IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 543 of 2004

BETWEEN: **NBF ASSET MANAGEMENT BANK** a body corporate duly constituted under the National Bank of Fiji Restructuring Act 1996 and having its principal office at 11 Auto City Place, Raiwaqa, Suva.

PLAINTIFF

AND: **TAVEUNI MANAGEMENT SERVICES LIMITED** a limited liability company incorporated under the laws of Fiji with its registered office at Suva in Fiji.

FIRST DEFENDANT

THE REGISTRAR OF TITLES of the Registrar of Titles Office, 1st Floor, Suvavou House, Suva, Fiji

SECOND DEFENDANT

THE ATTORNEY-GENERAL OF FIJI

THIRD DEFENDANT

Counsel: **Mr J. Oswalds and Mr V. Prasad for the Plaintiff**

Mr P. Knight for the First Defendant

Ms A. Prakash, Ms P. Prasad and Ms S. Chand for Second/Third Defendants

Date of Hearing: **21, 22, 23, 24 February 2017**

Date of Judgment: **25 May 2018**

JUDGMENT

Introduction/Chronology of Events

1. On 10 December 2004, Plaintiff filed Writ of Summons with Statement of Claim against Taveuni Estate Limited as First Defendant; Nadar Muthu Sami, Nal Muthu Sami as Second Defendants; Harry Krishna Murgan and Thomas Murgan as Third Defendants, Attorney-General of Fiji as Fourth Defendant and Registrar of Titles (**"ROT"**) as Fifth Defendant.

2. On 16 April 2005, Plaintiff filed Amended Writ of Summons removing Registrar of Titles as Fifth Defendant and joining Judith Ann Barton as Fifth Defendant; Murray John Cockburn as Sixth Defendant; Ian Dixon Menzies and Ginette Anne Menzies as Seventh Defendants; Alexander Renier Ridgeway as Eighth Defendant and Jakobus Petrus Theron as Ninth Defendant.

3. On 3 July 2006, Plaintiff filed Third Amended Writ of Summons removing Second and Third Defendants named in paragraph 1 hereof and Fifth to Ninth Defendants named in paragraph 2 hereof.

4. Third Amended Writ of Summons had Taveuni Estates Limited, ROT and Attorney-General of Fiji as First, Second and Third Defendants respectively.

5. On 11 July 2006, Master Udit directed that this matter take its normal course.

6. On 17 July 2006, Messrs Khan & Co. filed Acknowledgement of Service on behalf of First Defendant.

7. On 2 August 2006, First Defendant filed Statement of Defence to Third Amended Statement of Claim and Counterclaim.

8. On 8 August 2006, Kawakawadawa (Fiji) Limited (**"KFL"**) filed Application to be joined as an interested party which was returnable on 29 August 2006. This Application was filed by Messrs R. Patel & Co. when they were not Solicitors for Plaintiff but signed Application as Solicitors for Plaintiff.

9. On 16 August 2006, Plaintiff filed Reply to First Defendant's Defence and Defence to First Defendant's Counter-claim.

10. On 21 August 2006, Plaintiff filed Summons for Direction in respect to First Defendant which was returnable on 29 August 2006.

11. On 28 August 2006, Plaintiff filed Application to enter Judgment against Second and Third Defendants which Application was returnable on 13 October 2006.

12. On 29 August 2006, this matter was called before Master Udit (as he then was) when he directed parties to file Affidavit Verifying List of Documents (**"AVLD"**); exchange documents, convene Pre-Trial Conference (**"PTC"**), circulate Draft PTC Minutes and appear before him on 19 October 2006 for PTC; file Affidavits in respect to Joinder Application and adjourned the Application to 13 October 2006, for hearing.

13. On 14 September 2006, Messrs. Naidu Law filed Notice of Change of Solicitors on behalf of the First Defendant. It must be noted, Notice of Change of Solicitors was signed by Messrs. Naidu Law as Solicitor for the Plaintiffs and at the bottom of Notice of Change of Solicitors it is also stated it is filed for and on behalf of the Plaintiff. Obviously this was an error on part of Messrs. Naidu Law.

14. On 18 September 2006, Plaintiff filed AVLD.

15. On 28 September 2006, Messrs. R. Patel & Co. filed Amended Notice of Motion to join KFL as Plaintiff which was returnable on 13 October 2006. This time Messrs R Patel & Co. signed Amended Notice of Motion as Solicitors for the Second Plaintiff when KFL was not Second Plaintiff.

16. On 13 October 2006, Second and Third Defendants were granted leave to file Statement of Defence with $300.00 cost awarded to Plaintiff.

17. On 17 October 2006, Second and Third Defendants filed Statement of Defence.

18. This matter was next called before Master Udit on 2 November 2006 when the joinder Application was adjourned by consent to 2 February 2007, for mention only.

19. On 15 November 2006 and 23 November 2006, KFL and First Defendant filed their Submissions respectively.

20. On 2 February 2007, Joinder Application was adjourned to 6 March 2007.

21. On 6 March 2007, on KFL's Application, it was granted leave to withdraw joinder application and parties were directed to convene PTC by 19 April 2007, at the office of Messrs. Chan Law when this matter was adjourned to 1 May 2007.

22. On 22 March 2007, Application to Amend Counterclaim was heard and adjourned for Ruling on 27 March 2007.

23. On 28 March 2007, First Defendant filed Statement of Defence to Third Amended Statement of Claim.

24. On 10 April 2007, Plaintiff filed Reply to Defence and Defence to Counter Claim of First Defendant.

25. On 1 May 2007, Court directed parties to file Supplementary AVLD by 19 May 2007, exchange documents by 22 May 2007, convene PTC and file Minutes of PTC by 25 May 2007, and adjourned this matter to 25 May 2007, for review.

26. There is no record to state if this matter was called on 25 May 2007.

27. On 11 September 2007, First Defendant filed Application for Leave to continue with its Counter-claim against the Plaintiff which Application was returnable on 30 October 2007.

28. On 1 October 2007, Plaintiff filed its Submission.

29. This matter was called on 30 October 2007, before Master Udit but there is no file note to state what transpired on that day.

30. This matter was next called on 18 November 2007, when it was adjourned to 12 February 2008, for mention only.

31. On 23 January 2008, First Defendant filed its Submission.

32. On 11 February 2008, Plaintiff filed Supplementary Affidavit of Ambika Prasad.

33. On 15 February 2008, this matter was called and adjourned to 25 May 2008, for mention only.

34. On 11 April 2007, Plaintiff filed Submission in Reply.

35. This matter was next called before Master Udit on 7 April 2009, when Leave was granted to First Defendant to continue with Counter-Claim against Plaintiff under Section 43(2) of Banking Act 1995 pursuant to Ruling delivered on that day.

36. On 16 April 2009, Messrs Howard Lawyers filed Notice of Change of Solicitors on behalf of Plaintiff.

37. On 21 April 2009, Messrs Cromptons filed Notice of Change of Solicitors on behalf of First Defendant.

38. On 21 October 2009, Plaintiff filed Application to Amend Third Amended Statement of Claim which was returnable on 12 February 2010.

39. On 12 February 2010, the Application to Amend was adjourned to 26 February 2010, for mention.

40. On 26 February 2010, this matter was called before his Lordship Justice Calanchini when by consent of Defendants, leave was granted to Plaintiff to file Fourth Amended Statement of Claim and this matter was adjourned to proceed according to the rules.

41. On 4 March 2010, Plaintiff filed Fourth Amended Statement of Claim.

42. On 23 March 2010, First Defendant filed Statement of Defence to Fourth Amended Statement of Claim and Amended Counter-claim.

43. On 6 April 2010, Plaintiff filed Application to Strike Out certain paragraphs in First Defendant's Statement of Defence and Counterclaim which was returnable on 23 April 2010.

44. On 19 April 2010, Plaintiff filed Reply to First Defendant's Statement of Defence and Defence to Amended Counterclaim.

45. On 23 April 2010, Court directed parties to file Submissions and adjourned the Strike Out Application to 24 June 2010, with direction to file Affidavits and for Second and Third Defendants to file and serve Defence to Fourth Amended Statement of Claim.

46. On 7 May 2010, Second and Third Defendants filed Statement of Defence to Fourth Amended Statement of Claim.

47. On 27 May 2010, Plaintiff filed Application to Strike Out certain paragraphs in Second and Third Defendants Statement of Defence to Fourth Amended Statement of Claim which was returnable on 24 June 2010.

48. On 18 May 2010, Plaintiff filed its Outline of Arguments in respect to Strike Out Application of certain paragraphs in First Defendant's Statement of Defence and Counterclaim.

49. On 18 May 2010, First Defendant filed its Submissions in response to Plaintiff's Outline of Arguments.

50. On 8 June 2010, Plaintiff's Application seeking Order that Applications (2) to Strike Out part of Defendant's Statement of Defence and Counterclaim be heard together on 24 June 2010, was granted.

51. On 11 June 2010, Plaintiff filed Outline of Argument in Reply to First Defendant's Submission in respect to striking out part of First Defendant's Defence and Counterclaim.

52. On 24 June 2010, both Applications were heard and adjourned for Ruling on Notice.

53. On 8 July 2010, Plaintiff filed Outline of Arguments in respect to Application to Strike Out certain paragraphs in Second and Third Defendants Statement of Defence.

54. On 19 November 2010, this matter was called before his Lordship Justice Calanchini who made following Orders:-

(i) Defendants do file and serve Amended Defence to Plaintiff's Fourth Amended Statement of Claim within twenty-one days from 19 November 2010, in accordance with Order 18 of High Court Rules and thereafter for action to proceed in accordance with High Court Rules;

(ii) The Rates Action and the Main Caveat Action be stayed pending judgment in the present proceeding.

55. On 10 December 2010, Plaintiff filed Notice of Motion for Leave to Appeal his Lordship Justice Calanchini's Order made on 19 November 2010, which was returnable on 4 February 2011, and subsequently was adjourned to 9 March 2011.

56. On 9 March 2011, his Lordship Justice Calanchini directed Second and Third Defendants to file and serve Amended Defence within fourteen (14) days and in default, Plaintiff was at liberty to enter Judgment by Default.

57. On 24 March 2011, his Lordship Justice Calanchini delivered his decision in respect to Application for Leave to Appeal whereby the Application was dismissed with cost in favour of First Defendant and Second Defendant was ordered to file and serve Amended Defence within fourteen (14) days.

58. On 6 May 2011, First Defendant filed Application to Strike Out Plaintiff's Defence to Counterclaim and to enter Judgment on Counterclaim which was returnable on 14 June 2011.

59. On 6 June 2011, Plaintiff filed Application to enter default judgment against Second and Third Defendants which was returnable on 14 June 2011.

60. On 10 June 2011, Second and Third Defendants filed Amended Defence.

61. On 14 June 2011, his Lordship Justice Calanchini directed parties to file Affidavits and adjourned this matter to 5 July 2011, for mention.

62. On 5 July 2011, this matter was called before Master Amaratunga (as he then was) when Plaintiff was directed to file Affidavits in Reply and both pending Applications were adjourned to 9 September 2011, for hearing.

63. On 31 August 2011, Plaintiff filed Application to Amend its Fourth Amended Statement of Claim which was returnable on 9 September 2011.

64. On 1 September 2011, Plaintiff filed Application to amend Summons for Default Judgment which was returnable on 9 September 2011.

65. On 9 September 2011, by consent, Leave was granted for Plaintiff to file Amended Summons to Strike Out Second and Third Defendants Statement of Defence and Application for Leave to Amend Statement of Claim and Application by First Defendant to Strike Out Defence to Counterclaim was adjourned to 2 November 2011, for hearing.

66. On 23 September 2011, Plaintiff filed Amended Summons to Strike Out Second and Third Defendants Statement of Defence and to enter Judgment against Second and Third Defendants which was returnable on 20 October 2011.

67. On 20 October 2011, hearing date of 2 November 2011, was vacated and parties were directed to file Affidavits in respect to Amended Summons and the Applications were adjourned to 5 December 2011, for hearing.

68. On 5 December 2011, this matter was adjourned to 7 February 2012, for mention on the ground that Plaintiff sought more time.

69. On 7 February 2012, Plaintiff sought time to settle this matter and this matter was adjourned to 30 March 2012, for mention.

70. On 30 March 2012, this matter was adjourned to 7 June 2012, with no file note as to what transpired on that date.

71. On 4 June 2012, VP Lawyers filed Notice for Change of Solicitors on behalf of Plaintiff.

72. On 7 June 2012, pending Applications were adjourned to 27 July 2012, for hearing.

73. On 27 July 2012, the Applications were heard and adjourned for Ruling on 3 August 2012 and then to 7 September 2012.

74. On 2 August 2012, Second and Third Defendants filed Application to Amend their Statement of Defence which Application was returnable on 31 August 2012.

75. **This file was next called before Master Amaratunga (as he then was) on 11 April 2013, when Ruling was delivered whereby Second and Third Defendants Statement of Defence was struck out and Judgment entered against Second and Third Defendants.**

76. This matter was next called on 16 April 2013, and adjourned to 27 May 2013, for mention.

77. On 27 May 2013, Application to Amend Fourth Amended Statement of Claim and Application to Strike Out Defence to Counterclaim was adjourned to 19 June 2013, for hearing.

78. On 28 May 2013, Plaintiff filed Application to Amend Reply to First Defendant's Statement of Defence and Defence to Counterclaim which was returnable on 19 June 2013.

79. On 1 June 2013, being prior to Justice Amaratunga's contract as Judicial Officer expiring his Lordship directed the Registry that this matter be allocated to another Judge.

80. This matter was called in this Court on 16 July 2013, and on that day by consent:-

(i) Leave was granted for First Defendant to withdraw its Application to Strike Out Plaintiff's Reply to Defence and Defence to Counterclaim and accordingly the Application was dismissed and Struck Out with no order as to costs;

(ii) Plaintiff was granted Leave to file Amended Reply to Defence and Defence to Counterclaim within seven (7) days;

(iii) Plaintiff and First Defendant were directed to file Submissions in respect to Application to Amend Fourth Amended Statement of Claim by 23 August 2013, with Ruling to be delivered on notice.

81. On 23 July 2013, Plaintiff filed Reply to Amended Defence of First Defendant to Fourth Amended Statement of Claim and Amended Defence to Amended Counterclaim.

82. On 6 August 2013, First Defendant filed Reply to Defence to Amended Counterclaim.

83. Plaintiff and First Defendant filed Submissions by 23 August 2013, and Ruling was delivered on 17 February 2014, whereby Plaintiff was granted Leave to file Fifth Amended Statement of Claim with Plaintiff and First Defendant to file Defence to Fifth Amended Statement of Claim and Reply to Defence by 20 March 2014, and this matter was adjourned to 21 March 2014, for mention.

84. On 28 February 2014, Plaintiff filed Fifth Amended Statement of Claim.

85. On 11 March 2014, First Defendant filed Defence to Fifth Amended Statement of Defence and Counterclaim.

86. On 21 March 2014, this matter was referred to Master for compliance with pre-trial matters.

87. This matter was called before Master Rajasinghe (as he then was) when First Defendant was granted Leave to file Supplementary AVLD and adjourned to 21 July 2014, for PTC.

88. On 14 May 2014, Second and Third Defendants filed Application for Leave to Appeal Out of Time decision delivered on 11 April 2013, which was returnable on 11 June 2014.

89. On 11 June 2013, Plaintiff and Second and Third Defendants were directed to file Affidavits and this matter was adjourned to 1 August 2014, to fix hearing date.

90. On 2 July 2014, Second and Third Defendants filed Application to withdraw Application for Leave to Appeal Out of Time which was returnable on 22 July 2014.

91. On 22 July 2014, Leave was granted for Second and Third Defendants to withdraw Application for Leave to Appeal Out of Time with no Order as to costs and this matter was referred back to Master to complete pre-trial matters.

92. On 3 September 2014, Second and Third Defendants filed Application for Leave to Appeal Out of Time Justice Amaratunga's decision delivered on 11 April 2013, which Application was returnable on 31 October 2014.

93. This matter was called before Master Rajasinghe on 14 October 2014, when it was adjourned to 27 October 2014, for PTC and to 12 November 2014, for review.

94. On 14 November 2014, Leave was granted to Second and Third Defendants to withdraw the Application for Leave to Appeal Out of Time and this matter was adjourned to 6 March 2015, for mention.

95. On 29 January 2015, Second and Third Defendants filed another Application for Leave to Appeal Out of Time Justice Amaratunga's decision delivered on 11 April 2013, which was returnable on 1 May 2015.

