

of 4th Defendant, who is not a party to this action. According to the Plaintiff sales of shares in 4th Defendant is a 'dealing' in relation to iTaukei land as 4th Defendant owns the shares of 2nd and 3rd Defendants which, are two lessees of Native Land (at the moment Sheraton and Westin hotels in Fiji are located in those lands). By way of Mandatory Injunction the Plaintiff is seeking first right of refusal of shares in 2nd 3rd and 4th Defendants in terms of clause 15 of lease agents, which was already varied by 1st 2nd and 3rd Defendants as parties to the said two leases. The Plaintiff is a member of one of the land owning units of the land leased to 2nd and 3rd Defendants. The Plaintiff had sought some declarations and damages for alleged breaches by the Defendants. Alternately the Plaintiff is also seeking specific performance for issuance of shares in 2nd and 3rd Defendants to 1st Defendant. It should be noted at the outset no shares of 2nd and 3rd Defendants are on sale and only the shares of parent company (4th Defendant) are on sale. 4th Defendant's shares are owned by Fiji Cayman Holdings (FCH) and it had offered, the shares of 4th Defendant on sale. The effect of that share sale would be the control of properties (Westin and Sheraton hotels) on Two Leases that the Plaintiff is claiming certain interests as a member of one of the land owning units to the said two leases. The Plaintiff has filed this action as representative action, too.

FACTS

2. The 1st Defendant has entered in to on two iTaukei leases (Two Leases) where presently Westin and Sheraton Hotels and Golf Course situated. They are
 - (a) TL (formerly NL) 13796 dated 17 January 1971 – the Westin Lease;
 - (b) TL (formerly NL) 14619 dated 10 April 1974 – the Barton Lease. (Sheraton Lease)
3. The Two Leases provided, when they were entered into, that the then lessee companies would issue shares to 1st Defendant, as lessor, in lieu of lease premium, when improvements were made on the leased lands. They also set out how rent should be paid. The relevant words of the Westin Lease are as follows:

(Pages 1-2 of annexed JV -3 of the Affidavit in support)
IN CONSIDERATION of the premium hereinafter set out as "Participation of Native Owners", THE NATIVE LAND TRUST BOARD (hereinafter called the lessor) hereby leases to COMMERCIAL INVESTMENTS PROPERTIES LIMITED, whose post office address is Post Office Box 254, Nadi Airport, Fiji (hereinafter called the lessee) to be held by the lessee as tenant for the space of ninety-nine (99) years commencing on the 1st day of July, 1970, at the yearly rental hereinafter reserved to be paid to the lessor half-yearly in advance on the first days of January and July in every year, ALL THAT PIECE OF PARCEL OF LAND described as follows:

TO HAVE AND TO HOLD the same unto the lessee for the whole of said term, the lessee yielding and paying therefore unto the lessors in equal half-yearly instalments in advance during said term, rent as follows:

(a) Basic Annual Rent. The Basic Annual Rent, which applies to all undeveloped portions of the land and to all developed portions for two (2) years after improvements thereon have been placed in operation, shall be TWO HUNDRED DOLLARS (\$200.00) per acre per year for the first ten years and such annual rent for and during each successive ten-year period of said term as shall be established by reassessment hereunder; provided, however, that during the continuation of any share purchase options in favour of the Native Owners hereinafter established, only one-half (1/2) of said Basic Annual Rent shall be paid to the lessor and the other one-half (1/2) shall be credited to the Native Owners for application to the purchase of said shares on their behalf pursuant to the aforesaid option; and, further provided, that if and when said options shall have been fully exercised and exhausted or shall have lapsed according to the terms thereof, then in any such event the entire Basic Annual Rent, if any be then payable, shall be paid to the lessor half-yearly in advance as aforesaid.

(b) Annual Percentage Rent. The Annual Percentage Rent, which applies to all developed portions of the land two (2) years after the improvements thereon have been placed in operation, shall be two and one-half percent (2 1/2 %) of the gross receipts generated thereby; provided, however, that the maximum rent payable thereon shall not exceed ONE HUNDRED FIFTY THOUSAND DOLLARS (\$150,000.00) per annum; and further provided, that when the Annual Percentage rent applies to the parcel comprising Lot No.2 in the Denarau Island development plan, then the combined maximum rent payable in respect of Lots No.1 and No.2 shall be ONE HUNDRED FIFTY THOUSAND DOLLARS (\$150,000.00) per annum. From and after its initial application, the Annual Percentage Rent shall be the entire rent due hereunder and shall supersede and be entirely in lieu of the Basic Annual Rent on said developed portion of the land."

(emphasis added)

(Barton's lease contains provisions identical to the above. Which is annexed as JV-2 to the Affidavit in support)

Clause 15 of the lease annexed as JV-3 to the affidavit in support states as follows:

"15. Participation of Native Owners. The Native Owners shall be permitted to participate in the operation and resulting benefits thereof as follows:

(a) Issue of Participating Shares. When the improvements constructed on the land are first placed in operation the company or other entity then holding this lease, whether the same be the lessee or its permitted sublessee or assigns (hereinafter called the operating company) shall issue the lessor such number of shares of its profit participating stock or units of ownership as shall result in the lessor receiving and holding five percent (5%) of said shares then issued and outstanding.

(b) Share Purchase Option. At any time within the first ten (10) years after said improvements are placed in operation, the lessor shall have the right to acquire such additional number of said shares as would result in its receiving and holding an additional five percent (5%) of said shares of the operating company then issued and outstanding. If the said option is exercised at any time during the first five (5) years of operation, the price to be paid per share shall be either par or market value, whichever is less. If said option is not fully exercised and exhausted by the end of said first five (5) years, then at any time during the second five (5) years of operation, the lessor may acquire any remaining option shares by paying the current market value of the shares at the time of exercising the option. If the lessor and the operating company fail to agree upon the current market value of the shares to be so acquired, then the matter of valuation shall be submitted to a Board of Arbitration for determination. The lessor and the operating company shall each name one chartered accountant to the Board, and the two so named shall select a third member. Any matter submitted to arbitration as aforesaid shall be subject to and be determined in accordance with the Arbitration Ordinance Cap. 30, Laws of Fiji, 1967.

(c) Sale of Shares. All operating company shares shall be subject to a right of first refusal in favour of the existing shareholders, and any shareholder electing to sell any or all of his shares shall first offer said shares proratably to the existing shareholders on the same terms and at the same price being offered before selling the same to any other purchaser.

(d) Representation on Governing Board. The articles of said operating company shall provide and continue to provide that the lessor may name one director, upon the nomination of the Native Owners, to the governing board for every ten members, or fraction thereof, on the board.

(e) Employment of Native Owners. When the land hereby demised has been developed as aforesaid and the improvements constructed thereon have been placed in operation, then the lessee and the operating company, if the latter be other than the lessee, shall accord an employment preference to the Native Owners. An employment preference shall mean that in the event that there is either a skilled or an unskilled job vacancy for which a member of the Native Owners is qualified and is then available to fill such vacancy and is capable of satisfying all other established job requirements, and if all other employment considerations as between a member and a non-member applying for the same job are equal, then preference shall be given to a member of the Native Owners over a non-member. Upon being employed, said members shall be subject to all prevailing employment rules, practices, and policies of the employer".

