendant** further reiterates **paragraph 41 (i) and (ii)** as hereinabove.
46. The **Plaintiff** submitted that as deposed in his **Response Affidavit**, the **Plaintiff** doesn't have any form of **payslips** for remuneration received from his employment, and therefore, the **Plaintiff** cannot discover the same. Also, the **Plaintiff** is unable to retrieve the requested documents which may have existed, since he has moved houses several times, and since he has lost items stored electronically. Further, in terms of the **Response Affidavit**, the **Plaintiff** has discovered all the material documents that were in his physical possession, custody or power.
47. A fundamental prerequisite to discovery of specific document is that an applicant, (the **Defendant**), must establish a **prima-facie** case that the specific documents or class of documents (in this case *documents as per paragraph 44 (iii) - (v) inclusive*), do in fact exist or have existed, and are relevant and they were in '**possession, custody or power** of the opposing party (the **Plaintiff**).

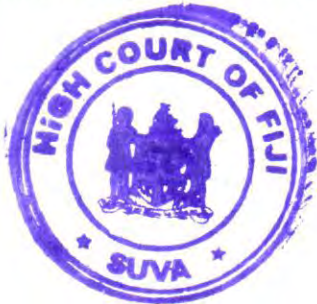
48. Relevance of the documents as stated at paragraph 44 (iii) - (v) inclusive does exist in order to mitigate the damage (if any) in this case. There is no evidence that the Plaintiff was in employment and or earned any income under that period for which these documents are sought for, **except for the period 2010**, when the Plaintiff was employed in his capacity as a **part-time Purchasing Officer**, as already admitted by the Plaintiff in his affidavit, the **Defendant** has failed to establish a **prima-facie** case that these documents (*documents as per paragraph 44 (iii) - (v) inclusive*), do in fact exist or have existed, and are relevant and they were in **'possession, custody or power** of the opposing party (the Plaintiff).
49. The Plaintiff is directed to **file and serve a Supplementary Affidavit** annexing any salary slip, evidence of income, contracts or letters and advertisements of his employment as a part-time Purchasing Officer during the **2010 period only**, since there is no evidence before this Court that the Plaintiff after his termination by the First Defendant was in employment elsewhere.
- (vii) *All other documents relating to the earnings of income/mitigation of loss from 2002 to date.*
50. The **Defendant** submitted that he has reserved the right to rely on any income earned by the **Plaintiff** in mitigation of his damage. That these documents exist because the **Plaintiff** has pleaded being in part time employment and making numerous applications for employment to various organisations from 2002 to date.
51. Further, the **Defendant** submitted that these documents are **relevant** to this action in that they affect the **calculation of damages** (if any) the **Plaintiff** would be entitled to.
52. That these documents would be in the **possession, custody or power** of the **Plaintiff** because they would be documents personally created or received by him during the relevant period.
53. The **Plaintiff** submitted that in terms of the **Response Affidavit**, the **Plaintiff** has **discovered all the material documents** that were in his **physical possession, custody or power**.
54. Further, the **Plaintiff** submitted that as deposed in his **Response Affidavit**, the **Plaintiff** doesn't have any form of payslips for remuneration received from his employment, and therefore, the **Plaintiff** cannot discover the same. Also, the **Plaintiff** is unable to retrieve the requested documents which may have existed, since he has moved houses several times, and since he has lost items stored electronically. Further, in terms of the **Response Affidavit**, the **Plaintiff** has **discovered all the material documents** that were in his **physical possession, custody or power**.

55. I reiterate that there is no evidence that the Plaintiff was in employment and or earned any income under that period for which these documents are sought for, except for the period 2010, when the Plaintiff was employed in his capacity as a **part-time Purchasing Officer**, as already admitted by the Plaintiff in his affidavit, the Defendant has failed to establish a **prima-facie** case that these documents (*documents as per paragraph 44 (iii) - (v) inclusive*), do in fact exist or have existed, and are relevant and they were in 'possession, custody or power of the opposing party (the Plaintiff).
56. The Plaintiff is directed to **file and serve a Supplementary Affidavit** annexing any salary slip and evidence of income derived from his employment as a part-time Purchasing Officer during the **2010 period only**, since there is no evidence before this Court that the Plaintiff after his termination by the First Defendant was in employment elsewhere.
57. In conclusion, for the aforesaid rational, I order accordingly:-

ORDERS

- (a) The Plaintiff to file and serve An Affidavit Verifying a List of Documents in respect of Tax Returns and Notices of Assessments for the period 2002- 2014 inclusive.
- (b) The Plaintiff is directed to file and serve a Supplementary Affidavit annexing any salary slip, evidence of income, contracts or letters and advertisements of his employment as a part-time Purchasing Officer during the 2010 period only.
- (c) If the plaintiff is unable to discover any document, then he should set out clearly in the affidavit what attempts he has made to locate the documents and why he is not able to discover these documents including details of when he parted with any of them and what has become of them.
- (d) Costs to be in Cause.

Dated at Suva this 26th Day of July 2016




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VISHWA DATT SHARMA
Master of High Court, Suva