96. On 6 March 2015, parties were directed to file Affidavits and the Application was adjourned to 21 April 2015.

97. On 21 April 2015, Second and Third Defendants withdrew the Application and as such the Application was struck out with costs assessed at $250.00 in favour of Plaintiff.

98. On the same day, parties were directed to hold PTC and file Minutes of PTC by 15 June 2015; Plaintiff to file and serve Copy Pleadings by 30 June 2015 and this matter was adjourned to 3 July 2015, to fix trial dates.

99. On 3 July 2015, this matter was set down for trial from 8 to 12 February 2016, and parties were directed to convene PTC and file PTC Minutes by 31 August 2015.

100. Parties failed to file PTC Minutes as directed and on 8 February 2016, trial dates were vacated and this matter was adjourned for trial from 12 to 16 September 2016.

101. On 17 August 2016, trial dates were vacated and this matter was adjourned for trial from 18 to 21 October 2016.

102. On 26 August 2016, Plaintiff filed Application to vacate the trial dates on the ground that the date was not suitable for the overseas counsel who had been involved in this matter for almost ten (10) years at that time, which Application was returnable on 1 September 2016.

103. On 1 September 2016, the trial dates were vacated and re-fixed from 21 to 24 February 2017.

104. This matter was called before Master Sharma on 1 September 2016, 21 September 2016 and 26 October 2016, for parties to file Minutes of PTC.

105. On 14 November 2016, Plaintiff and First Defendant filed Minutes of PTC.

106. On 15 November 2016, Plaintiff was directed to file Copy Pleadings within seven (7) days.

107. On 7 December 2016, it was noted that Copy Pleadings filed was not in order when Plaintiff was directed to file Copy Pleadings.

108. On 30 December 2016, Plaintiff filed Copy Pleadings.

109. Trial commenced on 21 February 2017 and concluded on 24 February 2017, when parties were directed to file Submissions by 21 April 2017, and Judgment was to be delivered on notice.

110. On 5 April 2017, First Defendant filed its Submissions.

111. On 20 April 2017, Plaintiff filed Application for release of court recording on such electronic format as requested by Plaintiff to Spark & Cannon, Court Transcribers of Level 9, 620 Barke Street, Melbourne Australia and to extend time for filing of Plaintiff's Submission within four (4) weeks of receipt of recordings by Plaintiff's Solicitors which Application was returnable on 20 April 2017.

112. The Application was opposed by First Defendant and after hearing Submissions and reading the Affidavits this Court refused the Application and directed Plaintiff to file Submissions by 25 May 2017, with First Defendant to file Reply to Submissions by 3 June 2017, with Judgment to be delivered on Notice. Plaintiff and First Defendant filed Submissions and Reply to Submissions as directed.

Change of Name

113. First Defendant has changed its name to Taveuni Management Services Limited and as such by consent First Defendants name has been substituted as **Taveuni Management Services Limited** (hereinafter referred to as **"TMSL"**).

Background/Agreed Facts

114. The background/agreed facts is clearly stated at paragraphs 1 to 37 of Minutes of PTC which are as follows:-

"1. The Plaintiff ("AMB"):

(a) is and was at all material times a body corporate constituted under Section 24 of the National Bank of Fiji Restructuring Act 1996;

(b) *is the statutory successor to the National Bank of Fiji, and any references to either the National Bank of Fiji or to AMB in these Minutes is to be taken as a reference to the same Corporation;*

(c) *has since 1 April 2007, been under the controllership of the Reserve Bank of Fiji Pursuant to section 30(2)(c)(i) of the Banking Act 1995.*

2. *The First Defendant ("TMSL") is and was at all material times a company duly incorporated pursuant to the laws of Fiji, which changed its name from Taveuni Estates Limited subsequent to the issue of this proceeding.*

3. *The Second Defendant (the "ROT") is and was at all material times charged with the administration of the provisions of the Land Transfer Act Cap 131 (the "Act").*

4. *The Third Defendant (the "A-G") is sued as the legal representative of the ROT.*

The Deed of Conveyance

5. *On or about 2 June 1995 TMSL as transferor and the National Bank of Fiji as transferee entered into a deed of conveyance dated 2nd June 1995 (the "Deed of Conveyance").*

6. *The Deed of Conveyance did not of itself constitute a registrable instrument of transfer from TMSL to AMB of Lot 1 on Deposited Plan 7340 (the "Rubbish Dump) and Lot 1 on Deposited Plan 7341 ("the Water Lot") (Deposited Plans 7340 and 7341 being referred to below as the "Deposited Plans") (together referred to as the "Water Lots").*

7. *As at the date of the Deed of Conveyance, TMSL was registered as the proprietor of all the land described in those folios marked with serial numbers (as defined by Section 21(1) of the Act, but hereinafter referred to as "CT No" or "CT Nos" as the case may be, 13527 and 17922 in the Register of Titles (as defined in the Act) (the "First Parent Title" and the "Second Parent Title" respectively, and together referred to as the "Parent Titles").*

8. *As at the date of the Deed of Conveyance the Parent Titles were each cancelled as to part and included the land being Lot 1 on DP 7340 and Lot 1 on DP 7341 for which separate valid titles did not exist.*

9. *In Annexure 3 to the Deed of Conveyance the area of the Water Lots was not specified, nor was the area specified of any of the lots included in Annexure 3.*

The Water Lots

10. *The water source for the Soqulu Estate is a natural spring located on Lot 1 on Deposited Plan 7341 (the "Water Source").*

11. *TMSL has at all material times supplied certain lot owners on the Soqulu Estate with water sourced from the Water Source for their domestic or commercial use, as the case may be.*

12. *The water is supplied to lots on the Soqulu Estate by means of a reticulated water system which is connected to an supplied from the Water Source (the "Reticulated Water System").*

13. *Lot 1 on Deposited Plan 7340:*

    (a) *does not have on it a water source for the Soqulu Estate;*

    (b) *has on it a rubbish dump in which rubbish generated by lot owners on the Soqulu estate has been dumped at all material times.*

14. *In or about mid 1994:-*

    (a) *the First Parent Title was encumbered by registered mortgage No. 294217 dated 10 December 1990 in favour of the National Bank of Fiji and by registered mortgages 294218 and 294219 in favour of the Australia and New Zealand Banking Group Limited ("ANZ").*

    (b) *the Second Parent Title was encumbered by registered mortgages Nos. 139612, 178615 and 294217 in favour of the National Bank of Fiji and by registered mortgages 294218 and 294219 in favour of ANZ.*

15. *In or about August 1994, alternatively February 1994:-*

(a) *a Request for New Certificate of Title was lodged with the Registrar of Titles by G P Lala & Associates, Solicitors, acting on behalf of the National Bank of Fiji as mortgagee of the Water Lots, together with the First Parent Title, requesting the issue of a separate Certificate of Title for the Rubbish Dump, which on lodgement was allocated instrument and dealing number 363858 by the Registrar of Titles ("Request No 363858").*

(b) *a Request for New Certificate of Title was lodged with the Registrar of Titles by G P Lala & Associates, Solicitors, acting on behalf of the National Bank of Fiji as mortgagee of the Water Lots, together with the Second Parent Title, requesting the issue of a separate Certificate of Title for the Water Lot, which on lodgement was allocated instrument and dealing number 363859 by the Registrar of Titles ("Request No 363859").*

16. *The originals of the instruments being Request No 363858 and Request No 363859 are missing from the Register Book at the Titles Office.*

17. *On or about 19th August 1994, pursuant to Request No 363858 and 363859, the Registrar of Titles:-*

(a) *endorsed on the First Parent Title a memorial of Request No 363858 which read: "Application for New C.T. No 363858 Registered 19 AUG 1994 at m (sic) To AS TO (sic) 49.8453 ha Lot 1 DP 7341 (sic) Cancelled vide CT 28286" and signed the memorial;*

(b) *endorsed on the Second Parent Title a memorial of Request No 363859 which read: "REQUEST FOR NEW C.T. No 363859 Registered 19/8/1994 at 10.20 am To AS TO (sic) 867.675 HA BEING Lot 1 ON DP 7341 CANCELLED VIDE CT 28202" but did not sign that memorial;*

(c) *issued two documents purporting to be duplicate Certificates of Title bearing CT Nos. 28286 and 28202 evidencing proprietorship of each Water Lot respectively (the "invalid duplicate Certificates of*

Title"), which Certificates of Title were sealed but not signed by the Registrar of Titles.

18. *The figures '7341' where they appeared in the memorial referred to in sub-paragraph 17(a) above, were an error made by the person entering the memorial and should have read '7340'.*

19. *In the premises, the invalid duplicate Certificates of Title were not valid Certificates of Title issued pursuant to the Act because the Registrar of Titles did not at the time of their purported issue create in the Register of Titles original Certificates of Title evidencing proprietorship of the Water Lots by way of folios bearing CT Nos. 28286 and 28202, or at all.*

20. *On or about 2 March 1995 the Registrar of Titles:-*

    (a) created a folium in the Register of Titles bearing CT No 28286 evidencing registered proprietorship of Lot 2 on Deposited Plan 6734 being a parcel of land in Levuka, on the island of Ovalau;

    (b) created and issued a duplicate Certificate of Title bearing CT No 28286;

    (c) created a folium in the Register of Titles bearing CT No 28202 evidencing registered proprietorship of Lot 1 on Deposited Plan 6734 being a parcel of land in Levuka, on the island of Ovalau;

    (d) created and issued a duplicate Certificate of Title bearing CT No 28202.

21. *Pursuant to the Deed of Conveyance, GP Lala & Associates as solicitors for the National Bank of Fiji prepared an instrument of transfer (the "Instrument of Transfer") dated 24 June 1995 for execution by TMSL in respect of the 117 lots listed in the Instrument of Transfer.*

22. *The Certificate of Title Nos. inserted in the Instrument of Transfer in respect of Lot 1 on Deposited Plan 7340 and Lot 1 on Deposited Plan 7341 were incorrect.*

23. *On or about 27 June 1995, the National Bank of Fiji lodged the invalid duplicate Certificates of Title together with the Instrument of Transfer,*

duly stamped with the appropriate ad valorem duty, at the Titles Office for registration of the transfer of the lots which were the subject of the Instrument of Transfer from TMSL to the National Bank of Fiji.

24. *On lodgement, the Instrument of Transfer was allocated instrument and dealing number 379880 by the Registrar of Titles who also affixed the seal of the Registrar of Titles to it but did not sign it in the space provided.*

25. *On or about 27 June 1995, the Registrar of Titles issued back to the National Bank of Fiji the invalid duplicate Certificates of Title each endorsed with a memorial of the transfer of the Water Lots from TMSL to the National Bank of Fiji bearing the date of issue.*

26. *At the time of issuing back to the National Bank of Fiji the invalid duplicate Certificates of Title, the Registrar of Titles did not and could not enter a memorial of the transfer of the Water Lots from TMSL to the National Bank of Fiji in the Register of Titles as he was required to do pursuant to the Act, because the folios which then existed in the Register of Titles bearing CT Nos 28286 and 28202 were in respect of parcels of land in Levuka, on the island of Ovalau (the "Levuka Lots").*

27. *On or about 16 April 1999, Munro Leys, Solicitors of Suva, lodged on behalf of TMSL with the Registrar of Titles a Request to Issue New Certificate of Titles in respect of each of the Water Lots, which on lodgement was allocated instrument and dealing number 426160 by the Registrar of Titles ("Request No 426160").*

28. *On or about 16 April 1999, the Registrar of Titles:*

    (a) endorsed on the First Parent Title a memorial of Request No 426160 which read: "Request for new C.T. No 426160 Registered 16.4.99 at 3.06pm To AS TO (sic) LOT 1 DP 7340 being 48.8453 ha Cancelled vide CT No 31921" and signed the memorial;

    (b) created an original Certificate of Title for the Rubbish Dump by way of a folium in the Register of Titles with CT No 31921;

    (c) endorsed on the Second Parent Title a memorial of Request No 426160 which read: "Request for New C.T. No 426160 Registered

16.4.99 at 3.06pm To AS FOR (sic) LOT 25 DP 4913 and LOT 1 DP 7341 Cancelled vide CT nos 31922 & 28820" and signed the memorial;

(d) *created an original Certificate of Title for the Water Lot by way of a folium in the Register of Titles with CT No 28820;*

(e) *issued to TMSL new duplicate Certificates of Title for the Rubbish Dump and the Water Lot bearing CT Nos 31921 and 28820 respectively.*

29. *TMSL received:*

(a) *two written requests from the ROT to deliver up to him CT No 28820;*

(b) *a request by email from Chan Law on 31 August 2005 to deliver up to the ROT CT Nos 31921 and 28820.*

The Forty Lots

30. *On 21 September 2009, TMSL transferred to AMB two of the Forty Lots, namely those evidenced by Certificates of Title Nos. 28335 and 28336.*

Clause (7) of the Deed of Conveyance

31. *AMB:*

(a) *in a letter from its then Chief Manager dated 30 November 1998 stated in reference to the Deed of Conveyance that AMB "has no intention of doing other than comply with the requirements therein and particularly by clauses 6, 7 and 8";*

(b) *entered into a Sale & Purchase Agreement dated 16 June 2006 as vendor with Kawakawadawa (Fiji) Limited ("KKD") as purchases (the "2006 Sale & Purchase Agreement") in which it covenanted with KKD that:*

(i) *it would comply with all the terms of the Deed of Conveyance;*

(ii) *the public facilities to be transferred to the Transferee, specifically defined as Lot 6 on DP 4797, Lot 1 on DP 4918*

and Lot 1 on DP 4912 will remain available for the exclusive use of Taveuni Estate lot owners and purchasers free of charge in perpetuity, as provided for in the Deed of Conveyance and that it will comply with all obligations thereunder.

32. *Clause 7 of the Deed of Conveyance states that "The Transferee covenants with the Transferors that the public facilities to be transferred to the Transferee, specifically defined as lot 6 on DP 4797, Lot 1 on DP 4918, Lot 1 on DP 4912 will remain available for the exclusive use of all Taveuni Estates lot owners and purchasers free of charge in perpetuity".*

Clause (8) of the Deed of Conveyance

33. *By Clause (8) of the Deed of Conveyance AMB covenanted with TMSL to preserve the Scheme Plan dated 3 April 1978 drawn by Ralph Grierson in relation to the lots being transferred to AMB in terms of the Deed of Conveyance.*

Caveat No 441493

34. *On or about 6 May 1998, TMSL lodged Caveat No. 441943 against 111 Certificates of Title of which AMB was registered as proprietor and TMSL subsequently withdrew this caveat.*

Lot 3 on DP 4709 (Certificate of Title No 28484)

35. *The land more particularly described in CT No 28484 (the "marina land") was at all material times land in respect of which AMB was registered or entitled to be registered as proprietor.*

Certificate of Title No 28215

36. *By instrument of transfer dated 15 March 1995, which was registered by the Registrar of Titles on 27 March 1995, AMB transferred the land described in Certificate of Title No 28215 to Graham Robin South (the "South Lot").*

Sale of 13 Lots by AMB to KKD in 2004

37. By Sale & Purchase Agreement dated 25 March 2004 AMB sold 13 lots at Soqulu on Taveuni to KKD (the "2004 Sale & Purchase Agreement")."

Documentary Evidence

115. Plaintiffs tendered fifty-two (52) documents in evidence which was marked as Exhibit P1 to P52 whilst Defendant tendered 29 documents in evidence which are marked as Exhibits D1 to D29. This Court will only deal with evidence and documents that are relevant to the issues in this matter.

Plaintiff's Case

116. Plaintiff called following witnesses:-

(i) Torika Goneca of Lami, Deputy Registrar of Titles (**PW1**);

(ii) Mosese Waqavonovono of 385 Mead Road, Suva, Office Manager (**PW2**);

(iii) Ambika Prasad of 26 Donu Road, Namadi Heights, Suva, Retired (**PW3**);

(iv) Rod Jepsen of 79 Cakobau Street, Suva, Land Surveyor/Consultant (**PW4**);

(v) Kenneth Neil Wright of 10/53 West Bank Terrace, Burnley, Victoria, Australia, Financial Advisor (**PW5**).

117. PW1 (Deputy Registrar of Titles) in her evidence in chief gave evidence that:-

(i) She does not have original or copy of Request for Certificate of Title being Instrument No. 363858 because it is not bound in the volume of the book and she knows it, because she searched for it and could not locate it;

(iii) The instrument could have been returned for correction;

(iv) She carried out search throughout her office but could not locate the instrument;

(v) There is no record of Certificate of Title No. 28286 (Exhibit P6) at ROT's office issued about 19 August 1994, as it is not bound to the book and she searched for it but could not locate it;

(vi) In respect of duplicate CT 28286 (Exhibit P6) she stated that it is issued over Lot 1 on DP 7340 and is dated 19 August 1994;

(vii) The Registered Proprietor was First Defendant and National Bank of Fiji became registered proprietor on 27 June 1995.