4. The **Clause 15(a)** in the Barton Lease (Annexed JV-2) is not identical to the above Clause 15 in Annexed JV-3, and begins with 30 day time period on which it becomes operational. Apart from the said operational time period of 30 day from the registration, the rest is similar. It begins with

'Within thirty (30) days after the registration of this lease, the company or other entity then holding this lease, whether the same be the lessee or its permitted sublessees or assigns.....(the rest of the clause is similar to the abovementioned lease.)

5. The history of the leases (and the shares required to be issued under clause 15 of those leases) is set out in the written submission of the 2nd 3rd and 4th Defendants (1st Defendant associated with that submission at the hearing) are not disputed and for convenience I reproduce the same as below with some deletions.

Date	Event
23 February 1971	Issue of TL13796 (Westin Lease) to Commercial Investments Properties Limited
4 July 1973	Assignment of Westin Lease to Nadi Beach Hotel Limited
10 April 1974	Issue of TL14619 (Sheraton Lease) to Fujikan Fiji Limited
8 May 1974	Issue of shares in Fujikan Fiji Limited to TLTB
1977	Westin (then Regent of Fiji) begins operations
[uncertain]	Issue of shares in Nadi Beach Hotel Limited to TLTB
5 September 1985	Assignment of Sheraton Lease to Capos Limited
[uncertain]	TLTB shares in Capos Limited "transferred in 1986"
1987	Sheraton begins operations
25 November 1990	"Shares held...were paid out to the landowners in 1990 on their request to pay off debts."
24 July 1996	Assignment of Westin Lease to Dubbo Limited Assignment of Sheraton Lease to Barton Limited
23 Sep 2015	Deed of Variation of Westin Lease Deed of Variation of Sheraton Lease (varying clause 15)

6. The current lessees of the Two Leases are Barton Limited (Second Defendant) (Sheraton Lease), and Dubbo Limited (Third Defendant) (Westin Lease).
7. 2nd and 3rd Defendants are fully owned subsidiaries of 4th Defendant (Excluding nominee shares held to comply with the minimum two-shareholder rule under the Companies Act that was repealed which is a company incorporated in Fiji. The shares in 4th Defendant are owned by an offshore company, Fiji Cayman Holdings (FCH) which is not a party to this action.
8. 2nd and 3rd Defendants had never issued shares to 1st Defendant and it had not requested Defendants to issue shares to it, at the time of the said transfer of two leases to them from the previous lessee.
9. The Plaintiff contend that since all lessees of the said two land parcels, except 2nd and 3rd Defendants had granted them shares, of such entities to the 1st Defendant, 2nd and 3rd Defendants are obliged to do so. According to the Plaintiff such share allocations were done in terms of clause 15, at the time of the said transfer of leases, to previous lessees.
10. There is no evidence that neither 2nd Defendant nor 3rd Defendant have ever issued dividends to its shareholders. It is believed that they had reinvested the profits in the respective entities enhancing their assets per share value. This will also enhance the share values of 4th Defendant, which is on offer at the moment.
11. In September 2015, 1st, 2nd and 3rd Defendants entered into Deeds of Variation which amended clause 15 of each of the two Leases. This variation is also registered accordingly. The varied clause 15 reads as follows:
Clause 15 in exhibits (Annexed JV 7 and JV 8 of Affidavit in Support)are as follows:

"THE PARTIES HAVE AGREED THAT THE LEASE SHALL BE VARIED AS FOLLOWS:

1. *By the deletion of clause 15 in its entirety and the substitution therefor of the following words:*

"15(a) Representation on Board of lessee. The Articles of Association of the lessee or its assignees shall provide, and continue to provide, that the board of directors of the company shall at all times include a nominee of the lessor, whose appointment

- (i) Shall commence when the company receives notice in writing of that appointment from the lessor and*

- (ii) *Shall continue, subject to any law in force concerning the qualification of a person to hold office as a director, until notice is received from the lessor terminating his or her appointment.*

"15(b) Participation of iTaukei Owners through the agency of the Lessor. If at any time during the term of the lease, the lessees or its assignees offers to the public redeemable preference shares in the lessee or its assignees, the lessor, as agent of the iTaukei owners, shall have the right to subscribe to such shares, on the same terms and conditions as all other subscribers, up to an amount not exceeding ten per cent (10%) of the total number of redeemable preference shares comprised in the issue.

To give effect to this clause:

- (i) *The lessee or its assignees shall, at the commencement any such offer to the public, deliver written notice to the lessor enclosing the terms of the offer and the total number of redeemable preference shares or comprised in the issue.*
- (ii) *The lessor must within 21 days deliver to the lessee completed subscription documentation and the required subscription moneys (on the same terms as is required of other subscribers) for a specified number of redeemable preference shares not exceeding 10% of the total number comprised in the issue.*

After delivery of the documentation and moneys referred to in subparagraph (i) the lessee or its assignees will be at liberty to accept completed subscription documentation and required subscription moneys from any other person without regard to the provisions of this clause 15(b)."

12. The shareholder of 4th Defendant (FCH) offered its shares in 4th Defendant in 2015 (1st Share Offer)
13. In pursuant to 1st Share Offer October 2015 FCH had entered in to Share Sale Deed with Avoser Challenge Limited to sell the shares of 4th Defendant, but this was terminated later.
14. FCH is in the process of inviting offers for the shares in 4th Defendant afresh, and when the OSI was filed offer was not concluded. (2nd Share offer).
15. On 3 November 2015, the Plaintiff had lodged caveats against the Two Leases, and the lessees are 2nd and 3rd Defendants, and a separate action is pending relating to the removal of the said leases.

ANALYSIS

Locus Standi

16. In January 2016, the Plaintiff issued the substantive proceedings in this case. He claims to do so in both a personal and representative capacity. He claims to be a "native owner" under the Two Leases. The Plaintiff is a member of his Land Owning Unit (LOU). Some of other 344 LOU members have different lawyers and are involved in different proceedings in HBC 319 of 2016. (see affidavit in opposition of 2nd -4th Defendants in , paragraph 11, Annexure AC-2) Defendants objected to the *locus standi* of the Plaintiff to bring this action at the hearing. Plaintiff relied on Fiji Court of Appeal decision in *Narawa v Native Land Trust Board* [2002] FJCA 9; ABU0012.99S (decided on 31 May 2002), I agree with the Plaintiff's submission that in terms of the said Court of Appeal decision Plaintiff as a member of land owning unit could bring a representative action, even if there is no evidence of majority members of the land owning unit does not support his action. The Court of Appeal in *Narawa* (supra) held,

'First, all the members of the mataqalis have a common interest in ensuring that the agreements are being properly administered by the Trust Board, and that they receive whatever is due to them from the agreements. If, as the appellants allege, the agreements have not been properly administered and Timber Fiji is guilty of breaches for which damages are payable but have not been claimed, the members will also have a common grievance. Whether in fact that is so can only be determined at the trial. Similarly, if the causes of action are made out, the relief obtained is likely to be beneficial to the members or at least most of them.

Secondly, it is apparent from the affidavits filed that a substantial number of the members of the mataqalis support the appellants in their action. It is also apparent that a substantial number do not. But they appear not to be advocating a different course of action, rather they favour taking no action at all. If the action succeeds, they will share in the fruits of it. If it does not, they will not be liable for costs.

*Thirdly, as we have pointed out, the appellants have no other course open to them. They cannot sue personally. They cannot bring an action as an unincorporated association because they would not obtain unanimity. As Megarry J pointed out in *John v Rees* (above) the representative action is a procedure the purpose of which should be to achieve justice. In the absence of any other remedy available to the appellants, the interests of justice will be served by allowing the action to proceed.*

Fourthly, the persons seeking to represent the members of the mataqalis are persons of standing. The court accepts that the paramount chief of the Yavusa Burenitu of Serua representing all the mataqalis and a former member of Parliament are likely to have acted responsibly in bringing the proceedings.

Fifthly, the rule provides that some of the class can be accepted from those represented. If some of those who do not support the action wish to be excluded, an application to the court can be made to achieve that result'. (emphasis added)

17. The above 5 reasons stated in the Court of Appeal decision are not principles for recognising a right to representative action by a member of land owning unit. There is no requirement that all 5 reasons are needed for a representative action. The ratio of the said Court of Appeal case is that a member of land owning unit who has a common grievance can make a representative action even without majority consent. The standing of the Plaintiff in the society in Court of Appeal decision that was stated as fourth reason in the said Court of Appeal decision in Narawa (Supra) is obiter.
18. Though the Plaintiff could institute an action as a member of land owning unit without evidence of majority of the members of land owning unit, this lack of approval from majority would be a consideration when it relates to an injunction as the court is required to consider the representative nature of the Plaintiff and how the reliefs sought going to affect the land owning unit as a whole. This aspect will be considered later in this judgment. As an example the orders that he seeks for right of first refusal regarding the share transaction cannot sustain.
19. Lack of consent of majority of the members of the land owning unit can be a factor that is considered in the exercise of the discretion of the court regarding the grant of injunction.

Undertaking as to the Damages

20. In the affidavit in opposition of 2-4th Defendants sworn by Mr. Caldwell in paragraphs 8(i) and 66, he stated that that significant work is being done and cost incurred in the course of preparing for the present offer of shares had incurred and a delay in completing it could result in significant loss. Already the entity that was selected in the 1st Share Offer did not conclude with the share transfer, and this was not related to the present action. So, the 2-4th Defendants should be aware of cost of a 2nd Share Offer.
21. He had also alerted loss of potential bidders if injunction is granted. This may be so considering that what is on offer. It is a substantial investment and there would be numerous extraneous factors that determine best offer for the FCH. There is an impact

on the 2nd Share Offer if an interim injunction is granted, this is considered in the balance of convenience of the parties.

22. The Plaintiff has given an undertaking as to damages dated 3 October 2017. He has based on this undertaking on this alleged claim for damages, which is not a security that can be relied upon. Firstly, the Plaintiff's SOC is not decided and court cannot predetermine success of that and consider the claim as a security. In an action of this nature where economic power of the two parties are imbalanced I am not inclined to reject the Plaintiffs application for interim injunction only on the insufficiency of the undertaking given by the Plaintiff, though it is a factor that I consider, in the balance of convenience.

Orders in the Summons for Injunction (OSI)

23. The Plaintiff in the summons filed on 3rd October, 2017 sought following interim orders

Restraining Order not to Consent to dealing

1. THE 1st Defendant and its Board, servants, nominees, employees, agents, assigns, officers, managers and anyone else acting on its behalf or in conjunction with it, and any and all persons with notice of this injunction, or otherwise howsoever, are restrained until further order of this Court, from directly or indirectly, by any means whatsoever, granting consent to the 2nd, 3rd and the 4th Defendants, and their servants, shareholders, nominees, employees, agents, assigns, officers, directors and anyone else acting on their behalf or in conjunction with any of them including but not limited to the accepted purchaser, and any and all persons with notice of this injunction, or otherwise howsoever, to deal in the Westin lease and the Sheraton lease, or either of them, by transfer, assignment of otherwise howsoever.

Restraining Order not to sell

2. THE 2nd, 3rd and the 4th Defendants, and their servants, shareholders, nominees, employees, agents, assigns, officers, directors and anyone else acting on their behalf or in conjunction with any of them, and any and all persons with notice of this injunction, or otherwise howsoever, are restrained until further order of this Court, from directly or indirectly, by any means whatsoever:

- a. *offering for sale by information memorandum, calling for tenders, selling, sanctioning or ratifying, removing, dissipating, alienating, transferring, assigning, encumbering, or similarly dealing with any shares or assets of the 2nd, 3rd and 4th Defendants, including but not limited to the sale of shares by the 4th Defendant in 2nd and 3rd Defendant companies or the sale or the sale of the ultimate beneficiaries, ownership and control, or transfer of shares of the 4th Defendant to any third parties, parent companies or holding companies in Fiji and elsewhere;*
- b. *instructing, requesting, counselling, demanding or encouraging any other person to do so; and*

- c. *facilitating, assisting in, aiding, abetting, or participating in any acts the effect of which is to do so.*

3. **THE 2nd, 3rd and the 4th Defendants, and their Boards, shareholders, nominees, servants, employees, agents, assigns, officers, directors and anyone else acting on their behalf or in conjunction with any of them, and any and all persons with notice of this injunction, or otherwise howsoever shall refrain from any act or omission which transfers effective control of exclusive possession under the Westin lease and Sheraton lease, or either of them, by transfer, assignment of otherwise howsoever, without the Plaintiff's informed consent before final determination of the substantive proceeding.**

4. **PARAGRAPHS 1, 2 and 3 apply to all of the shares in the 2nd, 3rd and 4th Defendants whether or not they are in their own name and whether they are solely or jointly owned. For the purpose of this order, the shares of the 4th Defendant include any shares which it has the power, directly or indirectly, to dispose of or deal with as if it were its own. The 4th Defendant is to be regarded as having such power if a third party holds or controls the shares in the 4th Defendant in accordance with its direct or indirect instructions.**

5. *The 1st, 2nd, 3rd and 4th Defendants, and their Board, their shareholders, nominees, servants, employees, agents, assigns, officers, directors and anyone else acting on their behalf or in conjunction with any of them, and any and all persons with notice of this injunction, or otherwise howsoever shall refrain from doing or omitting to do anything contrary to the Plaintiff's interest as cestui que trust under a constructive trust over the 2nd, 3rd, and 4th Defendant's shares by consenting to, recording, minuting, registering or facilitating or otherwise howsoever doing any of the things set out in Parts 9 and 10 of the Companies Act 2015, without the Plaintiff's informed consent before final determination of the substantive proceeding.*