(viii) Stated Certificate of Title is not signed by Registrar of Titles (**"ROT"**);

(ix) Agreed that Duplicate CT 28286 has detail of valid CT; is issued by ROT and appears to be an authentic duplicate CT;

(x) Duplicate CT 28202 (Exhibit P7) is over Lot 1 on DP 7341 and is registered on 19 August 1994, with National Bank of Fiji as current registered proprietor and appears to have been issued by ROT;

(xi) She has been working for ROT for twenty-two (22) years;

(xii) She has original CT No. 28286 (Exhibit P8) which is over Lot 2 on DP 6734 and registered on 2 March 1995, with registered proprietors being Hari Krishna Murgan and Thomas Murgan;

(xiii) She does not know why CT No. 28202 has handwriting on top of No. 28202 in the right hand top corner;

(xiv) CT No. 31921 (Exhibit P11) is over Lot 1 on DP 7340 and was registered on 16 April 1999, with First Defendant as registered proprietor;

(xv) Removal of Caveat (Instrument No. 426160) (Exhibit P13) is dated 21 July 1997, was lodged by Lateef & Lateef and in respect to Caveat No. 422665;

(xvi) Caveat No. 422665 (Exhibit P14) was lodged against Housing Authority Lease No. 130591 (Exhibit P15) which is over Lot 9 on DP3609;

(xvii) She has copy of Request for Title, Dealing No. 426160 in respect to Lot 1 on DP 7340, Lot 25 on DP 4913 and Lot 1 on DP 7341 which was lodged on 16 April 1999, by Munro Leys on behalf of First Defendant;

(xviii) She did not know how Removal of Caveat No. 422665 and Request for Titles has same number being 426160;

(xix) Once request for new title is received, they check whether deposited plan is registered or not; check who is the Applicant; who is the registered proprietor on head title; check if fee has been paid; then enter details of new Certificate of Title in registration book;

(xx) Certificate of Titles (**"CT"**) are kept in a separate volume. Deposited Plans have own register book;

(xxi) Next step in respect to request for new CT number is allocated and CT is created;

(xxii) CT is created by preparing Original and duplicate, then underlining the face of Title in red; affixing ROT's seal for ROT's signature and after ROT signs CT, Original CT is kept at ROT's office and duplicate is dispatched to the person lodging request;

(xxiii) CT number in respect to lots in Request for New Title being Instrument No. 426160 are as follows:-

Lot 1 on DP 7340 - CT 31921
Lot 25 on D P4713 - CT 31922
Lot 1 on DP 7341 - CT 28820

(xxiv) She does not know why CT number for Lot 1 on DP 7341 is not CT 31923 (sequential);

(xxv) When asked if it appeared odd to her in her long experience she stated "no idea";

(xxvi) In respect to last page of CT No. 17922 (Exhibit P1) left hand column with memorial Request for New CT (Dealing No. 363859) registered on 19 April 1994, Lot 1 on DP 7341 she could see what is on next line and number with line through them;

(xxvii) Numbers are 28260 and 28202 and letter "C" appears underneath but she cannot make out.

118. During cross-examination PW1:-

(i) Stated that Instrument number for Request for Title is 426160 whereas Instrument Number for Exhibit P13 (Removal of Caveat) is 426160"A";

(ii) Stated that Title is partially cancelled when land subject to Title is subdivided and new Title is issued over the lots;

(iii) Agreed that if one of the lots in the deposited plan is transferred then Transfer will be endorsed on the Head Title and partially cancelled will be written on Head Title;

(iv) Agreed that when first partial transfer is lodged for registration the Head Title will be marked partially cancelled and Duplicate Head Title will be retained by ROT;

(v) Agreed that first endorsement on CT 17922 is Mortgage to FNPF followed by Caveat, easements and encumbrances;

(vi) Agreed that it is practice of ROT Office, that when deposited plan is registered on the right hand side list of encumbrances and easements are recorded;

(vii) Agreed that CT 17922 had list of easements registered;

(viii) Stated that last endorsement on CT 17922 is Dealing No. 723793 registered on 17 September 2009 at 2.49pm in respect to Lot 15 on DP 4715; Lots 31 and 32 on DP 4716; Lot 40 on DP 4805; Lot 17 on DP 4806;

(ix) Agreed that endorsement is not signed by the Registrar, CT numbers are crossed and it seemed that endorsement was incomplete;

(x) Endorsement before that, is Dealing No. 426160 which is Application for issue of New Titles being CT Nos. 31921 and 28820;

(xi) Agreed that when last lot is transferred, CT is wholly cancelled as no lot is left to be transferred;

(xii) Agreed that when two Titles were issued pursuant to request Head Title was partially cancelled;

(xiii) Agreed that when Titles are issued from Head Title then easement/encumbrance endorsed on Head Title is brought down on new Title;

(xiv) Agreed that lot of easements were registered against CT 28820 because they were on CT 17922, from which CT 28820 was issued;

(xv) Agreed that DP 7340 (Exhibit P3) was registered by National Bank of Fiji as Mortgagee and not by registered proprietor and same appears for DP 7341 (Exhibit P4);

(xvi) Agreed that Duplicate CT 28286 (Exhibit P6) is not signed by ROT;

(xvii) When asked if it means, it is not valid as it is not signed by ROT, she stated she has no idea;

(xviii) Agreed that from her experience ROT will sign CT;

(xix) Stated that Duplicate CT 28820 is not signed by ROT;

(xx) Agreed Duplicate CT 28286 (Exhibit P8) is signed by ROT and land is in Levuka;

(xxi) Stated that Duplicate DT 28202 (Exhibit P7) is not signed by ROT;

(xxii) Agreed that Transfer No. 379880 is in respect to whole number of Titles from First Defendant to the Bank dated 24 June 1995, is not signed by ROT and was lodged by G.P. Lala & Associates;

(xxiii) Agreed that registered proprietor of CT 31921 (Exhibit P11) is First Defendant, is dated 16 April 1999, and is signed by ROT;

(xxiv) Stated that Exhibit P12 is CT 28820; registered proprietor is First Defendant, is dated 16 April 1999 and is signed by ROT.

119. In re-examination, PW1:-

(i) Stated that Instrument number for Request of New Title is 426160 whereas Instrument number for Removal of Caveat is 426160"A";

(ii) Stated at times dealing numbers are printed and handwritten and this happens when documents are missed out from batch when numbers are given at time of registration then letters are written after number;

(iii) Stated that Dealing No. 426160 and 426160"A" are not related;

(iv) When it is put to her that Removal of Caveat was lodged on 28 June 1997, and Request for CT was lodged on 16 April 1999, some two (2) years apart then how it ended up being 426160 and 426160"A" she stated that she has no idea;

(v) Stated when Head Title is partially cancelled Duplicate Head Title does not go to registered proprietor;

(vi) Agreed that Request in respect to Lot 1 DP 7340 and Lot 1 on DP 7341 was signed by G.P. Lala, Registered Proprietor is the Bank as Mortgagee and is registered by ROT;

120. During examination in chief PW2 gave evidence that:-

(i) He was first employed by National Bank of Fiji in October 1988, as Chief Manager's Assistant which position he held for approximately two years and then was appointed Manager Lending and held that position for two (2) years, and after that he moved to the position of General Manager Operations;

(ii) He first became involved with Soqulu in 1991 because loan portfolio for Soqulu came under his discretion;

(iii) He found that loan was doubtful and under auspicious of Bank lawyers Rajesh Chand & Associates;

(iv) The Solicitors were moving with recovery of Bank loan with Bank and directors of Soqulu Plantation;

(v) Sometimes in 1993, Mr Rajesh Chand migrated to Australia and sometimes in 1994, Mr G. P. Lala was instructed to act for the Bank against Soqulu Plantation;

(vi) Mr Lala gave outline of legal works as to serve fresh demand, do foreclosure on Soqulu Plantation loan and try to find real owners of lots by advertisement in the print media;

(vii) Mr Lala did not think First Defendant was real owner of those lots, because during initial investigation it was revealed that several lots were sold, and they received enquiries from lot owners and that two or three people made claim to be owner of one lot;

(viii) Mr Lala also advertised in New Zealand, Australia, United States of America and believe in Hong Kong;

(ix) As a result of advertisement Bank received abundant amount of letters requesting for direction from individual owners of lots;

(x) Bank through it's Solicitors G.P. Lala & Associates served Notice of Default dated 2 June 1994, on First Defendant (Exhibit P17);

(xi) According to his recollection, after service of Default Notice, Bank was to do foreclosure on Stinson Pierce Group but Mr Lala came up with another form of recovery which was to swap various lots and this was discussed by Bank's management and Mr Lala;

(xii) Bank had to take various traits of land including water source lot; one towards Wairiki side where refuse was to be dumped; a foreshore area; golf course; golf club; marina; and lots towards right exit (Douglas Estate);

(xiii) Bank wanted these lots because they were large track of lots not responded to by anybody to the advertisement;

(xiv) Bank wanted water source lot because it was valuable asset and was encumbered;

(xv) Mr Lala approached Bank with opportunity to trade-off with properties of First Defendant and this was to be documented by Deed of Transfer;

(xvi) When shown Deed of Conveyance dated 2 June 1995 (Exhibit P18), and asked if that is the document he stated that he thought so;

(xvii) He could not give firm answer to the question if he could recall if that document was executed as he was not actively present.

121. During cross-examination PW2:-

(i) Agreed that he was employed by NBF in 1998, and stated that at that time Mr Visanti Makrava was General Manager and Chief Executive Officer of NBF;

(ii) Stated that Ambika Prasad was employed by NBF at that time as Manager, Savusavu Branch;

(iii) Stated that he left NBF in October 1995, and he first became involved with Soqulu in 1991;

(iv) Stated that he did not have direct dealing with officers in charge of First Defendant and he could not recall who were running First Defendant at that time;

(v) Stated that he did not hear that Price Waterhouse Cooper was managing First Defendant;

(vi) Stated that he does not have advertisement placed by Mr Lala;

(vii) After seeing Mortgagee Sale advertisements and re-advertisements in Daily Post on 10 June 1994, 17 December 1994 and 1 April 1995, he agreed with contents of the advertisements when it was read out to him;

(viii) Stated that he did not have any direct dealing with management of First Defendant;

(ix) Agreed that he made reference to the fact NBF was contemplating foreclosure and stated he has layman type knowledge as to what is foreclosure;

(x) Agreed that you can only do foreclosure if no tenders are received after attempt to sell property by mortgagee sale;

(xi) Stated that he could not recall if any tenders were received in respect to the three mortgagee sale advertisements;

(xii) Stated that he had nothing to do with preparation of Default Notice (Exhibit P17) and agreed that notice lists number of titles including CT Nos .13527 and 17922 and all titles referred to large areas of land with 600 acres being the largest;

(xiii) Stated that he cannot give firm answer as to whether three titles were mortgaged to Bank under different mortgagees;

(xiv) Stated that individual properties secured by Bank for advances made for Soqulu and Default Notice was issued against all these properties;

(xv) In respect to lots stated to be excised or taken out in whole he agreed that he still thought that is what is said;

(xvi) Agreed that Default Notice was signed by Bank as Mortgagee and received without prejudice by First Defendant and it was signed by Mr Woodman.

(xvii) Agreed that he said Bank considered water and rubbish lots valuable and stated that it was his personal view and he cannot vouch for others;

(xviii) Stated that he was not aware if any services were provided to lot owners or water was delivered to boundaries of commercial lots through reticulation system owned and operated by First Defendant or that water sources which fed the reticulation was situated on part of CT 17922;

(xix) Stated that water lot was situated on the top of hill and agreed land was quite steep;

(xx) Stated that he thought water lot was valuable because it contained large areas of land and that he did not take any advice as to what the value of water lot would be;

(xxi) Agreed that he would say the same for rubbish dump lot, but stated that it was referred to then as unencumbered lot and not as rubbish dump and he was not aware that this was used as rubbish dump;

(xxii) Stated that he did not know if all Titles in the Default Notice or Advertisement were for subdivided lots;

(xxiii) Stated that he is not aware in detail as to process adopted in Fiji for track of titles;

(xxiv) Agreed that Deed of Conveyance has effect of transferring properties to purchaser only when transfer is executed and registered at ROT;

(xxv) Stated that he did not have any involvement in negotiating and signing Deed of Conveyance;

(xxvi) Stated that he could not see any common seal of Bank in Deed of Conveyance and the signature under word "Signature" appears to be Mr Makrava's.

122. In re-examination PW2:-

(i) Stated that G.P. Lala & Associates had direct dealing with management of First Defendant;

(ii) Stated that G.P. Lala & Associates will convey discussions held with First Defendant to Bank which will be presented to the Board of the Bank on monthly basis and when any clarification is sought or decision is made by Board they will convey it to G.P. Lala & Associates;

(iii) Stated that he attended Board Meetings to report on portfolio lending which included Soqulu's latest monthly reports;

(iv) Monthly report from Mr G. P. Lala was about what transpired in his discussion and was general report about his dealings with First Defendant about Soqulu lots;

(v) Stated that other reason water and rubbish dump lots were valuable because they were unencumbered and at first sight appeared valuable lots.

123. PW3 during examination in chief gave evidence that:-

(i) He started working for National Bank of Fiji (**"the Bank"**) on 14 July 1977, and on 1 July 1996, he moved to Plaintiff as Manager International and Acting Manager Treasury in which position he

remained until early 1998, when he moved to being Acting Financial Controller;

(ii) Agreed that he remained in that position and was confirmed much later;

(iii) He first became involved with Soqulu between September and October 1999, when Plaintiff received request from a Company to purchase four to five acres of land on the hilly mountainous place in Soqulu for purpose of Millennium Monument;

(iv) Read contents of letter dated 21 May 1999, from him to ROT (Exhibit P19);

(v) The reason he wrote letter was because Plaintiff engaged Wood and Jepsen to draw up subdivision plan and Plaintiff enclosed copy of Duplicate CT No. 28202 with letter and the offer to purchase was part of particular piece of land described in Duplicate CT No. 28202;

(iii) Plaintiff was advised by Wood and Jepsen that there was problem with CT 28202 in that land subject to Original CT 28202 was not in Taveuni but in Island of Ovalau;

(iv) Plaintiff thought error was from Titles office;

(v) He was not aware about the problem before October 1999, and he told his staff and Chief Manager of Plaintiff Mr Robert Escudier who simply said to have it corrected and that is when he wrote to ROT;

(vi) Read letter dated 22 October 1999, from Vazila Ltd to Plaintiff (Exhibit P20);

(vii) Letter dated 30 November 1999, from Vazila Ltd to Plaintiff (Exhibit P21) was about same five acre lot; the problem and discussion about subdivision with surveyors and Town and Country Planning;

(viii) At that time no legal advise was sought but was sought in late 1999 from Jamnadas & Associates who liaised with ROT;

(ix) It was not until late 2000, when Jamnadas & Associates advised Plaintiff that another CT has been issued over land subject to CT 28202;

(x) Jamnadas & Associates did not advise on any other lots and advise was only on water lot;

(xi) There was nothing coming out of dealing between Jamnadas & Associates and ROT and ROT did not help to any extent;

(xii) Plaintiff then instructed Chan Law to investigate CT 28202, and search on remaining parcel of land which was some one hundred (100) CT numbers which included rubbish dump lot;

(xiii) Then he thought it was suspected fraud which suspicion arose in 2002;

(xiv) Until then they thought it was ROTs Office error;

(xv) Other lots apart from water lot and rubbish dump lot seemed okay.

124. During cross-examination PW3:-

(i) Agreed that he joined Plaintiff in July 1996, and Plaintiff was created by Statute;

(ii) Stated Plaintiff was created to look after larger performing loans and non-performing loans;

(iii) Stated that when he joined Plaintiff, the General Manager was Mr Escudier and his immediate boss was Mr Ian Kerr, General Manager Finance;

(iv) Stated that he did not have anything to do with the Deed of Conveyance or the transfer that followed it;

(v) Stated that he did not know who were Plaintiff's lawyers in connection with the Deed of Conveyance but subsequently found out that it was G.P. Lala & Associates;

(vi) Stated that Plaintiff took over non-performing loans of the National Bank of Fiji from 1 July 1996, and he was not aware if it included First Defendant and Soqulu;

(vii) Stated that he did not do any work in the Account but wrote letters in 1999;

(viii) His involvement with First Defendants' Account was as being Acting Manager Finance at that time and because parcels of Soqulu land (Titles) was held with Finance Department they had to verify that against balance sheet and Finance Department was accountable.