Right of first refusal on sale of shares

6. **THE 1st, 2nd, 3rd and 4th Defendants and their Boards, shareholders, nominees, servants, employees, agents, assigns, officers, directors and anyone else acting on their behalf or in conjunction with any of them, and any and all persons with notice of this injunction, or otherwise howsoever, are restrained from consenting to deal, selling, transferring or otherwise dealing with the shares in the 2nd, 3rd or 4th Defendants with a third party, parent companies or holding companies in Fiji and elsewhere, other than the Plaintiff herein unless the Plaintiff as existing shareholder, has previously been given a right of first refusal to purchase the operating or ordinary shares proratably on the same terms, conditions and the same price being offered before selling the same to any other purchaser.**

Mandatory Injunction

7. **FURTHER OR ALTERNATIVELY, a mandatory injunction directed at the 2nd, 3rd and 4th Defendants and their shareholders, nominees, servants, employees, agents, assigns, officers, directors and anyone else acting on their behalf or in conjunction with any of them, and any and all persons with notice of this injunction, or otherwise howsoever, to offer to the Plaintiff by way of a right of first refusal the shares in the 2nd, 3rd and 4th Defendants proratably on the same terms and the same price being offered or has been previously offered by a third party or other purchaser to the 2nd, 3rd and 4th Defendants and their servants, shareholders, nominees, employees, agents, assigns, officers, or directors,**

Mareva Injunction

8. FURTHER OR ALTERNATIVELY if the total value free of charges or other securities of the 4th Defendants' assets in Fiji exceeds \$100 million (ONE HUNDRED MILLION DOLLARS), the 2nd, 3rd and 4th Defendants may sell, remove, dissipate, alienate, transfer, assign, encumber, or similarly deal with them so long as the total unencumbered value of the 4th Defendant's assets in Fiji remains above \$100 million.

Alternative Payment of Security into Court

9. Order 8 above will cease to have effect if the 2nd, 3rd and 4th Defendants and their shareholders, nominees, servants, employees, agents, assigns, officers, directors and anyone else acting on their behalf or in conjunction with any of them, and any and all persons with notice of this injunction, or otherwise howsoever, provide security by paying the sum of \$100 million (ONE HUNDRED MILLION DOLLARS) into an interest bearing account of the High Court of Fiji registry and the said registry is hereby directed to accept such payment.

10. **THE** 1st, 2nd, 3rd and 4th Defendants and their Board, shareholders, nominees, servants, employees, agents, assigns, officers, directors and anyone else acting on their behalf or in conjunction with any of them, shall at their cost within 30 days hereof provide this Honourable Court with the Native Owners' consent to variations to the Westin lease and Sheraton lease.

11. Costs of this application shall be costs in the cause.

12. Any further or other orders this Honourable Court finds appropriate.*

24. For convenience as well as to prevent any confusion the above orders are referred to as Order contained in Summons for Injunction (OSI 1 to 10), OS 11 and 12 are common general reliefs and no need to deal with them specifically.
25. In National Commercial Bank Jamaica Ltd v. Olint Corp Ltd (Jamaica) 2009.1 WLR 1405at 1409 held, (Per Lord Hoffmann)

'It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the

defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396, 408:

"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."

Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases." (emphasis added)

26. It is difficult to stop commercial transactions till litigations are completed. The litigation is not the best course for resolving issues expeditiously, but it is inevitable and most instances the last resort. As stated in the above Privy Council decision National Commercial Bank Jamaica Ltd v. Olint Corp Ltd (Jamaica) 2009 1 WLR 1405 , that commercial 'world will not stop pending trial'. The Plaintiff is not only seeking to restrain the Defendants as well as third parties from certain actions but also seeks orders to put him in a dominant or commanding position in the commercial affairs of 2nd, 3rd and 4th Defendants. He desired his consent being obtained for 2nd Share Offer, as well as Mandatory Injunction and also Mareva Injunction.
27. OSI 1 deals with the grant of consent of 1st Defendant to deal with Westin lease and the Sheraton lease. These are two native lands that were leased under 99 year lease and presently they are leased to 2nd and 3rd Defendants. The shares in 2nd and 3rd Defendants are not on sale but they are subsidiaries of 4th Defendant, and its shares are held by FCH, which has offered shares in 4th Defendant for sale.

28. In pursuant to an offer for share sale, in October, 2015 FCH entered in to Share Sale Deed with Avoser Challenge Limited. The Share Sale Deed, agreed to sell the shares of 3rd Defendant who owns shares of 2nd and 3rd Defendants. This transaction was terminated and again shares of 4th Defendant is on sale.
29. FCH is not a party to this proceedings, the Plaintiff is seeking to prevent the share sale of it. Though this is not a determinative factor to reject the injunction it would have been better if FCH was made a party. An injunction would not only bind the parties to the action but also all others who had notice of such orders. (See Z Ltd v A and others - [1982] 1 All ER 556, Per Lord Denning)
30. OSI 1 refers to consent of the 1st Defendant regarding any 'dealing' relating to two leases. The lessees are 2nd and 3rd Defendants. According to the Plaintiff share sales by Fiji Cayman Holdings of 4th Defendant, are dealing in the Two Leases. Share sales of 4th Defendant cannot be considered as a dealing in Two Leases in terms of Native Lands Trust Act. Share transfer will not transfer any of the assets in the companies, though the effect of the share transfer may take control of the assets and liabilities of that entity.
31. OSI 2 seeks restraining order not to offer, sell, or deal with the **shares or assets** in 2nd, 3rd and 4th Defendants. The said order is broad and covers a wide area of activities and not limited to Share Offer of FCH relating to the shares in 4th Defendant. It refer to 'dealing with any shares or **assets** of 2nd, 3rd and 4th Defendants...' (see 2(a) of OSI). This order is not only vague and too broad and if granted can halt all the operation of the said 3 entities including daily operation of the said entities. It would be hard or impossible for any entity to function without 'dealing with any assets' and it is clear that no interim injunction can be granted on such broad terms in this instance. The Plaintiff has not claimed for all assets of the 2nd, 3rd and 4th Defendants, too.
32. OSI 3 deals with refraining of transfer of effective control of exclusive possession of the two leases, without Plaintiff's consent. The Plaintiff is only one person of one land owning unit. What is an 'effective control' is not described in the said order, but it seems that Plaintiff seeks an order of the court to obtain his consent for the share sales of 4th Defendant by FCH. Again not only the order sought are not clear and excessively wide to halt activities of the 2nd 3rd and 4th Defendants and also their boards, directors, unnecessarily. How the Plaintiff obtained right to grant consent is also not clear.

33. OSI 4 is not an order and it is an explanation of earlier three orders sought in OSI 1, 2, 3 regarding ownership of the shares. Since it is not an order I need not deal with that.
34. OSI 5 refers to Plaintiff's interest as *cesti que* trust over shares of 2nd, 3rd and 4th Defendants. Again the said order is not clear as it sought 'to refrain from doing or omitting to do anything contrary to' his alleged interest as *cesti que* trust. This kind of order cannot be granted in the said terms as it is vague and the way it is drafted has applications to third parties who will not be informed of the nature of the injunctive order. The said order also seeks prevention of registering or doing anything set out in Parts 9 and 10 of the Companies Act 2015. While Part 9 of the Companies act 2015 deals with 'Company Registers', the Part 10 refers to 'Directors'. This order again sought Plaintiff's consent for any act that they sought to restrain in that order. It is clear that Part 9 and Part 10 of the Companies Act 2015 contain wide range of activities and if granted would result in affecting all the activities under said Parts of the Companies Act 2015 and it is vague and excessively broad as it is against 1 to 4th Defendants and their boards and shareholders, directors, nominees etc.
35. OSI 6 is not only an order against 1st to 4th Defendants but their Boards, shareholders, servants, employees, agents, officers, directors and anyone else acting on their behalf and all persons with notice of injunction from restraining from consent to deal, transfer, sell of the shares in 2nd, 3rd and 4th Defendants without Plaintiff being given the right of first refusal. Though the Plaintiff has instituted this action in representative capacity there is another land owning unit that had institute separate action. In the circumstances Plaintiff cannot obtain an order so that he gets a dominant position in litigation over other land owning units. Such order is in conflict with interest of other litigants.
36. OSI 7 is an alternate order, for Mandatory Injunction seeking an order of the court to offer the Plaintiff by way of a right to first refusal the shares in 2nd, 3rd and 4th Defendants proratably on the same terms and prices that those were offered previously by previous share offer that was subsequently terminated. In relation to Mandatory injunction Lord Hoffmann (Privy Council) in Commercial Bank Jamaica Ltd v. Olint Corp Ltd (Jamaica) 2009 1 WLR 1405 at p 1409 held,

'What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant

it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in Shepherd Homes Ltd v Sandham [1971] Ch 340, 351, "a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted."

37. How the Plaintiff acquires a right to first refusal for a price of share based on terminated Share Sale Agreement is not known. If the Share Sale Agreement is now terminated, how could any right derive to the Plaintiff for the price contained in such terminated Share Sale Agreement needs to be explained. The SOC is not clear on this and affidavit in support also does not explain that. Firstly, the Plaintiff will only be a beneficiary as a member of land owning unit hence he will not acquire any right for first refusal. Secondly, even such a right for first refusal is recognized it will be operated when an offer is selected from 2nd Share Offer. No right of first refusal can arise from a previous share sale that was terminated. I do not wish to state more on that issue as the interpretation of clause 15 of the two lease agreements and their variation in 2015 is the basis of this action. Without a basis such a Mandatory Injunction cannot succeed. Before granting a Mandatory Injunction a court should be mindful of the impact of the order that makes and final outcome of that if the party who is seeking such an order fails. There is no high degree of assurance that at trial such an order will sustain. In this instance such consideration favours refusal of Mandatory Injunction.
38. OSI 8 is an alternate or further order for Mareva Injunction. The dangers of Mareva Injunctions and abuse of the court process to steal a march over litigation is a tactic that should be avoided.
39. In Z Ltd v A and others [1982] 1 All ER 556 at 571-753 Lord Kerr LJ discussing the importance and development of Mareva Injunction alerted the abuse of the same and held,

However, the jurisdiction must not be abused. In particular, I would regard two types of situations as an abuse of it. First, the increasingly common one, as I believe, of a Mareva injunction being applied for and granted in circumstances in which there may be no real danger of the defendant dissipating his assets to make himself 'judgment-proof'; where it may be invoked, almost as a matter of course, by a plaintiff in order to obtain security in advance for any judgment which he may obtain; and where its real effect is to exert pressure on the defendant to settle the action. The second, and fortunately much rarer, illustration of what I would regard as an abuse of this procedure, is where it is used as a means of enabling a person to make a payment under a contract or intended contract to someone in circumstances where he regards the demand for the payment as unjustifiable; or where he actually believes, or even

knows, that the demand is unlawful; and where he obtains a Mareva injunction ex parte in advance of the payment, which is then immediately served and has the effect of 'freezing' the sum paid over'. (emphasis added)

40. Considering the circumstances of this case there is no evidence of asset stripping or likelihood of such an event. In contrast there is evidence that not even dividends being declared by 4th Defendant, indicating investing profits in the company in Fiji. Though the past is not an indicator how the future operation of the company, on the available evidence there is no likelihood of dissipation of assets by the Defendants in this action.
41. It is as an additional order or as an alternative order to the value of 100 million Dollars for the assets in 4th Defendant in Fiji. To consider Mareva Injunction as an additional order or alternate order first there should be some evidence of danger that assets being removed out of the jurisdiction. Already FCH is an offshore company and it had offered shares in 4th Defendant. There was such an offer earlier and the offer was accepted by a Fijian company. The Plaintiff did not sought Mareva Injunction during the previous offer. The alleged risk of share offer in 4th Defendant being accepted by a foreign entity was present at that time too. He did not even come to the court till Avosor was selected in the said share offer. Share sale of an entity would not transfer the assets of the company out of the jurisdiction merely because the share holder is a foreign entity. There is no evidence of assets of the 2nd and 3rd Defendants are going to be dissipated, on or after the offer of the current share offer.
42. OSI 9 is an alternate order to the above order further facilitating Mareva Injunction and seeking an order to pay 100 million Dollars to court as security. I do not think that there is a need to consider this injunctive order since there is no evidence before me in support of Mareva Injunction contained in OSI 9. It only suffice that the said calculation of 100 million also has several flaws including and not limiting to alleged loss due to failure of the reassessment of the rent under the said lease agreements. There is no need for such re-assessment since the said clause provided that all developed portions would after 2 years from the improvements would incur a lease rental based on 2.5% of the gross receipts (see Annual Percentage Rent in annexed JV 2 and JV 3)(These are dealt in paragraph 45 of the affidavit in opposition of Mr. Caldwell). It was further averred in the said affidavit in opposition that the Basic Annual Rent provision which required revaluation of undeveloped land, contained in two leases never applied as both lands were fully developed when 2nd and 3rd Defendant became lessees. The Plaintiff had also

included dividends for the shares when no dividends were declared. So, this value \$100 million cannot be substantiated.

43. OSI 10 is an order seeking a direction of the court to provide consent of native owners for the variation to the lease within 30 days. What is the basis of the said order cannot be found in the SOC. At the hearing the counsel for Plaintiff was unable to provide any requirement of concurrence of individual members of land owning units for variation of the clauses contained in the two leases. The order is not clear, but this refers to the variation that was already completed and without indicating such a consent was required under law and also the parties were obliged for such a requirement such order cannot be granted.

Statement of Claim

44. The Statement of Claim (SOC) of the Plaintiff was filed on 22nd September, 2016 and accordingly following orders are sought.