(ix) Stated that at that time he did not know if Soqulu Plantation or First Defendant mortgaged properties to the Bank and that Plaintiff took over Bank debt but he did find out in 1998, as Deed of Conveyance was with Finance Department;

(x) Stated that he became aware that Bank acquired property at Soqulu from Soqulu Plantation/First Defendant after he sighted Deed of Conveyance in 1998;

(xi) Stated that Deed of Conveyance was shown to him by Mr Kerr because he was leaving the Plaintiff;

(xii) Stated that he did not become responsible for the Account at that time because they had planned to reduce their portfolios and less priority was given to sale of real estate properties and hence Soqulu property was left for sometime;

(xiii) Stated that according to Chief Manager they did not think it was urgent;

(xiv) Stated that he was not aware that in 1994, G.P. Lala & Associates on behalf of Bank made Application for three hundred (300) titles owned by First Defendant but became aware in 1999;

(xv) He became aware that legally much of titles were issued to Mr G.P. Lala were registered properties of First Defendant and was aware that Mr G.P. Lala took possession of Duplicate CT Nos. 28202 and 28286 but did not know when he took possession;

(xvi) Stated that he did not know when Mr Lala took possession of the title but probably agreed if said in 1994 or 1995;

(xvii) He is aware that Duplicate CT Nos. 28202 and 28286 were not signed by ROT and he is not aware if Mr Lala brought this to the attention of the Bank;

(xviii) Stated that in 1999, he instructed Jamnadas & Associates to investigate and not G.P. Lala & Associates because at that time he did not know G.P. Lala & Associates was handling and no one at the Bank told him that;

(xix) Agreed that he was asked to sign Affidavit in Civil Action Nos 386/05 filed by Plaintiff against First Defendant to remove Caveat and on 15 September 2005, he did sign the Affidavit in Support of the Application to Remove Caveat (Exhibit "D2");

(xx) After seeing his Affidavit sworn on 3 August 2007, in respect to Civil Action No. 287 of 2007 (Exhibit "D3") filed by First Defendant against Plaintiff and Kawakawadawa (Fiji) Ltd (**"KFL"**) he stated he could not remember at all as to what the action was about;

(xxi) When it was put to him that that action was about an attempt by First Defendant to recover annual service charge for lots transferred to Plaintiff and then sold by Plaintiff to KFL, he stated that he cannot recall;

(xxii) Stated that what is stated at paragraph 6 of his Affidavit (Exhibit "D3") is correct;

(xxiii) Agreed with what is stated at clause 6 of Deed of Conveyance (Exhibit P18) and what is stated at paragraphs 11(a) to (e) and 12(a) to (d) of the Proforma Sales & Purchase Agreement attached to Deed of Conveyance and that obligation to pay rates and charges was passed to KFL;

(xxiv) Stated that he had seen Sales and Purchase Agreement dated 16 June 2006, between Plaintiff and KFL of one hundred seven (107) lots;

(xxv) After looking at the Sale and Purchase Agreement and Proforma Agreement agreed that on the face of it there is no resemblance between the two;

(xxvi) Agreed that Clause 5.1 of Sale and Purchase Agreement says KFL must comply with Deed of Conveyance;

(xxvii) Stated he could not recall that when Plaintiff transferred land to KFL it took Deed of Covenant from KFL to pay charges to First Defendant;

(xxviii) When it was put to him that if Plaintiff did not take it, he agreed that it was a breach of Deed of Conveyance he stated "it supposedly did";

(xxix) Stated as correct when clause 5.1 of Sale and Purchase Agreement between Plaintiff and KFL (Exhibit "D4") was read out to him.

125. In re-examination PW3:-

(i) Stated that reason no account was transferred from Bank to Plaintiff was that the Account would have settled prior to 1 July 1996;

(ii) Stated that Account was settled between Bank and borrower and his understanding is it was through Deed of Conveyance;

(iii) Agreed that he first became involved with Soqulu in 1999, and stated that Mr Kerr gave him Deed of Conveyance in 1999 because he was leaving the Plaintiff;

(iv) Stated the immediate purpose of his having Deed of Conveyance was to verify all titles held in Finance Department;

(v) Stated that he did know about any problems for any of the titles;

(vi) Asked as to what is meant by prima facie evidence in reference to his Affidavit sworn on 15 September 2005 (Exhibit "D2"), and Chan Law's letter he stated that he does not actually know;

(vii) Stated he could not recall why the Bank did not take Deed of Covenant from KFL.

126. PW4 (Surveyor) in his examination in chief gave evidence that:-

(i) In 1999, he was engaged by Vazilu Ltd to hive off five (5) acres of land from Soqulu Estate;

(ii) When it was put to him that it was called water lot he stated he could not recall but it was for some Millennium development;

(iii) Seven lots were to be hived off with three (3) one (1) acre lots, and four (4) half (½) acre lots;

(iv) Confirmed Scheme Plan shows a scheme plan report of subdivision of CT 28202;

(v) He was instructed in October 1999, when he lodged Application for subdivision which was not approved by 9 December 1999;

(vi) He sent field officers to carry out survey, prepare survey plan and go for registration;

(vii) In this case plan was not registered because of some anomalies in the Title which he obtained from search and advised the Bank, Mr Ambika Prasad;

(viii) When Mr Prasad was informed Mr Prasad was bit surprised and he did not know about it;

(ix) He did not know what happened after that.

127. During cross-examination PW4 stated that sale with Vazila Ltd did not go ahead because subdivision plan in respect to land subject to Duplicate CT No. 28202 was not registered and Registrar discovered anomaly.

128. In re-examination PW4 stated that he brought the anomaly to Registrar's attention and she did not sign the plan.

129. PW5 in examination in chief gave evidence that:-

(i) Since middle of 2000, he has been director of KFL which company owned one hundred (100) or thereabout lots in Soqulu Estate out of possible eight hundred (800) lots;

(ii) His guess is that about thirty or forty lots have developments on it;

(iii) Since 2006, First Defendant sent service charge invoices to KFL for club, water, collection of rubbish and maintenance of verges on the road side;

(iv) KFL has not paid any of the invoices because it has no contract with First Defendant for supply of services and KFL has no contract with First Defendant, because, it believes water service title is owned by Plaintiff;

(v) Other reason invoice is not paid is that KFL has no residence, they don't use water, KFL does not produce any rubbish as such it does not require rubbish collection; and no one pays charges including Jamie Grey of Melbourne who owns twenty (20) lots;

(vi) Also they do not want to deal with non-governmental body and will deal with a body corporate for transparency;

(vii) Other body who they would pay is Local Council because it is State owned and that ratepayers could see the account and know who is running it;

(viii) First Defendant maintains some verges and some are not maintained;

(ix) KFL received invoice for $29,000.00 ($2,600.00 per annum) from First Defendant for eleven years, from when KFL bought the lots from Plaintiff;

(x) Service provided is poor because water supply to some houses have been intermittent and verges not frequented very often;

(xi) He and his wife own 292 acres of farm in the Estate which consists of thirteen lots/titles which they purchased from KFL in 2010;

(xii) He had interest in club house and First Defendant obtained ex-parte injunction against him and the Application for Injunction was dismissed;

(xiii) Plaintiff obtained possession of the Club around August 2008;

(xiv) Anyone could come and use golf course whether owner of lots or not;

(xv) Public would pay charges for use of swimming pools;

(xvi) In respect to Tax Invoice for charges issued in 2017, by First Defendant to KFL he stated that interest was charged at 10%, and interestingly charge was $1,200.00 then increased to $1,800.00 and now it is $2,450.00;

(xvii) All Invoices are outstanding because they have not paid as there is no contract to pay.

130. During cross-examination PW5:-

(i) Agreed that evidence he gave is on behalf of KFL and KFL is not a party to this action;

(ii) Stated that KFL is owned by himself, his wife Rosalia Valenia Niubalavu and Estate of Sera Lee and he believe that Probate or Letter of Administration in respect Estate of Sera Lee has been granted;

(iii) Stated that he does not know who prior shareholders of KFL were and that some of them were iTaukei;

(iv) Director of KFL are him, his wife, Mr Philip Morais and Mr Philip Morais Junior;

(v) Stated that KFL is not paying for Plaintiff's legal costs of this action;

(vi) Stated that he specifically does not know who is paying Plaintiff's legal fees but ultimately funds are coming from one of Mr Morais's companies;

(vii) Stated that Mr Morais or any of his companies are not structured in KFL;

(viii) Stated that purchase of lots by KFL from Plaintiff was financed by Collins (Fiji) Ltd whose owners are Mr Morais and Mr Mark Roswethorn and Mr Roswethorn is certainly not bankrupt;

(ix) No one manages KFL as it is not operating company and as such has no Manager;

(x) Board of Directors makes decision for KFL, like decision not to pay invoice for charges and meetings are held over phone;

(xi) Stated that he remembered sending document dated 20 June 2007, on KFL letter updating shareholders on what happened after KFL owned lots which includes right of Plaintiff over legal action against First Defendant;

(xii) Stated that his understanding was that KFL was acquiring Plaintiffs right and liabilities in the legal action against First Defendant;

(xiii) Agreement also provides that if First Defendant is successful in its Counter-claim against Plaintiff, KFL will indemnify Plaintiff for any damages awarded against Plaintiff;

(xiv) Agreed that KFL has no cash and only assets it has, is lots in Soqulu and benefit of this action;

(xv) Agreed that in the letter it is stated that KFL has purchased farm for $270,000.00 with funding from him and residential lots for $2.7 million with funding from Mr Mark and Mr Philip;

(xvi) Agreed that KFL offered Philip and Mark 75% of company which they rejected and offered to incorporate Collins Ltd with 20% to KFL for $540,000.00 and option was for about 18 months (until 31 December 2007) which offer was accepted by KFL;

(xvii) Agreed that he said KFL purchased lots from monies borrowed from Collins and KFL sold land rights to Collins and recovered a finder fee of $60,000.00;

(xviii) Stated that KFL entered into Agreement with Collins to sell land to Collins ten (10) years ago, which he intends to honour and directors of Collins have not asked for land to be transferred;

(xix) Stated that he does not live on the Estate but visits quite often;

(xx) Last he went to the Estate was in October 2016, and stated that it would surprise him if he was there now there will be more than 30 to 40 homes there;

(xxi) Stated that he is not aware how residential estates in Fiji outside town/city boundaries are managed and has no idea how Maui Bay is managed;

(xxii) Agreed that if a developer has to maintain an Estate it costs money;

(xxiii) Stated that he did not know if all lot owners pay charges like one pays to Suva City Council;

(xxiv) Stated that though reticulation system is in Soqulu Estate Commercial/Residential lot owners got water to some lots and the set-

up was disintegrated when NBF called up the loan because ownership of some common properties belonged to different parties;

(xxv) Stated that First Defendant got into trouble because golf course and marina are not owned by the developer anymore and in that case their view is the covenant on public facilities is not valid and there is time for new set-up;

(xxvi) Stated that water system has disintegrated because of following reasons:-

(a) Pipe running across their farm to the tank has not been filled for ten (10) years;

(b) They have been told that no way they will get water to six (6) lots in Tabua Place owned by KFL;

(c) He has spoken to a Estate Agent who in selling lots as little as $10,000.00 and the Agent told him that price is cheap because it has no water access;

(d) There are 800 lots with 18km road and First Defendant has small part-time labour force;

(e) He would not know how may lot owners cannot get water but suspects fair few cannot;

(f) In his view the size of the Estate would require significant investment in capital to get water to every lot;

(xxvii) Disagreed with the suggestion that only because there is no water to six (6) lots in Tabua Place and information by some that they do not have water he is of the view the water reticulation system has disintegrated;

(xxviii) When it was put to him that large proportion of residential lots get water he stated that lesser proportion do and large proportion do not

and only person who knows the proportion is Mabaa, Manager of Water System, employed by First Defendant;

(xxix) Stated that he does not know if water is not available to six (6) lots in Tabua Place because water charges are not paid;

(xxx) Stated that he is aware that water has been cut off for lots for which charges have not been paid;

(xxxi) Stated that he is not aware that water pipes have been installed to boundary of each lot;

(xxxii) Agreed that to run water reticulation system you need water tanks and pipes;

(xxxiii) Stated that he does not know how many water tanks or how many kilometres of pipes are installed on Soqulu Estate;

(xxxiv) Stated that he knows about one million litre water tank installed on towards top end of the Estate;

(xxxv) Stated that he does not know who installed those water tank and water pipes;

(xxxvi) Stated that he know that since 1995, First Defendant has been maintaining the water reticulation system at its own cost and he has an idea which is his guess as to at what the costs might be and agreed that he may be totally wrong;

(xxxvii) Stated that he does not know if all lot owners expect KFL signed Deed of Covenant with First Defendant to pay service changes;

(xxxviii) Agreed that since it is good idea if provision of service provided is taken by lot owners;

(xxxix) Stated that KFL as owner of substantial lots put that proposal to Mr Ian Menzies to get his opinion because he believed Ian Menzies would have an idea what lot owners view would be;

(xl) Stated that Ian Menzies felt that people would not want to get into legal dispute with First Defendant or breach the contract they signed and he believed that First Defendant may take action against lot owners;

(xli) Agreed to suggestion that if some entity provided service then it would charge for providing services;

(xlii) When it was put to him that if that happened First Defendant will not set charges he stated that he does not know what First Defendant would do;

(xliii) Stated that he does not know if Menzies had put the proposal to First Defendant;

(xliv) Agreed that Menzies owned property at Soqulu and be bought one (1) lot from KFL but does not know if Menzies is paying charges to First Defendant;

(xlv) Agreed that he gave evidence that KFL received invoices from First Defendant and none of the invoices have been paid;

(xlvi) Stated that he responded about the invoices through VP Lawyers or perhaps Howards;

(xlvii) Agreed that he is of the view KFL is the owner of golf course and golf club because it bought those properties from Plaintiff and that as owner of property it has responsibility to maintain it;

(xlviii) Agreed that when KFL entered into Agreement to buy golf course and golf club it was occupied by First Defendant with approval and at request of Plaintiff;

(xlix) Agreed that KFL wanted to run golf course and golf club as owners and KFL entered into an Agreement with Plaintiff to run golf course and golf club;

(l) Agreed that in 2004, Chan Law was acting for Plaintiff and advertised for sale of lots at Soqulu;

(li) Agreed that KFL responded and offered to buy and KFL's offer was accepted;

(lii) Agreed that in the Advertisement by Chan Law it was stated that "The successful purchaser must be aware that Taveuni Estates Ltd (TEL) controls land and water rate. By a scheme plan dated 3 April 1978, and by a Deed of Conveyance dated 2nd June 1995 TEL must set these rates."

(liii) Stated that they did not know what it meant until after they did due diligence and was told by Chairman of Plaintiff, Mr Daniel Elisha that the Plaintiff controls water through ownership of water lot for which they believe they had legal title to the land;

(liv) Stated that on one hand they saw statement in the advertisement and on the other hand he was told by Chairman of Plaintiff that Plaintiff owned water lot and had commenced legal action against First Defendant and with that due diligence they made decision to purchase the land and the legal right;

(lv) Stated that they asked Ms Marie Chan what it meant but they did not put great weight on what she said and instead put more weight on their lawyers Howards answer;

(lvi) Disagreed with suggestion that since Ms Marie Chan had placed the advertisement only she could say what it meant and anyone else would guess it;

(lvii) Stated that Howards advised them that water lot was legally owned by Plaintiff and covenant on the golf course did not make any sense and was unenforceable and therefore they decided to proceed with purchase of lots;

(lviii) Stated that he could not recall what Chan Law told him;

(lvix) In reference to following Sales and Purchase Agreements:-

1st Agreement - 13 lots (Farm)

2nd Agreement - 100 lots;

he stated that he was involved in negotiation with Plaintiff for 2nd Agreement and Sera Lee and Samisoni Matasere were involved in negotiating 1st Agreement with Plaintiff and thought they successfully tendered for farm land in 2003 or earlier and they settled in 2004;

(lx) Stated that he was not director of KFL when Sera Lee and Samisoni tendered for and signed Sale and Purchase Agreement in respect to farm lots;

(lxi) Agreed that he was director of KFL when properties were transferred to KFL and they came for his help and to finance it;

(lxii) When it was put to him that he was of the view that it was good buy he stated "mistakenly, yes".