1. ***A DECLARATION*** that upon a true and proper construction and/or interpretation and/or application of the iTaukei Land Trust Act of Fiji, Cap. 134 (as amended) and/or the Trustee Act of Fiji Cap. 65 and/or the iTaukei Land Trust (Leases and Licences) Regulations (as amended) and/or iTaukei Lease No. 14619 ("the Sheraton lease") and/or iTaukei Lease No. 13796 ("the Westin lease") and/or the common law –

- (a) *the Plaintiff has locus standi to bring these proceedings.*
- (b) *the Yavusa-e-tolu are shareholders of the 2nd, 3rd and 4th Defendant since 1996 and currently hold up 10% ordinary shares in the 4th Defendant.*
- (c) *The 2nd and 3rd Defendants are the operating companies in the Sheraton lease and the Westin lease respectively.*
- (d) *The 1st Defendant has certain fiduciary powers, duties and functions as a statutory trustee including but not limited to –*
 - (i) *A duty to abide by the foundational values of the Constitution, good governance, transparency and accountability;*
 - (ii) *A duty to act in good faith and in the best interests of the Yavusa-e-tolu;*
 - (iii) *A duty not to act for a purpose collateral to the purposes conferred by the iTaukei Land Trustee*

Act (as amended), the Sheraton lease and the Westin lease;

- (iv) *A duty not to act as to place itself in a position in which the interests as trustee and lessor conflicts with the interests of all members of the Yavusa-e-tolu as beneficiaries;*
 - (v) *A duty not to act so as to place itself in a position in which its duties and interests as trusts for all members of the Yavusa-e-tolu as beneficiaries under the iTaukei Land Trust Act (as amended) is subject or subservient to the rights of the lessees being the 2nd Defendant and the 3rd Defendant and/or the 4th Defendant.*
 - (vi) *A duty to exercise its investment powers fairly and honestly with care; and*
 - (vii) *A duty of care not to negligently and/or arbitrarily and/or unconstitutionally control and administer the Sheraton lease and the Westin lease.*
- (e) *The 1st Defendant breached its obligations and duty of care as statutory trustee and lessor by negligently and/or arbitrarily and/or unconstitutionally controlling and administering the Sheraton lease and the Westin lease and the benefits and proceeds derived therefrom, where it holds in trust for and on behalf of the Yavusa-e-tolu.*
- (f) *The 1st Defendant is liable in general damages to be assessed for dereliction of, or failing to diligently observe, its fiduciary powers, duties and functions as statutory trustee including but not limited to –*
- (i) *Failing to procure and demand from the 2nd, 3rd and 4th Defendants, issuance of 5% shares in the 2nd Defendant and 5% shares in the 3rd Defendant with an additional issuance of 5% shares in the 3rd Defendant purchased by the 1st Defendant for and on behalf of the Yavusa-e-tolu since 1996, in terms of clause 15 of both the Sheraton lease and the Westin lease;*
 - (ii) *Failing to account for the funds it retained from the Basic Annual Rent that were credited to the 'native owners' for application to the purchase of shares according to the Basic Annual Rent covenants of the Sheraton lease and the Westin lease;*
 - (iii) *Failing to purchase for and on behalf of the Yavusa-e-tolu a further 5% shares in the 2nd*

Defendant despite retaining funds from the Basic Annual Rent covenants of the Sheraton and Westin leases;

- (iv) Failing to procure and demand from, and sue the 2nd, 3rd and 4th Defendants for non-payment of 5% share of dividends in the 2nd Defendant and 10% share of dividends in the 3rd Defendant, owed to the Yavusa-e-tolu;*
- (v) Failing to comply with the reassessment schedule and provisions stipulated in the Sheraton lease and the Westin lease for the calculation of the fair market rentals to be paid by the 2nd and 3rd Defendants to the 1st Defendant for an on behalf of the Yavusa-e-tolu;*
- (vi) Failing to procure, demand and sue for fair market rentals as stipulated in the Sheraton lease and the Westin lease, to be paid by the 2nd, 3rd, and/or 4th Defendants for an on behalf of the Yavusa-e-tolu;*
- (vii) Failing to receive true lease rentals pursuant to the Sheraton lease and the Westin lease from the 2nd, 3rd and/or 4th Defendants and distribute them to the Yavusa-e-tolu;*
- (viii) Failing to ensure full and proper 'Participation of Native Owners' as permitted under the Sheraton lease and the Westin lease to participate in the operation and resulting benefit, of the tourism ventures operating on the Sheraton lease and the Westin lease;*
- (ix) Failing to protect the Yavusa-e-tolu's shares in the 2nd, 3rd and/or 4th Defendants as eligible ultimate beneficiaries;*
- (x) Allowing the 2nd, 3rd and/or 4th Defendants to vary the Sheraton lease and the Westin lease for the removal of the Yavusa-e-tolu's shares in the 2nd and 3rd Defendant's as eligible ultimate beneficiaries;*
- (xi) Allowing the 2nd and 3rd Defendants by themselves, their principals, servants and/or agents as lessees in the Sheraton lease and the Westin lease to create the 4th Defendant as a shell company to circumvent the 1st Defendant's control and administration of the Sheraton lease and the Westin lease for and on behalf of the Yavusa-e-tolu; and*

- (xii) *Failing to exercise duty of care by negligently controlling and administering the Sheraton lease and the Westin lease, the benefits and proceeds derived from them.*
- (g) *The 1st Defendant is liable in general damages to be assess for its dereliction of, or failing to diligently observe, its statutory duty of care (for which the 1st Defendant levies poundage by retaining percentage of lease proceeds payable to the Yavusa-e-tolu to fairly, constitutionally and equitably control and administer the Sheraton lease and the Westin lease, benefits and proceeds for the benefit of the Yavusa-e-tolu.*
- (h) *Both instructions for the variation of the Sheraton lease and the Westin lease registered by the 1st, 2nd, 3rd and/or 4th Defendants by themselves, their servants and/or agents, are invalid and unenforceable on the following grounds –*
- (i) *For want of consultation with the Yavusa-e-tolu depriving them of natural justice especially the right to be heard before the abandonment of their shareholding and benefits guaranteed under the Sheraton lease and the Westin lease;*
- (ii) *for want of consent by 60% and more of members of the Yavusa-e-tolu;*
- (iii) *the total removal of consideration in the Sheraton lease and the Westin lease including but not limited to the mandatory shareholding of the Yavusa-e-tolu in the 2nd, 3rd and/or 4th Defendants; and the total removal of consideration permitted by the Sheraton and the Westin leases through the participation of the Yavusa-e-tolu in the operations and resulting benefit therefrom.*
- (i) *The 2nd, 3rd, and/or 4th Defendants continually retain and utilize shares, dividends and/or profits belonging to the Yavusa-e-tolu, in constructive trust for and on behalf of the Yavusa-e-tolu.*
- (j) *The 2nd and 3rd Defendants are liable in general damages for breach of, or failing to diligently observe, its lessee obligations and/or duties, expressly stated in and/or implied from the covenants in the Sheraton lease and the Westin lease as follows –*
- (i) *failing to issue 5% shares in the 2nd Defendant and 10% shares in the 3rd Defendant, to the 1st Defendant for and on behalf of the Yavusa-e-tolu since 1996;*