(lxiii) Stated he was familiar with the terms of Sale and Purchase Agreements signed on 25 March 2004, and 16 June 2006 (Exhibit D4) between Plaintiff and KFL;

(lxiv) Agreed that total purchase price for 107 lots was $3,042,163.13 (VIP);

(lxv) Agreed that copy of Deed of Conveyance is attached to the Agreement and proforma Sale and Agreement to be used by Plaintiff on sale of lots is attached to the Deed;

(lxvi) When clause 7.4 of the Sale and Purchase Agreement was read out to him he stated that he can see that;

(lxvii) Agreed that he is aware as director of KFL that if First Defendant is successful in its Counter-claim in full or in part in damages then KFL is to indemnify Plaintiff in that regard.

131. In re-examination PW5:-

(i) Stated that in order to give effect to what was put to Mr Menzies lot owners will need to take access to water and rubbish dump lots to be given by First Defendant who is registered proprietor of those lots;

(ii) Stated that another alternative will be those lots be transferred to Plaintiff and then Plaintiff transfer the lots to KFL and they would grant access to body representing lot owners;

(iii) Stated that he does not know what Mr Menzies thought about direct transfer of those lots from First Defendant to KFL;

(iv) Stated that Mr Menzies thought lot owners would get in trouble with Plaintiff because First Defendant had history of litigating, dissenting or complaining about lot owners who withheld or did not pay rate for believing that services have not been provided;

(v) Stated that Mr Menzies expressed the view that there is no likelihood at all that First Defendant would let lot owners out of the service contract because Mr Menzies felt that they will be giving away that business and they will not give easily;

(vi) Stated that he could not recall when Plaintiff consent for First Defendant to occupy club house was withdrawn but guessed it to be in 2008 or 2009;

(vii) Agreed that Agreement for KFL to operate and manage golf course/club house was signed on 31 October 2006;

(viii) Stated that consent was withdrawn as soon as they purchased the property;

(ix) Agreed that it took until 2008 for Court to determine Plaintiff and KFL was entitled to possession;

(x) Agreed that KFL did operate club house and made significant loss and the upshot of that was it closed the club house;

(xi) Stated he could not recall other reason to close the club house and main reason was losing $13,000.00 per month;

(xii) Stated that the argument between KFL and First Defendant about club house was that First Defendant wanted club house opened for longer hours which dispute ended up in Court;

(xiii) Stated that Agreement dated 31 October 20016 (Exhibit P58) authorised KFL to operate club house;

(xiv) Stated he could form the view that what Ms Marie Chan meant by advertisement was true in legal sense and needed to do due diligence;

(xv) In reference to proforma Sale and Purchase Agreement (Annexure I to Deed of Conveyance - Exhibit P18) he stated that if that Agreement was signed between Plaintiff and KFL then Plaintiff would be vendor and KFL the purchaser and if KFL sold under that Agreement than KFL would be vendor and a third party the Purchaser;

(xvi) Stated that there is a subsequent Agreement in respect to indemnity by KFL to Plaintiff.

Defendant's Case

132. Defendant called Peter John Walton Stinson of 1 Ross Street, Benowa 4217, Queensland, Australia, Company Director/Consultant as it's only witness (**DW**).

133. DW during examination in chief gave evidence that:-

(i) He is Fiji Citizen;

(ii) He started Stinson Pierce Group in late 1960s, left that company in 1997, when he became Deputy Chairman of Jodie Mcpherson in Hong Kong;

(iii) In early 1980, he returned to Fiji at request of then Prime Minister to run for election for Alliance Party and was elected to Parliament for two, five year terms;

(iv) For one year he was Minister for Lands and then Minister for Mineral Resources and Minister for Tourism until 1987 election;

(v) In 1990, he was sent to Australia as Ambassador with accreditation to Singapore;

(vi) His father was late Sir Charles Stinson, Politician, Mayor of Suva and founding member of New Independent Government;

(vii) When asked if he was involved in development of Soqulu by First Defendant he stated that when he was Chairman of the Group, he did not get involved in acquisition of Soqulu and left it for two (2) Executives; he visited Soqulu for a day in 1979, and he did not become involved until April or May 1995;

(viii) He is currently director of First Defendant and he became director in late 1997 or 1998 when he retired from his government position;

(ix) Current directors/shareholders of First Defendant are him and his daughter;

(x) He is director of Taveuni Management Services Ltd (**"TMSL"**) and First Defendant holds shares in TMSL;

(xi) After clarification was sought by the Court it was revealed that:-

(a) Taveuni Estates Ltd changed its name to Taveuni Management Services Ltd; and

(b) Nasau Limited changed its name to Taveuni Estate Ltd.

(xii) He first found out about Soqulu in April 1995, when Mr G. P. Lala and Mr Kafoa went for a meeting with him when he thought that they came to discuss about SPARTECA which was being negotiated between Fiji and Australia Government but it turned out that they came to discuss First Defendant;

(xiii) At the meeting they revealed to him that he has substantial shareholding in the form of original inception, inheritance and another shareholder transferred his shares to his Company;

(xiv) They asked him to sit down with Price Waterhouse Coopers (**"PWC"**) to sort out issues they had;

(xv) PWC was Manager together with other companies in the Group for First Defendant and PWC partners Frank Otto Fischl and John Desmond Roger based in Sydney were involved but Fischl came to Fiji to start sailing business;

(xvi) Confirmed 1st paragraph in letter dated 16 May 1995, from Mr G. P. Lala to him as correct and agreed that prior to this letter he received Deed of Conveyance by fax;

(xvii) When he received draft Deed of Conveyance he sent it to PWC, Sydney and all he knew that after the transfer First Defendant would no longer own any free and clear lots and no further involvement in the negotiations;

(xviii) He did not have any involvement in negotiating Deed of Conveyance until the 1st of June 1995, when he gave permission to proceed and he was waiting replies from third parties who would affect the venture and NBF communicated and was frustrated that he has not made up his mind;

(xix) Agreed that he is aware that Deed of Conveyance had attached to its Schedule forty (40) lots to be transferred to NBF and Schedule containing Forty (40) lots that were in doubt as to whether they were available to be transferred and First Defendant had ten (10) days from 2 June in which to satisfy the Bank that none of the lots were available for transfer;

(xx) Soqulu Estate in 1994 and 1995 briefly comprised Eight Hundred Ninety (890) subdivided approximately one (1) acre lots, two or three commercial lots, one hotel site, little bit later another hotel site, nineteen water tanks, twenty-eight kilometres of tar-sealed road, and about two hundred (200) kilometres of underground water pipes;

(xxi) When he went there in 1995, water tanks and pipes were in a state of bad repair;

(xxii) PDC Construction built water tanks and installed pipes for Mr Mcyntre and then Stinson Pierce;

(xxiii) He described that as water reticulation system serving the Estate;

(xxiv) First Defendant from 1995, until present spent over two million dollars on repairing and re-building water system and maintenance of water pipes and supply is ongoing seven days a week and repair costs are paid by First Defendant with capital injection from him and bank loan;

(xxv) One piece of reticulation system is on the water lot;

(xxvi) It is not possible to have water delivered to lots from water source without reticulation and water reticulation system cannot operate without water source;

(xxvii) Water source is essential part of reticulation system because no one builds anywhere without water;

(xxviii) He discussed about water source with PWC who assured him that water source is on balance of land on CT 17922 and that balance property did not form part of Transfer attached to the Deed of Conveyance;

(xxix) In reference to Exhibit P18 (Deed of Conveyance) confirms what is said in Clause 1 on Page 2 and Clause 2 on Page 2 and Clause 6 of Page 3;

(xxx) Attached to the Deed of Conveyance is Annexure being a blank Sale & Purchase Agreement and it is his understanding it that Sale & Purchase Agreement is referred to in Clause 6;

(xxxi) Agreed that Schedule I for One Hundred Seventeen (117) lots, Schedule B or 2 listing Forty (40) lots and Scheme plan (Exhibit D30) copy of which plan is clear;

(xxxii) In either of those Schedules there is no referral to CT No. 17922;

(xxxiii) In reference to Exhibit D13 (Transfer No. 590102) he stated it was transfer from NBF to KFL dated 22 July 2006;

(xxxiv) When he was asked if he still thinks Transfer is dated 22 July 2006 when registration date is 30 June 2006 he answered "Yes";

(xxxv) When it was put to him that, that is after 2006, he stated "two different dates";

(xxxvi) When he was told that Transfer is dated after Deed of Conveyance he answered "Oh, yes";

(xxxvii) Exhibit D10 is letter dated 9 June 1995, from Frank Fischl to Mr G. P. Lala and reads paragraph 3 on page 2 of the letter;

(xxxviii) In reference to Exhibit D14, letter from Chan Law to Cromptons he stated that when they were making preparation for their bid to NBF for purchase of titles advertised and they requested for list of all properties that were available for sale from Chan Law;

(xxxix) Exhibit D15 is advertisement for sale of 107 lots and he responded to this advertisement;

(xl) Exhibit D16 is letter written by Plaintiff to him in respect to Caveat No. 44943 lodged by First Defendant because when advertisements of lots for sale were placed they had no indication of zoning and indicated that it could be used for farming and read last paragraph of the letter;

(xli) Chan Law acting for Plaintiff carried out investigation for forty (40) titles and they agreed to uplift Caveats on forty (40) titles and gave to Ambika Prasad who signed Affidavit withdrawing any claim for forty titles whereby Ambika Prasad swore and admitted in that particular Court case is 386 or 287;

(xlii) Chan Law also sent letter requesting for removal of Caveat;

(xliii) Plaintiff lodged caveat on some titles ten (10) years after the Deed;

(xliv) Exhibit D22 is letter dated 7 February 1996, from Plaintiff signed by Mr Ian Kerr to Mr J. Pala director of First Defendant and reads third sentence in 1st paragraph of the letter;

(xlv) Exhibit D23 is letter dated 11 March 1999, from Plaintiff signed by Mr Escudier to him;

(xlvi) Exhibit D24 is letter dated 8 April 1999, by First Defendant signed by him and reads paragraph 3 on 1st page and paragraph 2 on 2nd page;

(xlvii) He is aware that company called Nasau Ltd lodged Caveat over property consisting golf course;

(xlviii) Plaintiff applied for removal of that caveat which later ended up in Court when Justice Jiten Singh found that Caveat should remain which decision was appealed to Court of Appeal who was in favour of upholding the Caveat;

(xlix) Exhibit D25 is Court of Appeal Judgment;

(l) He is aware about other residential developments apart from Soqulu and in particular he owns properties in Pacific Harbour and Port Denarau;

(li) For Pacific Harbour properties he is not sure if it is within town boundary and when he purchased he paid service charges for water, sewerage and land rate and had rubbish removed and all those services were provided by Pacific Harbour Management Company but he does not know who provides it now;

(lii) He as lot owner paid service charges to that company and signed documents with the Company for service charges;

(liii) He knows that other lot owners pay service charges to that company;

(liv) When asked if he has similar arrangements with lot owned in Soqulu he stated that virtually he does not know and Deed was drawn by Mr Arthur Lee of Munro Leys, same lawyer who drew up Pacific Harbour Deed to his knowledge and one exception is that Soqulu did not provide sewerage services;

(lv) Some lot owners signed Deed of Covenant with First Defendant for provision of those services;

(lvi) One owner who purchased the lot and the original lot owner signed but failed to obtain Deed of Covenant from purchaser and the other is KFL;

(lvii) Agreed that according to his knowledge every other lot owner signed Deed of Covenant;

(lviii) First Defendant sent invoice for service charges to KFL every year and then a reminder which becomes twice a year;

(lix) Exhibit D28 is letter dated 27 September 2016, from First Defendant signed by him to KFL with schedules attached showing all lots owned by KFL, amount owing up until 2016, and $2,935,169.68 being rates for 2017, as rates are charged in advance and the Agreement allows for penalty interest at 10% per annum on unpaid lot owners;

(lx) Interest is charged if debt is overdue for one year which means lot owners have one (1) year grace period;

(lxi) Next page on Exhibit D28 is consolidated tax invoice covering ninety-four to ninety-six lots payable and due by 30 September 2016;

(lxii) First invoices would have been sent the year after purchase, so in 2006;

(lxiii) KFL did not pay any part of the invoice;

(lxiv) He does not know, whether KFL wrote to them to say why they not paying the invoice but only record is statement made by Plaintiff;

(lxv) All discussion in relation to this proceeding was held between Plaintiff, First Defendant with Mr Morais with exception of one brief meeting with Mr Morais, maybe twelve (12) years ago;

(lxvi) He is not aware if Plaintiff attempted to obtain Sale and Purchase Agreement and Deed of Covenant in the form attached to the Deed of Conveyance.

134. During cross-examination DW:-

(i) Agreed that he was not member of First Defendant in 1994, 1995 and 1996 and he first found out about Soqulu in 1995;

(ii) Agreed that he was not aware about Notice of Default served on First Defendant in 1994, demanding twenty million dollars ($20m) and nobody brought it to his attention in his group of companies;

(iii) Stated that First Defendant delegated management of First Defendant to PWC for specific reasons;

(iv) Agreed that he cannot say what First Defendant was doing or not doing in 1993, 1994 or 1995 and that water lot and rubbish dump site is important to First Defendant;

(v) Stated that the other lot owner who is not paying service charges is local Indian man who purchased property from Vera Lockteff;

(vi) Stated that estimated number of lot owners are something short of three hundred (300);

(vii) When it was put to him that First Defendant does not pay service charges for its own lots he stated that First Defendant subsidies it;

(viii) Agreed that other company owned by First Defendant does not pay service charges;

(ix) Stated Rockliff was another company associated with him but was sold five (5) or six (6) years ago;

(x) Stated that Rockliff paid service charges but sold one hundred (100) lots to others of whom some pay and some do not;

(xi) Stated that on average a lot owner pays FJD$1,521.95 service charge and some are higher and some are slightly lower;

(xii) Stated that First Defendant issued invoices for about four hundred fifty thousand ($450,000.00) but collected about three hundred fifty thousand dollars ($350,000.00) which has reduced to about fifty percent (50%) since amendment to Land Sales Act;

(xiii) When it was put to him that he said three hundred (300) lot owners pay rates he firstly said that year before probably about three hundred (300) and badly affected by amendment to Land Sales Act to half but subsequently said that he cannot tell exactly and has to ask Accountant so he can give date by date;

(xiv) When it was put to him that he did not disclose any returns or accounts he stated that he provided that to Counsel;

(xv) Agreed that just over one hundred lot owners are paying who consume water;

(xvi) When it was put to him only thirty (30) lots have been developed he stated more like double that and then stated he does not know exactly;

(xvii) Agreed that they do not collect rubbish either;

(xviii) Disagreed that First Defendant makes tardy profit;

(xix) Agreed that twenty (20) years later First Defendant is trying to hang onto water lot and rubbish dump;

(xx) When asked why he did not put water lot and rubbish dump to representative, transparent and fully audited body corporate he stated that they often looked at it as under Sale & Purchase Agreement and First Defendant is empowered to pass collection of service charges to government or any other form of government or quasi-government or communal entity and they discussed with owners and it is not financially viable to do so because it has been subsidised by sale of real estate from 1995;

(xxi) Agreed that it would definitely be financially viable if eight hundred (800) lot owners paid one thousand five hundred dollars ($1,500.00) per year;

(xxii) Disagreed with comment that he did not put to body corporate because First Defendant has been making profit and still is;

(xxiii) Agreed that he said one hundred sixty five (165) lots to be repossessed by First Defendant and stated the reason for that is that there are people PWC and them could not locate from 1970's;

(xxiv) When it was put to him that he does not have to locate them because they are lot owners he stated that how can rates be collected if you cannot locate them;

(xxv) Agreed to comment that, that is the reason because they cannot collect service charge;

(xxvi) When it was put to him that that was part of his business model he stated “no longer”;

(xxvii) When it was put to him that he will re-possess the properties he stated that it is not economically viable;

(xxviii) When it was put to him that that was part of their business to charge exorbitant amount of money and if they do not pay, you cut water and re-possess he stated that most of these were over forty (40) years ago;

(xxix) When it was put to him that there was no re-possession in 1990’s he stated that there were five (5) successful ones which took them four (4) to five (5) years with cost for each recovery in excess of seven thousand five hundred dollars ($7,500.00);

(xxx) Stated that First Defendant did not repossess any lots in 2000 to 2010;

(xxxi) In reference to Exhibit P46 (Transcript of Telephone Conversation with P. Morais) at page 19 when P. Morais asked how many lots he stated that he answered 197 lots - repossessed properties and when P. Moriais asked so you have 500 lots he stated that he answered once Courts are finished with re-possession, will have 500 lots;

(xxxii) When it was put to him that he said there was no repossession in 2000 to 2010 and it meant he was untruthful to P. Morais or he is being untruthful to Court he stated it was “guess work”;

(xxxiii) When it was put to him that 300 + 197 equals to 497 he stated he does not know and it is not correct;

(xxxiv) Stated that when P. Morais asked him “you biggest guy” he answered “Yes” and that at that moment he had 300 and is paying rates on and others are in re-possession stage;

(xxxv) Agreed that he told Court that First Defendant did not pay service charges;

(xxxvi) When it was put to him that he said to P. Morais that he has 300 and he is paying rate on he stated that he stopped quite some years ago on receipt of advice from lawyer;

(xxxvii) Agreed to suggestion that lawyer advised cannot pay to yourself;

(xxxviii) Agreed that he cannot tell whether director or representative of First Defendant colluded with ROT to defraud Plaintiff of water lot and rubbish dump lot;

(xxxix) When it was put to him that director of First Defendant will be able to give answer he stated that he thought so;

(xl) When it was put to him that they were F. Fischl and Woodman he stated that one is deceased and one is retired;

(xli) When it was put to him that somebody from First Defendant knew Mr G. P. Lala who was making Application for title he stated that he heard that it was discovered by F. Fischl, PWC discovered it some years later and he believed Munro Leys;

(xlii) Stated that he does not know their Application included water lot and rubbish dump lot;

(xliii) Disagreed when it was put to him that somebody representing First Defendant colluded with someone in Titles office to ensure duplicate Certificate of Titles over water lot and rubbish dump lot were in fact bogus;

(xliv) When asked how can he know and answered in the negative he stated he does not know about any titles until 1997 or 1998;

(xlv) When it was put to him that the answer there is he does not know he stated he does not know;

(xlvi) When it was put to him that Munro Leys did not bother to check if water lot and rubbish dump lot were hived off the Title he stated he does not know and present title was still in existence at time of that Application;

(xlvii) In reference to Exhibit P1 (CT 17922) when it was put to him that if Munro Leys would have checked parent title, they would have seen Request for Title (Instrument No. 38359 registered on 19 August 1994) for water lot and rubbish dump lot lodged by G.P. Lala and hived off part of it he stated he does not know;

(xlviii) When it was put to him that ROT did not bother to check parent title he stated he does not know;

(xlix) When it was put to him that at sometime collusion stopped and ROT requested First Defendant to return CT No. 28820 to it he stated he remembers seeing it in the list of documents;

(l) In reference to Exhibit P57 he stated that it is letter to Munro Leys and he did not see it and agreed that Munro Leys is his lawyer;

(li) In reference to Exhibit D10 he agreed that it was fax notification of 14 June 1995 at 10.44 am from PWC to G.P. Lala;

(lii) When it was put to him that fourth last paragraph on page 2 of the fax talks about sending folder but no folder of documents was sent he stated that he has no idea as he was doing different job in a different country;

(liii) Confirmed as correct when he was read out 3rd last paragraph on page 2;

(liv) Stated that there was attempt to satisfy clause 13(b) of Deed of Conveyance within ten (10) days;

(lv) Agreed that clause 13(b) of Deed of Conveyance required First Defendant to transfer forty (40) lots with other lots;

(lvi) Stated that it was stopped when it was put to him that it was not satisfied because forty (40) lots were still owned by First Defendant and it was dishonesty by Fischl he stated “Not dishonest”;

(lvii) When asked as to what is spirit of clause 13(b) he stated that he was not involved;

(lviii) Agreed that intention of clause 13(b) was if First Defendant was able to transfer any of the lots it would do so but stated that First Defendant had no lots;

(lix) When it was put to him that number of lots paid in full to First Defendant he stated "No some five or six out of forty held in trust";

(lx) When asked if they relinquished their right he stated he remembered someone saying that they do not want lots and that they held lots in trust until they could locate the lot owners or their heirs;

(lxi) Agreed that Fischl's letter when it said "have been able to locate Munro Leys letter dated 11 October 1994" he stated that in his opinion it should be transferred;

(lxii) When it was put to him that the spirit of Deed of Conveyance was that if there were any lots First Defendant could transfer it would do so, he stated that in his opinion it should have been transferred and he does not know debate about not wanting to transfer;

(lxiii) Agreed that "available" means that nobody having better rights to those titles then Plaintiff;

(lxiv) Agreed that the High Court decided that First Defendant is not entitled to occupy the Club house and prior to that First Defendant opened that business to public;

(lxv) Stated that at request of District Commissioner First Defendant allowed public who were not lot owners to play golf and use tennis court and he believed small fee was charged if people had the money;

(lxvi) Agreed that when First Defendant maintained the golf course and tennis court it was for exclusive use of lot owners as stated in Deed of Conveyance;

(lxvii) Stated that it was based on request from District Commissioner which request was not in writing and that the Commissioner visited and staff turned him away and he believed a Cabinet Minister was with him;

(lxviii) Agreed that on basis of oral request from District Commissioner he chose to breach the requirement and he could not recall when request was made but said maybe in 1998;

(lxix) Stated he did not take any legal advice on the request and because they considered it as a reasonable request;

(lxx) Agreed that he like lot owners to think that, when First Defendant was in occupation of Country club it was as a charity for then;

(lxxi) Agreed that First Defendant always made a loss from country club, and First Defendant ran the business from club house, golf course and tennis court from 1970 until about 2008;

(lxxii) Agreed that he told Court that First Defendant had to put hand in its pocket and subsidise so that lots could be sold;

(lxxiii) When it was put to him that the position is that lot owners service charges never went to maintain country club facilities he stated "never";

(lxxiv) Agreed that First Defendant did that out of goodness of its heart as charity for lot owners and stated partly to assist marketing the Estate;

(lxxv) Stated that for years First Defendant provided service it did not make profit and that the country club would for some months break even and when you take into account the cost of maintaining golf course and surrounding it always ran a loss;

(lxxvi) Stated that whoever is the registered proprietor of country club lot have to accept the responsibility attached to it;

(lxxvii) Agreed that that person would have to continue to tipping tens of thousands or maybe hundreds of thousand dollars every year and stated that this was decided in the High Court and Court of Appeal;

(lxxviii) Agreed that they have to do in perpetuity and referred to Deed of Conveyance;

(lxxix) Agreed that they will have to be infinitely wealthier because of perpetuity;

(lxxx) Agreed that he did not expect NBF to be infinitely wealthy;

(lxxxi) Stated that on the other hand he expected NBF or any other owner of that country club to set aside enough capital to generate enough income to maintain the Country Club;

(lxxxii) Stated that he thought it would cost between forty to fifty thousand dollars a year to maintain and operate the country club and this is after they spent hundreds and hundreds of thousand dollars rebuilding and restoring it;

(lxxxiii) Agreed that First Defendant did not own it but as stated, they had arrangements with Plaintiff to acquire that but never happened;

(lxxxiv) When it was put to him that First Defendant only transferred it in 1995, he stated "Yes" but at the time of transfer it was agreed between Mr Ian Kerr the Deputy Chief Executive of Plaintiff, and Manager of First Defendant that it was only right the First Defendant should own that property;

(lxxxv) Stated that Plaintiff never did the transfer and in the opinion of both parties it was not even worth a dollar;

(lxxxvi) Stated that country club broke even and loss was derived from maintaining golf course and tennis court;

(lxxxvii) Confirmed that operating cost for golf course and tennis court would be forty to fifty thousand dollars a year after deducting income from country club and between 1995 to 2008, several hundred thousand dollars was spent and mostly at the beginning of the period;

(lxxxviii) In reference to Exhibit P50 (Extract from Profit and Loss Account 1996 to 2006) agreed that it is signed by PWC for First Defendant including Capital Expenditure;

(lxxxix) Stated that there is no sign off on the page because it is only an extract for Mr Ian Menzies and that is an estimate as it is from Cash Flow;

(xc) Stated that capital expenditure would be for the whole Estate including the annual cost of replacing pipes or rebuilding tanks, maintaining roads which were dedicated to government who failed to maintain them;

(xci) When asked as to generally how much capital expenditure is required to be spent on country club each year, he stated that when KFL left several hundred thousand dollars;

(xcii) When asked to give an estimate as to how much capital expenditure will be required for each year, he stated that he cannot give an estimate because it is too small a part of his group of companies to be able to come up with an estimate and it is a fraction of the total expenditure and he cannot give estimate;

(xciii) When it was put to him that it would be necessary to set aside $50,000.00 if interest rate was between two or three percent it would be necessary to set aside capital expenditure of two million dollars in order to get general income of fifty thousand ($50,000.00) per annum, he stated that if everybody paid the rate, they might ask lot owners including KFL to contribute;

(xciv) When asked if director and shareholders of company owning the lots could use the country club he stated that they cannot restrain them;

(xcv) Stated that if a lot has 200 joint owners they will be entitled to use the country club;

(xcvi) Agreed when it was put to him that in its Defence, First Defendant alleges that it did not become aware about registration of Deposited Plan No. 7340 and 7341 until late 1999, and stated also received fax from Munro Leys in 2001, and therefore he was little confused as to when it exactly was, but listening to Mr Neil Wright yesterday give evidence, he also seemed to think that they discovered it sometime in the early 2000;

(xcvii) When it was put to him that Munro Leys applied for new CT in April 1999, he stated that he has not been asked that question and later said he presumed so;

(xcviii) When it was put to him that in First Defendant's Counterclaim, it is seeking an Order that Plaintiff comply with clause 8 of the Deed of Conveyance and asked to explain how can Plaintiff comply with that clause he stated that residential lots are residential and there is on right hand side of scheme plan a legend with recreation area, residential areas, public reserves, commercial areas and condominium and it is fairly easy to follow;

(xcix) Agreed that Plaintiff has sold all its lots;

(c) When asked then how exactly can Plaintiff comply with clause 8 he stated that it is contained in the Sale and Purchase Agreement between Plaintiff and KFL that scheme plan attached hereto be complied with and Plaintiff never debated it for ten (10) years and it is only KFL who is challenging it;

(ci) When it was put to him that it is not registered plan and no stamp of Director of Town and Country Planning he stated it is broken into hundreds of pieces;

(cii) Agreed that he told Court that PWC had advised him that water lot and rubbish dump lot did not form part of the Deed;

(ciii) Did not agree when it was put to him that they were wrong;

(civ) When it was put to him that Lot 1 DP 7340 is listed in the Deed of Conveyance he stated that when everybody looked at the Deed of Conveyance he certainly did not know and because there was no detailed database he certainly did not know what any of the lots were and they were under impression by going to ANZ Bank as Plaintiff's Mortgages both of which referred to balance of CT 17922 and could not remember balance of other CT number;

(cv) Stated that at time of Deed of Conveyance they were not in the mortgages;

(cvi) Agreed that Lot 1 on DP 7340 and Lot 1 on DP 7341 are in Annexure to Deed of Conveyance;

(cvii) When it was put to him that in fact PWC was wrong when they assured him that those lots did not form part of the Deed of Conveyance, he said that beyond seeing the first draft which was attached to the Deed of Conveyance which had an area on it he honestly did not know what any title referred to and because he said his first involvement with the whole development was in 1995.

135. In re-examination DW:-

(i) In reference to Annexure 3 to Deed of Conveyance (Exhibit P18) stated that:-

(a) No. 28 has CT No. 28202 - DP 7341 Lot 1;

(b) CT 28202 is not correct title number;

(c) There is no area for that lot;

(d) At No. 31 it states CT 28286 - DP 7340 Lot 1;

(e) CT 28286 is not correct number according to his knowledge;

(f) No area of lot is shown

(ii) Stated that there is no reference to CT 17922 anywhere;

(iii) In reference to Transfer (Exhibit P10) in respect to 117 lots he stated that:-

(a) It is Transfer No. 379880;

(b) Was prepared by G.P. Lala & Associates;

(c) Appears to be 117 lots in the transfer;

(d) There is no reference to CT 17922;

(e) Fourth page of Transfer in description column it has five entry - Lot 1 on DP 7340 and Lot 1 on 7341 and to left of Lot 1 on DP 7340 is CT 28286 and Lot 1 on 7341 has CT 28202

(f) The title numbers in (iii)(e) are not correct;

(g) None of the forty (40) titles mentioned in the DOC appear on the Transfer;

(h) Only Titles in Annexure 3 of DOC appear.

(iv) Agreed to suggestion that they Duplicate CT Nos. 28286 and 28202 bogus titles were issued on the Application of G.P. Lala & Associates relating to Lot 1 on DP 7340 and Lot 1 on DP 7341;

(v) Stated CT 17922 is nowhere in the Transfer;

(vi) When it was put to him that personally he would have found out about those titles in 1999, he stated that that would have been the earliest;

(vii) Agreed that Duplicate Titles were issued in the name of First Defendant and Titles issued in 1999, were also issued in the name of First Defendant;

(viii) Agreed that at this time registered owners of those two properties is First Defendant;

(ix) In reference to Exhibit D10 (PWC letter/fax) he stated:-

(a) Address given for PWC is Sydney and is addressed to G.P. Lala;

(b) Sent by facsimile and Country code for Fiji is 679;

(c) Assumed fax was sent to G.P. Lala, GPO Box 14384, Suva;

(d) Fax does not have 679 but 0629 and it could be code for anywhere in the world as Australia code is 61.

(x) Stated that he did not have objection from any lot owner to allow public on golf course;

(xi) When it was put to him that he said in cross-examination that he believed or understood that at the time of signing or around the signing of the Deed of Conveyance, none of the forty titles were available for transfer he stated that his recollection and belief is that Fischl found two (2) which should go to NBF and he transferred them without having been sold other than two returned to Plaintiff or sent to them;

(xii) Stated that reason none of the Titles were available was that it was either subject to Plaintiff's mortgage or Plaintiff's Caveat and all of them were subject to Sale and Purchase Agreement to a third party;

(xiii) When asked to explain why some or all of them at that point in time has not been transferred to Purchaser he stated that the possible causes or blockages were Plaintiff's Mortgage, Caveat by Plaintiff and Transfer being impounded for non-payment of stamp duty or taxes and that there were about 60 to 70 titles impounded by Tax Office and as a result of his meeting with Government and Commissioner of Inland Revenue that Transfer were released and transfer processed;

(xiv) Stated that the last count they did, showed all the titles were transferred except for five or six for which they tried to locate legitimate purchaser who had purchased and paid in full.

Issues for Determination

136. It is apparent from the evidence and submission filed by Plaintiff and First Defendant the issues for determination are:-

(i) Whether water lot and rubbish dump lot is owned by Plaintiff or First Defendant?

(ii) Whether Plaintiff is entitled to Transfer of lots pursuant to Clause 13 of Deed of Conveyance (Exhibit P18)?

(iii) Whether clause 7 of the Deed of Conveyance (Exhibit P18) is void for uncertainty?

(iv) Whether Plaintiff passed payment of rates and charges to KFL pursuant to Clause 6 of Deed of Conveyance (Exhibit P18)?

(v) Whether Plaintiff's claim is statute barred pursuant to Section 4 of Limitation Act 1971?

(vi) Whether First Defendant is entitled to damages?

137. Plaintiff submits that Plaintiff's claim is not statute barred pursuant to Section 4(1) of the Limitation Act 1971 on the grounds that:-

(i) Deed of Conveyance is a Deed and not a Contract;

(ii) First Defendant holds the water lot and rubbish dump lot in trust for Plaintiff;

(iii) Certificate of Titles over Water and Rubbish Dump lots were obtained by First Defendant fraudulently;

(iv) First Defendant failed to transfer forty (40) lots to the Plaintiff pursuant to clause 13 of Deed of Conveyance as a result of fraudulent misrepresentation by First Defendant.

138. It is therefore convenient to deal with the issue as to whether Deed of Conveyance is a Deed and not a contract and then determine if Section 4(1) of Limitation Act 1971 applies in this instance.

Whether Deed of Conveyance is Deed or Contract?

139. Plaintiff submits that Deed of Conveyance (hereinafter referred to as **"DOC"**) is a Deed and not a Contract which is not caught by Section 4(1) of the Limitation Act 1971.

140. First Defendant submits that Deed of Conveyance is not a Deed but a Contract and is caught by six (6) year limitation period pursuant to Section 4(1) of Limitation Act 1971 on the ground that:-

(i) DOC was not signed, sealed and delivered and no seal is attached by the Bank;

(ii) DOC is not a legal document in which consideration was necessarily enshrined which was subsequently executed by transfer;

(iii) It was a debt compromise, finalised by registrable transfer.

141. To determine whether DOC is a Deed or a Contract, the Court needs to look at the content and purpose of DOC and not entirely the form and manner of execution.

142. It is no doubt and that if what is submitted by First Defendant at paragraph 140 of this judgment and DOC has those features then it would be much easier to determine this question.