- (ii) *failing to maintain the 5% shares of the 1st Defendant in the 2nd Defendant's Register of Members and the 10% shares of the 1st Defendant in the 3rd Defendant's Register of Members, for and on behalf of the Yavusa-e-tolu since 1996;*
- (iii) *failing to pay 5% share of dividends earned by the Yavusa-e-tolu from 1996 to date in terms of the covenants in the Sheraton lease and/or retaining the same without any cause or authority to do so; and*
- (iv) *failing to pay 10% share of dividends earned by the Yavusa-e-tolu from 1996 to date in terms of the covenants in the Westin lease and/or retaining the same without any cause or authority to do so; and*
- (k) *The Yavusa-e-tolu has preemptive rights or the first right of refusal of the offer by the 2nd, 3rd and 4th Defendants to sell their respective shares in or around April, 2015 by tender which was subsequently awarded to Avoser Challenge Limited whose bid was accepted.*
- (l) *The 2nd and 3rd Defendants by themselves, their servants and/or agents cannot in law assign their rights and obligations as lessees to the Sheraton lease and the Westin lease absolutely to the 4th Defendant or any other person, without varying the Sheraton lease and the Westin lease first, and obtaining the consent in writing of the 1st Defendant (first had and obtained),*
- (m) *The caveats lodged by the Plaintiff and the Head of Yavusa Nabati aka Yavusa Yakuilau and registered by the Registrar of Titles on the Sheraton lease and the Westin lease titles, being Caveat No.: 820306 in the Sheraton lease and Caveat No. 820302 in the Westin lease be extended until the hearing and determination of these proceedings and/or alternatively AN ORDER that injunction be issued against the 2nd, 3rd and 4th Defendants by themselves, their principles, directors, servants and/or agents from proceeding with any share sales, transfers and agreements, powers, rights and remedies conferred on them or entered into between them and third parties severally and/or collectively by instruments for the sale, transfer and dealings of the same, pending the hearing and determination by this Honourable Court of the Plaintiff's claim.*

2. **A DECLARATION** *that the Yavusa-e-tolu was entitled to hold since 1996 and currently are entitled to hold 5% ordinary shares in the 2nd Defendant and 10% ordinary shares in the 3rd Defendant and are therefore shareholders in the 2nd and 3rd Defendants.*

3. **AN ORDER** consequent upon the grant of all or any of the aforesaid declarations, that the 1st Defendant pays the Yavusa-e-tolu general, special, compensatory, an exemplary damages for breach of, or failing to diligently observe its fiduciary powers, duties and functions as statutory trustee and statutory duty of care, expressly stated in or implied from a true and proper construction and/or interpretation and/or application of the iTaukei Land Trust Act of Fiji, Cap. 134 (as amended), the iTaukei Land Trust (Leases and Licences) Regulations (as amended), the Trustee Act of Fiji, Cap. 65, the Sheraton lease and the Westin lease.
4. **AN ORDER** directing the 1st Defendant to consult the Yavusa-e-tolu in its exercise of its fiduciary powers, duties and functions as statutory trustee, and statutory duty of care, expressly stated in or implied from a true and proper construction and/or interpretation and/or application of the iTaukei Land Trust Act of Fiji, Cap 134 (as amended), the iTaukei Land Trust (Leases and Licences) Regulations (as amended, the Trustee Act of Fiji, Cap, 65, the Sheraton lease and the Westin lease.
5. **ALTERNATIVELY, A DECLARATION** that if Variation of Lease No. 819237 and Variation of Lease No. 819236 registered by the 1st, 2nd, 3rd and/or 4th Defendants by themselves, their servants and/or agents over the Sheraton lease and the Westin lease are deemed valid, binding and enforceable, then they are not retrospective, operational and effective until 23rd September 2015.
6. **AN ORDER** directing the 1st Defendant to specifically perform, observe and/or exercise its fiduciary powers, duties and functions as statutory trustee, expressly stated in or implied from a true and proper construction and/or interpretation and/or application of the iTaukei Land Trust Act of Fiji, Cap. 134 (as amended), the iTaukei Land Trust (Leases and Licences) Regulations (as amended), the Trustee Act of Fiji, Cap. 65, the Sheraton lease and the Westin lease, and do as follows-
 - (a) Terminate or cancel the Sheraton lease and the Westin lease for breach of fundamental terms and provisions therein;
 - (b) Carry out valuation of the Sheraton lease and the Westin lease;
 - (c) Furnish the Yavusa-e-tolu the Valuation Report thereof;
 - (d) Reassess rentals payable to the Yavusa-e-tolu members; and
 - (e) Provide an account of the lease proceeds and/or benefits accrued or earned for and on behalf of the Yavusa-e-tolu, on the Sheraton lease and the Westin leases from 1970 to date.
7. **AN ORDER** that the 2nd Defendant observes and/or exercises its obligations as lessee and/or constructive trustee, expressly stated in or implied from a true and proper construction and/or interpretation and/or application of the Sheraton lease and the

Westin lease, and pay the Yavusa-e-tolu special damages specifically 5% back dividend on its profits from 1996 to the date of judgment in this matter including compounded interest for loss of opportunity to further invest these sums, the particulars and Annual Financial Accounts of which will be subpoenaed and/or discovered at discovery.

8. **AN ORDER** *that the 2nd and 3rd Defendants observe and/or exercise its obligations as lessee and/or constructive trustee, expressly stated in or implied from a true and proper construction and/or interpretation and/or application of the Sheraton lease and the Westin lease and pay the Yavusa-e-tolu, general, compensatory and exemplary damages for breach or, or failing to diligently observe lessee and/or constructive trustee obligations and/or duties, expressly stated in or implied from, the covenants in the Sheraton lease and the Westin lease, owed to the Yavusa-e-tolu since 1996.*

9. **AN ORDER** *that the 3rd Defendant observes and/or exercises its obligations as lessee and/or constructive trustee, expressly stated in or implied from a true and proper construction and/or interpretation and/or application of the Sheraton lease and the Westin lease and pay the Yavusa-e-tolu special damages specifically 10% dividend on its profits from 1996 to the date of judgment in this matter including compounded interest for loss of opportunity to further invest these sums, the particulars and Annual Financial Accounts of which will be subpoenaed and/or discovered at discovery.*

10. **AN ORDER** *that the 3rd Defendant observes and/or exercises its obligations as lessee and/or constructive trusts, expressly stated in or implied from a true and proper construction and/or interpretation and/or application of the Sheraton lease and the Westin lease and pays the Yavusa-e-tolu general, compensatory and exemplary damages for breach of, or failing to diligently observe constructive trustee duties, expressly stated in or implied from the covenants in the Westin lease as constructive trustee and lessee owed to Yavusa-e-tolu.*

11. **ALTERNATIVELY, AN ORDER** *for specific performance of the Sheraton lease and the Westin lease a that the 2nd and 3rd Defendants issue the 1st Defendant 5% shares in the 2nd Defendant and 10% shares in the 3rd Defendant respectively and/or upto 10% shares in the 4th Defendant, to hold for and on behalf of the Yavusa-e-tolu members now and in the future.*

.....(SOC)

45. According to the said orders sought in the SOC in the Writ of Summons, following can be deduced;

1. The declarations contained in 1,2,5, above and accordingly that Plaintiff has a locus standi to bring these proceedings and Yavusa e-tolu are shareholders of 2nd - 4th Defendants since 1996 holding upto 10% of Defendant.

Damages in following instances

2. An order for payment of money to Yavusa-e tolu damages for alleged breaches under law relating to two leases. (Order 3)
 3. Direction to 1st Defendant to consult Yavusa-e tolu in its exercise of fiduciary powers under law. (Order 4)
 4. 1st Defendant to cancel two leases for breach of fundamental terms and perform other duties. (Order 6)
 5. Order to pay dividends at 5% on profits from 1996 for 2nd Defendant as special damages. (Order 7)
 6. Payment of damages by 2nd and 3rd Defendants for breaches of lease. (Order 8)
 7. Payment of 10% dividend on its profits by 3rd Defendant from 1996 including compounded interest. (Order 9)
 8. 3rd Defendant for payment of damages for breaches of obligations under constructive trusts. (Order 10)
 9. Alternatively for an order for specific performance of alleged conditions of two leases and 2nd and 3rd Defendants to issue the 1st Defendant 5% shares in 2nd Defendant and 10% shares in the 3rd Defendant and upto 10% shares in the 4th Defendant.
46. So, looking at the orders sought in the SOC the Plaintiff had only sought some declarations and damages contained except Orders 6 and 9 in SOC sought orders for specific performance for transfer of some shares from 2nd and 3rd Defendants (5% and 10%) to 1st Defendant, and also for specific performance of directing to 1st Defendant to perform its duties.
47. In the affidavit in support of the SOI the Plaintiff states as follows
- 'I am making this application for injunction to protect contractual, customary land and economic rights of the Native Owners under iTaukei leases, which may not touch, and concern the land, or be protected by caveats 820302 and 820306.'*
48. It is evident that Plaintiff cannot seek an injunction based on orders in SOC as they refer to some declarations and also for damages. It should also note that there is no irreparable or continuing loss sought under said orders that may warrant interim injunction. Order 6 in SOC is only direction for 1st Defendant to perform its obligations and for termination of two leases.
49. At the hearing counsel for the Plaintiff said they had sought specific performance, against 2nd and 3rd Defendants, hence injunctive relief can be granted under said relief.

50. The order for specific performance in Order 11 of SOC was sought as an alternate relief against 2nd & 3rd Defendants, so it cannot be an irreparable loss to the Plaintiff. The order for specific performance was sought as an alternate remedy, and if it could lead to an irreparable loss to the Plaintiff, why it was sought in as an alternate remedy needed explanation, but no such explanation is made in the affidavits in support. Order 6 cannot be the basis for injunctive relief considering the nature of that, too.
51. When the SOC was filed the shares of 4th Defendant, held by FCH was already on sale and Plaintiff did not seek any injunctive reliefs at that time. At the hearing counsel for the Plaintiff said the entity selected in the first offer was an entity in Fiji, but now they fear the transaction being completed off shore.
52. Since the share sale in 4th Defendant was not completed it could be sold at any time to any person including an off shore entity. If there was irreparable loss from 2nd Share Officer in 4th Defendant could have sought such a relief at the commencement of this action but had waited for more than one year to make this application. Delay in making an application for injunction will also favour refusal of it in the exercise of the court's discretion.
53. The Plaintiff in the alternate relief for specific performance only sought shares in 2nd, 3rd Defendants to be transferred to 1st Defendant. The shareholding he has sought in specific performance were 5% and 10% respectively. The shares of 2nd and 3rd Defendants are not on sale, but the shareholder of 4th Defendant had offered the shares of 4th Defendant. The Plaintiff state in the affidavit in support that caveats filed by him relating to the two registered leases would be nugatory and would be academic if the injunctive reliefs are not granted. If so, why he did not seek such orders earlier?
54. So the Plaintiff cannot seek injunctive relief in order to compel the Defendants to sell the shares on sale to him on several grounds. Firstly the shares that were offered for sale are neither Initial Public Offering (IPO) nor Rights or Bonus Shares Issued. They are shares already issued and owned by a third party to this action (FCH). Neither subsidiaries of 4th Defendant nor the 4th Defendant owns them. Unless there is some statutory prohibition or for another reason that court consider interference is needed, the discretion of the court should not be used to interfere with shareholder's right to dispose its shares in an interim injunction. In a case such as this the Plaintiff has not shown the basis for the interference

with shareholder's right to dispose shares when he cannot even claim for a share in 4th Defendant.

55. The Plaintiff's claims contained in the SOC do not indicate that how he could interfere with share offer and or sale of 4th Defendant owned by FCH. The Plaintiff's claim is a representative action relating to alleged interest he claims in SOC for the two of the assets owned by 2nd and 3rd Defendants. I have not been provided any case where such a remote claim had interfered with a share sale of a company. Commercial interests of the entities are equally important rights and should be interfered with caution in an appropriate instance.
56. The Plaintiff cannot hold share sale of a shareholder who was not even named as a party on such remote claim. Secondly, even if FCH is made a party still it is not clear how Plaintiff could seek an injunctive relief to interfere with the rights of a shareholder to dispose the shares the way he likes. There is no allegation of any breach of any statutory provision regarding said share transaction. Thirdly, Plaintiff's claims for specific performance which was sought as an alternative remedy if granted will only make 1st Defendant a minority share holder holding less than 10%. 1st Defendant object to this application, hence there is no room even for an action for a derivative action (which is not pleaded in SOC). Fourthly, there is no claim to substantiate Plaintiff's interim injunction seeking first right of refusal in the shares on offer.
57. The OSI contained 10 specific Orders which I have dealt separately. The Plaintiff cannot seek injunctive orders in terms of the final reliefs he had sought in the SOC which only had sought damages and also an order for specific performance as an alternate remedy.

CONCLUSION

58. Even though the Plaintiff's action cannot be struck off in limine for lack of his locus standi, the balance of convenience favour refusal of the injunction in the exercises of court's discretion. The injunctive orders sought are not clear and specific and too broad and if granted in the present form it will seriously hamper not only 2nd Share Offer but the operations of two hotels. Such an injunction would not help the Plaintiff at the end if he succeeds. There is a delay by the Plaintiff as he did not sought such injunctive relief during the 1st Share Offer. As stated earlier, Order 6 and 11 in the SOC cannot be basis for injunctive reliefs sought in Summons for Interim Injunction. The rest of the orders in

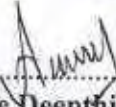
SOC are for damages. Overall justice would favour refusal of summons for interim injunction. The grant of injunction will not support Plaintiff's claims contained in SOC. The Summons seeking Injunctive relief filed on 3rd October, 2017 is struck off. Considering the nature and the circumstances the cost of this application is summarily assessed at \$1,500.

FINAL ORDERS

- a. The Summons seeking interlocutory Injunctive relief filed on 3rd October, 2017 is struck off.
- b. Cost of this application is summarily assessed at \$1,500.

Dated at Suva this 27th day of October, 2017.




.....
Justice Deepthi Amaratunga
High Court, Suva