143. The test to determine whether a document is Deed or some other document in particular contract is objective one.

144. In **400 George Street (Qld) Pty Limited v. B C International** [2010] QCA 245 (10 September 2010) the Court of Appeal had adopted following dicta from **Toll (FGCT) Pty Limited v Alp.. Pty Ltd** (2004) 212 CLR 165 and 179:-

> *"31. This Court, in Pacific Carriers Ltd v. BNP Paribas, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the*

subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction."

145. The Court of Appeal in **400 George** case stated as follows in respect above statement:-

> *"32. These statements of principle were directed to the meaning of contractual terms but, in my view, they have application to the question of whether the Instrument was intended to take effect as a deed. The numerous authorities to which this Court was referred, as one might suspect, support the conclusion that this question is to be decided principally by reference to the contents of the instrument under consideration"*

146. The DOC (Exhibit P18) at 1st page it is stated as follows:-

> "**DEED** OF CONVEYANCE
>
> THIS **DEED** OF CONVEYANCE is made the 2nd day of June 1995"
>
> ***(emphasis added)***

147. The word **Deed** is used at paragraph 2 of preamble of Exhibit P18.

148. The heading before the start of terms and conditions of DOC states as follows:-

"NOW THE **DEED** WITNESSETH as follows" ***(emphasis added)***

149. This **"deed"** is used in clause 8, 11, 13(c) and 14 of DOC which read as follows:-

Clause 8

"The Transferee covenants with the Transferor to preserve the Scheme Plan dated 3 April 1978 drawn by Ralph M Grierson a copy of which is annexed hereto as annexure 2 in relation to the properties being transferred to the Transferee in terms of this **deed** and in terms of clause 22 of the mortgage dated 10 December 1990."

Clause 11

"The deed of conveyance is conditional upon the ANZ agreeing to the terms of this **deed** and furthermore agreeing to and discharging all mortgages on property that is subject to this conveyance."

Clause 13(c)

"That the matters mentioned in (a) and (b) above must be resolved within ten days of the date of this **deed**."

Clause 14

"This **deed** may be varied only with the consent of all the parties to this **deed**."

(emphasis added)

150. Another factor that shows that DOC is a Deed and not contract is that the consideration sum for Transfer of lots is paid by Transferor which is opposite to what happens in contract for sale. In normal standard contract of sale consideration is paid to the Transferee.

151. It is undisputed fact that DOC was executed on 2 June 1985, after the Bank commenced Mortgagee Sale to recover debt owed by First Defendant to the Bank.

152. Pursuant to DOC First Defendant agreed to convey its properties described therein to the Bank in return for the Bank not pursuing the Mortgagee Sale of properties mortgaged to secure First Defendant's debt which at that time stood at eight million dollars ($8,000,000.00).

153. DOC was therefore a Deed of Settlement between the Bank as secured creditor and First Defendant as debtor.

154. After considering the Submissions of the Plaintiff and First Defendant and what is stated at paragraphs 144 to 153, this Court finds that Deed of Conveyance is a Deed and not a Contract.

Trust

155. It is not doubted, that once someone enters into a Sale and Purchase Agreement or Deed to acquire interest in real or personal property on certain terms and conditions that person acquires a beneficial interest in the property.

156. Jessel M.R. in **Lysaght v. Edwards** (1876) Vol II ChD 499 at page 506 stated as follows:-

> *"It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession."*

157. Jessel M.R. at page 508 referred to other case authorities which dealt with the issue as follows:-

"First in the case of Hadley v. London Bank of Scotland (1), I find this passage in the judgment of Lord Justice Turner: "I have always understood the rule of the Court to be that if there is a clear valid contract for sale the Court will not permit the vendor afterwards to transfer the legal estate to a third person, although such third person would be affected by lis pendens. I think this rule well founded in principle, for the property is in equity transferred to the purchaser by the contract; the vendor then becomes a trustee for him, and cannot be permitted to deal with the estate so as to inconvenience him."

In Shaw v. Foster (2) the general proposition is, I think, laid down by every one of the noble Lords who made a speech on that occasion. Lord Chelmsford says (3): "According to the well-known rule in equity, when the contract for sale was signed by the parties Sir William Foster became a trustee of the estate for Pooley, and Pooley a trustee of the purchase-money for Sir William Foster." Lord Cairns says (4): "Under these circumstances, I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner, in the eye of a Court of Equity, of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest, if anything should be done in derogation of it."

158. At page 510 of **Lysaght** case (Supra) Jessel M.R. states as follows:-

"It must, therefore, be considered to be established that the vendor is a constructive trustee for the purchaser of the estate from the moment the contract is entered into."

159. Brief fact of **Lysaght** case is that S. B. Edwards entered into an agreement with Plaintiff to sell his mansion called "The Bury" with adjoining properties. Prior to completion of Sale, Edwards passed away.

According to Edwards Will dated 22 July 1873, he changed part of his estate including Bury Farm to pay his debts subject to trust and empowered his trustees to postpone sale of real estate at request of his wife.

Plaintiff instituted proceeding to enforce the agreement.

The Court held that the property subject to the agreement was held in trust by Edwards and ownership of the property to be conveyed to the Plaintiff.

160. In **Lee v. Kissun** (1966) 12 FLR 4 his Lordship Justice Marsack V.P. (as he then was) stated as follows:-

> *"As is stated in Williams on Vendor and Purchaser 4th Edn. p. 59:*
>
> > *"As from the date of the contract for sale (but subject to the condition that the contract be duly performed) the property shall in equity belong to the purchaser."*
> >
> > *The principle is set out in Hals. 3rd Edn. p.558 para. 1040:*
> >
> > > *"Upon the signing of a contract for sale of land a change takes place in the equitable, but not the legal, interest in the land. At law the purchaser has no right to the land, nor the vendor to the money, until the conveyance is executed. In equity, however, if the contract is one of which specific performance would be ordered, the beneficial interest passes to the purchaser immediately on the signing of the contract, and thereupon the vendor, in regard to his legal ownership and possession of the land, becomes constructively a trustee for the purchaser."*
> >
> > *It is true that the legal estate in the land does not pass by the contract itself; but in equity the property in the land sold is considered as being vested in the purchaser from the date of the contract for sale."*

161. The principle stated in **Lysaght** and **Lee** cases applies equally to Deed pursuant to which properties are to be conveyed to a party.

162. This Court will now deal with water lot and rubbish dump lot.

Water Lot and Rubbish Dump Lot

163. Water Lot is known as Lot 1 on DP 7341 containing 2044A 0R 11.5P, Rubbish Dump Lot is known as Lot 1 on DP 7340 containing 120A 2R 31.9P

164. Plaintiff submits that the Water and Rubbish Dump lots which are subject to CT Nos. 28820 and 31921 are held by First Defendant in trust for the Plaintiff.

165. Clause 1 of DOC provides as follows;-

> *"In consideration of the sum of $8,000,000.00 (EIGHT MILLION DOLLARS) which has been agreed as being the transfer value shall be paid to all the Transferee in satisfaction of all monies owing to them under the Mortgages and otherwise, the receipt of the said sum is acknowledged by the Transferee and in consideration of the release hereinafter contained the Transferors as registered proprietors hereby conveys unto the Transferee all that land contained and described in annexure 3 TO HOLD unto the Transferee in fee simple, free from all right of redemption of the Transferors under the Mortgage to the intent that the said Mortgages' terms shall merge and be extinguished in the fee simple.*
>
> *By way of further consideration the Transferors agree not to challenge the validity of the Transferee's securities listed in this deed."*

166. Plaintiff submits that pursuant to the DOC, First Defendant should have conveyed the Water and Rubbish Dump Lots to the Bank together with other Lots.

167. Court makes following findings in respect to Water and Rubbish Dump Lots;

(i) Messrs. G.P. Lala & Associates acting for the Bank as Mortgagee of properties comprised in CT Nos. 17922 and 13527, had the subject properties subdivided and applied for new Certificate of Titles over three hundred (300) lots which were part of different deposited plans;

(ii) The Application for Request for New Titles was also for Water and Rubbish Dump Lots as is endorsed on CT 17922 and CT 13527 (Exhibits P1 and P2);

(iii) All Certificate of Titles were issued in the name of First Defendant who was the registered proprietor of parent title at the material time;

(iv) For reason that would be dealt with later the Duplicate Certificate of Titles over Water and Rubbish Dumps Lots being CT Nos. 28202 and 28286:-

a) were issued to Messrs. G.P. Lala & Associates without it being signed by the then Registrar of Titles;

b) There is no evidence if original titles over Water and Rubbish Dump Lots being CT Nos. 28206 and 28286 were either issued or got lost without it being recorded in the Register kept by Registrar of Titles.

(v) Request for Water and Rubbish Dump Lots were endorsed on CT No. 17922 and 13527 being Instrument Nos. 363859 and 363858 (Exhibits P1 and P2);

(vi) Pursuant to Annexure 3 of DOC, various lots which included land subject to Certificate of Title Nos. 17922 and 13527 the head titles, Water and Rubbish Dump Lots were to be conveyed by First Defendant to the Bank;

(vii) On 2nd March 1995, Registrar of Titles had issued Certificate of Titles Nos. 28202 and 28286 over lots 1 and 2 on Deposited Plan No. 6734 being lands situated in Levuka and nothing to do with land subject to DOC between the Bank and First Defendant;

(viii) On 27 June 1995, First Defendant by its director Mr Peter Stinson (First Defendant's witness) executed Transfer (Exhibit P10) in respect to lots which included Water and Rubbish Dump lots being Lot 1 on DP 7340

and Lot 1 on DP 7341 which had CT Nos. 28286 and 28202 alongside the land description;

(ix) Transfer No. 379880 (Exhibit P10) could not be registered against Water and Rubbish Dump Lots because the CT Nos. 28202 and 28286 inserted on the Transfer were for lots situated in Levuka and not Taveuni;

(x) The reason Transfer had CT Nos. 28202 and 28286 alongside Lot 1 on DP 7341 (Water Lot) and Lot 1 on DP 7340 (Rubbish Dump Lot) was that the Duplicate CTs over those lots held by Plaintiff and/or Messrs. G.P. Lala & Associates had Duplicate CT Nos. 28202 and 28286 over those lots.

(xi) Despite the fact that First Defendant signed Transfer of Water and Rubbish Dump Lots in favour of the Bank and Request for New Certificate of Title in respect to Water and Rubbish Dump Lots being Instrument Nos. 363859 and 363858 as shown on Certificate of Title No. 17922 and 13527 (Exhibits P1 and P2), First Defendant applied for and obtained CTs over Water and Rubbish Dump lots through Messrs Munro Leys.

168. Mr Peter Stinson, director of First Defendant giving evidence on behalf of First Defendant gave evidence that First Defendant did not intend to transfer Water and Rubbish Dump lots to the Bank and he was not aware that DOC and Transfer included Water and Rubbish lots as no proper Certificate Numbers were inserted next to Water and Rubbish Dump Lots or the area of the lots were mentioned.

169. His evidence was that if larger area was shown then he would have known that the lots were in relation to Water and Rubbish Dump Lots. Transfer (Exhibit P10) clearly shows large areas for Lot 1 on DP 7340 and Lot 1 on DP 7341 being 120A 2R 31.9P and 2044A 0R 11.5P respectively.

170. This Court after analysing the fact and demeanour of Mr Stinson finds his evidence that he was not aware about Water and Rubbish Dump lots being

part of DOC and Transfer in favour of the Bank (Exhibit P10) unimaginable and it obviously lacks credibility on the ground that the First Defendant through its directors including Mr Stinson from day one knew or ought to have known that Water and Rubbish Dump lots were conveyed to the Bank by Transfer dated 24 June 1995, which could not be registered against the Original Titles for CT Nos. 28202 and 28286 held at ROT's office because these titles were over land in Levuka.

171. This Court has no hesitation in making the finding that for all intention and purpose the Water and Rubbish Dump lots belonged to the Bank and now Plaintiff and the most honourable thing First Defendant could have done when it obtained CT Nos. 28820 and 31921 over Water and Rubbish Dump lots was to transfer these lots to Plaintiff.

172. The principle, the registered owner holds the property in trust for purchaser has solid application to the facts of this case on the grounds that:-

(i) Water and Rubbish Dump lots were part of Annexure 3 of DOC which is signed by First Defendant;

(ii) Transfer No. 379880 (Exhibit P10) has Water and Rubbish Dump lots;

(iii) If duplicate CT Nos. 28202 and 28286 over Water and Rubbish Dump lots were issued properly with the Original Titles being available at ROT office over these lots then from 27 June 1995 or thereabout, the Bank would have been registered proprietor of Water and Rubbish Dump lots.

173. This Court therefore holds that the properties comprised and described in Certificate of Title Nos. 28820 and 31921 being Water lot and Rubbish Dump Lot were from 16 April 1999, being date of issue of those Titles have been held in trust by First Defendant in favour of the Plaintiff.

174. Even though this Court holds the Water and Rubbish Dump lots are held by First Defendant in trust for the Plaintiff it will also look at Plaintiff's allegation of fraudulent conduct on First Defendant's part.

175. First Defendant by it's Counsel submits that Plaintiffs title to Water and Rubbish Dump lots being Certificate of Title Nos. 28820 and 31921 is indefeasible.

176. It is well established that registration of Title or interest with Registrar of Titles makes that interest indefeasible except for fraud.

177. Section 39 to 41 of Land Transfer Act 1971 provides as following;

> **"(39)** ***Estate of registered proprietor paramount, and his or her title guaranteed***
>
> *(i) Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the State or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall, except in case of fraud, hold the same subject to such encumbrances as may be notified on the folium of the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except -*
>
> - *the estate or interest of a proprietor claiming the same land, estate or interest under a prior instrument of title registered under the provisions of this Act; and*
> - *so far as regards any portion of land that may by wrong description or parcels or of boundaries be erroneously included in the instrument of title of the registered proprietor not being a purchaser or mortgagee for value or deriving title from a purchaser or mortgage for value; and*
> - *any reservations, exceptions, conditions and powers contained in the original grant.*
>
> *(ii) Subject to the provisions of Part 13, no estate or interest in any land subject to the provisions of this Act shall be acquired by possession or user adversely to or in derogation of the title of any person registered as the proprietor of any estate or interest in such land under the provisions of this Act.*

(40) Purchaser not affected by notice

"Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest in land subject to the provisions of this Act shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which proprietor or in any previous proprietor of such estate or interest is or was registered, or to see to the application of the purchase money or any part thereof, or shall be affected by notice, direct or constructive, of any or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

s41 Instrument etc void for fraud

"Any instrument of title or entry, alteration, removal or cancellation in the register procured or made by fraud shall be void as against any person defrauded or sought to be defrauded thereby and no party or privy to the fraud shall take any benefit therefrom."

178. It is well established that party alleging fraud must provide evidence of actual fraud on part of registered proprietor.

179. The definition of fraud for the purpose of Land Transfer Act 1971 was stated by Privy Council in **Assets Company Limited v Mere Rohini** [1905] AC 176 at 210 as follows:

"Passing now to the question of fraud, their Lordships are unable to agree with the Court of Appeal. Sects. 46. 119. 129. And 130 of the Land Transfer Act, 1870, and the corresponding sections of the Act of 1885 (namely, as 55, 56, 189, and 190) appear to their Lordships to shrew that by fraud in these accounts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar

to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."

180. In **Fels v Knowles** (1907) 26 NZLR 608 the Court of Appeal dealing with similar provisions and proceedings for setting aside of transfer stated as follows:

"The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorized, as in the cases of easements or incorporeal rights, to the right registered".

See **Subarmani v Dharam Sheila** (1982) 28 FLR 82.

181. The principle in **Assets Company Ltd case and Fels v. Knowles** (Supra) was adopted with approval in Courts in Fiji and by Privy Council in **Wainimiha**

Sawmilling Company Limited (In Liquidation) v Waione Timber Company Limited [1926] AC 101 (page 106).

182. At last paragraph of page 106 in **Wainimiha Sawmill** case his Lordship Lord Buckmaster stated as follows:-

> *"If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear. It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances."*

183. His Lordship Justice Singh in dealing with section 40 of Land Transfer Act in **Narayan v. Sigamani**; FJHC 204; HBC 059 of 2004 (5 September 2008) stated as follows:-

> *"[19] What section 40 means is that knowledge is only one ingredient of fraud. It is not the be all and the end all of fraud. There are cases which when referring to actual notice also refer to* ***"wilful blindness"****. This term covers situations where a person who has knowledge of facts which should put him/her on further enquiry but they do not conduct that enquiry. In the Assets Co. case Lord Lindley stated:*
>
> ***"The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may properly be ascribed to him."***
>
> *[20] Further in Waimiha in the Court of Appeal Salmond J. stated:*

> ***"The true test of fraud is not whether the purchaser actually knew for a certainty of the existence of the adverse right, but whether he knew enough to make it his duty as an honest man to hold his hand, and either to make further inquiries before purchasing, or to abstain from the purchase, or to purchase subject to the claimant's rights rather than in defiance of them. If, knowing as much as this, he proceeds without further inquiry or delay to purchase an unencumbered title with intent to disregard the claimant's rights, if they exist, he is guilty of that willful blindness or voluntary ignorance which, according to the authorities, is equivalent to actual knowledge, and therefore amounts to fraud."***

This comment of Salmond J. was adopted by the Fiji Court of Appeal in the unreported judgment Gajadhar v. Jai Pal & Another ABU 49 of 1981 (judgment 30th July 1982).

[21] Some Australian cases also have adopted ***'wilful blindness'*** *as an aspect of fraud. In Macquarie Bank Limited v. Sixty Fourth Throne Pty Ltd. (1998) 3 VR 133 this concept of* ***"willful blindness"*** *was explained as follows:*

> ***"to abstain deliberately from reasonable enquiry for fear of what the inquiry will reveal, to choose to shut one's eyes to the obvious – to assume a state of 'wilful blindness' – or otherwise to generate a state of contrived ignorance, may of course be dishonest. It has been well said that willful blindness – deliberately turning a blind eye to obvious or obviously ascertainable facts is akin to fraud e.g. Lego Australia Pty Ltd v. Paraggio (1993) 44 FLR 151 at 171."***

184. Plaintiff by its Counsel submits that First Defendant acted in collusion with officer of Registrar of Titles to defraud Plaintiff when:-

(i) Duplicate Certificate of Title Nos. 28202 and 28286 over Water and Rubbish Dump Lots had issued to Messrs. G.P. Lala & Associates.

(ii) Registrar of Titles Office failed to create Original Certificate of Title Nos. 28202 and 28286 over Water and Rubbish Dump lots and also failed to enter the details of the Titles in the Register kept by the Registrar of Titles for Certificate of Titles.

(iii) Registrar of Titles issued Certificate of Title Nos. with number CT Nos. 28202 and 28286 in respect to properties situated in Levuka and in no way related to Water and Rubbish Dump lots or land owned by First Defendant in Taveuni in any respect.

185. Duplicate Certificate of Title Nos. 28202 and 28286 over Water and Rubbish Dump lots were issued by Registrar of Titles to Messrs. G.P. Lala & Associates, Solicitor for the Plaintiff, and it was the same Solicitors who applied for these Titles.

186. Plaintiff by its Counsel submit that this Court should consider circumstantial evidence to find fraud on part of all the Defendants.

187. With due respect this Court cannot accept that submission and as is stated in cases cited above Plaintiff must establish actual fraud to defeat indefeasibility of Title.

188. This Court is of the view that the Plaintiff has failed to provide any form of evidence to establish actual fraud on the part of the First Defendant when Duplicate Certificate of Titles was over Water and Rubbish Dump Lots were released to Messrs. G.P. Lala & Associates without original Titles being created or details being entered in the Register.

189. PW1 (Deputy Registrar of Titles) in her evidence stated the process for issuing of new CT as follows:-

(i) Once Request for New CT is received ROT Office checks if deposited plan (DP) is registered;

(ii) If DP is registered they then check as to who is registered properties in respect to Head Title;

(iii) They then check for and enter details of new CT in Register kept at ROT Office;

(iv) After that new CT number is allocated for the lots and new CT is created;

(v) When new Titles are issued over respective lots Head Title is partially cancelled.

190. She had no idea as to how Duplicate CT Nos. 28286 and 28202 over Water and Rubbish Dump Lots were released without details being entered in the register, it not being signed by ROT.

191. No evidence of fraud against First Defendant was produced in Court in respect to issuance of Duplicate CT No. 28202 and CT 28286 over Water and Rubbish Dump Lots and no evidence of collusion between First Defendant and ROT Office was produced.

192. **Plaintiff further submits that First Defendant applied for and obtained CT Nos. 31921 and 28820 on 16 April 1999, over Water and Rubbish Dump Lots by fraud.**

193. Mr Peter Stinson for First Defendant gave evidence that when they saw that Head Titles was not cancelled and Titles were not registered in respect to Water and Rubbish Dump Lots, First Defendant applied for Titles over these lots.

194. The Court makes following findings in respect to CT Nos. 28820 (Exhibit P12) and 31921 (Exhibit P11):-

(i) On or about 16 April 1999, First Defendant through its Solicitor Messrs Munro Leys applied for New Certificate of Title over Water and Rubbish Dump Lots;

(ii) Request for New Certificate of Titles lodged on 19 August 1994 (some four and half years prior to First Defendant's application applied about 16 April 1999), on behalf of the Bank was endorsed over parent title being CT Nos. 17922 and 13527;

(iii) First Defendant by its directors including Mr Peter Stinson knew that Water and Rubbish Dump lots were conveyed to Plaintiff pursuant to DOC;

(iv) First Defendant by its directors including Mr Peter Stinson knew that First Defendant on 24 June 1995, executed Transfer (Exhibit P10) over various lots including Water and Rubbish Dump Lots in favour of the Bank;

(v) Plaintiff for all intent and purpose knew that it was the registered proprietor of Water and Rubbish Dump lots and this is supported by the fact the Duplicate Titles it had with them had the Transfer in favour of the Bank endorsed at the Bank as appears from back pages of Duplicate CT Nos. 28286 and 28202 (Exhibits P6 and P7).

Also Transfer endorsed on both Duplicate Titles are signed by the ROT.

(vi) Plaintiff soon after discovering through Wood and Jepsen that Duplicate Titles over Water and Rubbish Dump lots held by them were bogus liaised with ROT and instructed its Solicitors to rectify the default;

(vii) Acting ROT on 18 August 2000, wrote to Messrs. Munro Leys, Solicitors for First Defendant for return of CT No. 28820 (Water lot) - (Exhibit P24);

(viii) On 21 September 2003, Plaintiffs' then Solicitors also wrote to Messrs. Munro Leys for First Defendant to surrender CT No. 28820 (Exhibit P27);

(ix) First Defendant failed/neglected/refused to deliver CT Nos. 28820 and 31921 to Registrar of Titles as required;

(x) First Defendant knew or ought to have known that Original CT Nos. 28202 and 28286 did not relate to Water and Rubbish Dump Lots in the register and ROT's Office as those numbers were allocated to land in Levuka because as per records kept at ROT's office these numbers were not allocated to any other land;

(xi) First Defendant despite being aware of the above fact applied for and obtained CT over Water and Rubbish Dump Lots through its Solicitor Messrs Munro Leys.

195. DW's evidence in re-examination as appears at paragraphs 135(i) to (xiv) of this Judgment stated as follows:-

"(i) In reference to Annexure 3 to Deed of Conveyance (Exhibit P18) stated that:-

(a) No. 28 has CT No. 28202 - DP 7341 Lot 1;

(b) CT 28202 is not correct title number;

(c) There is no area for that lot;

(d) At No. 31 it states CT 28286 - DP 7340 Lot 1;

(e) CT 28286 is not correct number according to his knowledge;

(f) No area of lot is shown

(ii) Stated that there is no reference to CT 17922 anywhere;

(iii) In reference to Transfer (Exhibit P10) in respect to 117 lots he stated that:-

(a) It is Transfer No. 379880;

(b) Was prepared by G.P. Lala & Associates;

(c) Appears to be 117 lots in the transfer;

(d) There is no reference to CT 17922;

(e) Fourth page of Transfer in description column it has five entry - Lot 1 on DP 7340 and Lot 1 on 7341 and to left of Lot 1 on DP 7340 is CT 28286 and Lot 1 on 7341 has CT 78202

(f) The title numbers in (iii)(e) are not correct;

(g) None of the forty (40) titles mentioned in the DOC appear on the Transfer;

(h) Only Titles in Annexure 3 of DOC appear.

(iv) Agreed to suggestion that they Duplicate CT Nos. 28286 and 28202 bogus titles issued on the Application of G.P. Lala & Associates relating to Lot 1 on DP 7340 and Lot 1 on DP 7341;

(v) Stated CT 17922 is nowhere in the Transfer;

(vi) When it was put to him that personally he would have found out about those titles in 1999, he stated that that would have been the earliest"

196. This Court fails to understand why DW and First Defendant kept on saying that CT 17922 and CT 13527 should have been inserted alongside Lot 1 on DP 7340 and Lot 1 on DP 7341.

197. Simple reason CT 17922 and CT 13527 is not stated alongside Lot1 on DP 7340 and Lot 1 on DP 7341 is that:-

(i) Properties subject to CT 17922 and CT 13527 had been subdivided;

(ii) Lot and CT numbers are lots that were created after subdivision of properties subject to CT 17922 and CT 13527;

(iii) Insertion of CT Nos. 28202 and 28286 alongside Lot 1 on DP 7340 and Lot 1 on DP 7341 in Annexure 3 of DOC and Transfer dated 24 June 1995 (Exhibit P10) by G. P. Lala & Associates was due to the fact that Duplicate CTs held by them in respect to these lots (Water and Rubbish Dump Lots) had CT Nos. 28202 and 28286.

198. This Court as per above findings of facts and assessing the demeanour of witness hold that First Defendant obtained CT Nos. 28820 and 31921 by fraudulent conduct on its part.

199. Having held that Water and Rubbish Dump Lots are held by First Defendant as trustee in favour of Plaintiff and First Defendant obtained CT Nos. 28820 and 31921 by fraudulent conduct there is no need to consider Plaintiff's submissions relating to mistake, rectification or specific performance.

Limitation Act

200. Before this Court deals with other issues it is appropriate to determine if Section 4(1) of Limitation Act 1971 applies in respect to claim for Water and Rubbish Dump Lots.

201. Having held that DOC is a Deed and not a Contract, Water and Rubbish Dump Lots were held by First Defendant in trust and First Defendant obtained CT Nos. 28820 and 31921 over Water and Rubbish Dump Lots by fraud it is obvious that Section 4(1) of Limitation Act 1971 as pleaded by First Defendant is not applicable.

202. Even though First Defendant only pleaded Section 4(1) of Limitation Act 1971 being six (6) year limitation period this Court will deal with relevant provisions of Limitation Act 1971 for sake of completeness.

203. Section 4 (3) of Limitation Act 1971 provide as follows:-

> *"An action upon a specialty shall not be brought after the expiration of 12 years from the date in which the cause of action, accrued, provided*

that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act."

204. Deed is a speciality and as such this action should be brought prior to expiry of twelve (12) years.

205. According to Plaintiff's submission which is not disputed the settlement in this matter took effect on 27 June 1995.

206. Plaintiff commenced this proceeding on 10 December 2004, which is well written the twelve (12) year period.

207. Section 9 (1) of Limitation Act 1971 provides as follows:-

"No period of limitation prescribed by the provisions of this Act shall apply to an action by a beneficiary under a trust, being an action -

a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
b) to recover from the trustee, trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his or her use."

208. Having held that First Defendant holds the Titles to properties subject to Water and Rubbish Dump Lots in trust for Plaintiff no period of limitation applies in respect to those lots.

209. Section 15 of Limitation Act 1971 provides as follows:-

"Where in the case of any action for which a period of limitation is prescribed by this Act, either -

a) the action is based upon the fraud of the defendant or his or her agent or of any person through whom he or she claims or his or her agent; or
b) the right of action is concealed by the fraud of any such person; or

c) the action is of relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it, provided that nothing in this section shall enable action to be brought to recover, any property which-

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made."

210. This Court accepts PW3's (Mr Ambika Prasad) evidence that Plaintiff only discovered:-

(i) The fact that Duplicate Title Nos. 28202 and 28286 over Water and Rubbish Dump lots had not been signed by ROT:

(ii) Original CT Nos. 28202 and 28286 has been allocated to land situated in Levuka; and

(iii) No Original Title with numbers 28202 and 28286 over Water and Rubbish Dump lots existed in folder at ROT's office;

in the year 1999, when Plaintiff agreed to sell part of water lot to Va Zilu Limited for construction of Millennium Monument and was informed by Mr Rod Jepsen, Registered Surveyor that the land subject to CT 28202 is situated in Island of Ovalau and not in Taveuni.

211. This is supported and corroborated by evidence of Mr Rod Jepsen (PW4) to the effect that he informed Mr Ambika Prasad of Plaintiff that subdivision of the lot

cannot take place because CT 28202 is in respect to land in Levuka, and when Mr Prasad was told he did not know about it, and was bit surprised.

212. Question that Plaintiff discovering the defect by exercising due diligence does not arise because of the mere fact that Duplicate Title is only released to the person lodging the Request for New Title once both Original and Duplicate is signed by the ROT as per PW2's evidence and also Transfer in favour of the Bank is endorsed on the Duplicate Titles and signed by ROT.

213. Furthermore, the Duplicate CT Nos. 28202 and 28286 held by Plaintiff (Exhibit "P6" and "P7") were endorsed with Transfer No. 379880 in favour of the Bank and the endorsements are signed by Registrar of Titles. Therefore, anyone looking at both Duplicates will have no doubt that the Bank is the Registered Proprietor of land subject to these Titles.

214. The fact that ROT released the Duplicate Title to Messrs G. P. Lala & Associates, the lodger who then forwarded it to Plaintiff together with other 298 CTs with Transfer in favour of the Bank duly endorsed and signed by ROT, titles would indicate to any reasonable person that all titles are in order.

215. Having held that there was no fraud on part of First Defendant in respect to issue of Duplicate CT Nos. 28202 and 28286 there is no need to deal with section 15 of Limitation Act 1971 in respect to these CTs.

216. However, Section 15 is relevant to CT Nos. 28820 and 31921 which were issued on 16 April 1999.

217. Given that these CTs were issued on 16 April 1999, the action commenced within the six year period and as such there is no need to consider this section any further.

218. In any event this Court having held that Plaintiff came to know about the fraud in 1999 (Paragraph 208 of this Judgment) the limitation period started in 1999. This action was therefore commenced within six (6) year limitation period.

Whether Plaintiff is entitled to Transfer of forty (40) lots pursuant to Clause 13(b) of DOC

219. Clause 13 of DOC provides as follows:-

"Notwithstanding any other provisions of this deed, the parties hereby agree to the following:-

(a) that the 40 certificates of titles numbers annexed hereto as annexure 4 may have been fully paid. In the event that evidence is produced of full payment, each such lot for which evidence is not produced will form part of this transaction.

(b) That in the event that there are any titles that are unencumbered, such titles shall be made available for transfer on a title for title basis to the Transferees herein in substitution for those in (a) for which evidence of full payment is provided.

(c) That the matters mentioned in (a) and (b) above must be resolved within ten days of the date of this deed."

220. Plaintiff at paragraph 56 of its Submission filed on 25 May 2017, stated that Plaintiff now claims for thirty-eight (38) lots as two (2) lots in Annexure 4 of DOC has been transferred by First Defendant to Plaintiff.

221. This Court has no hesitation in accepting Plaintiff's Submissions that the word "unencumbered" in Clause 13(b) did not mean that the Titles have to be free from encumbrances such as easements and covenants. It simply means that Titles will need to be free from mortgages and charges in favour of Third Parties to secure any debt.

222. This Court also accepts Plaintiff's Submissions that "unencumbered" in Clause 13(b) does not include mortgage or charges in favour of the Bank.

223. Plaintiff submitted that First Defendant by its letter dated 9 June 1995 signed by Mr Peter Fischl (Exhibit D10) First Defendant made fraudulent misrepresentation to the Plaintiff that First Defendant did not own any lots that could be transferred to Plaintiff pursuant to Clause 13(b) of DOC.

224. The said letter in verbatim states as follows:-

"By facsimile: 0015 679 302 904

9 June 1995

PRIVATE AND CONFIDENTIAL

Mr GP Lala
GP Lala & Associates
GPO Box 14385
SUVA FIJI

Dear Mr Lala

DEED OF CONVEYANCE MADE 2 JUNE 1995

I refer to paragraph 13 of the above deed which deals with 40 certificates of titles numbers annexed as annexure 4 to the deed.

Of those 40 title references, references 1 to 22 inclusive relate to lots which were either sold directly by Soqulu Plantation Limited (now Taveuni Estates Limited ("TEL")) to end purchasers or to Trois Investment Limited ("Trois") which later assigned back to Stinson Pearce Holdings Limited the Trois sale contract with the end purchaser. These lots have been fully paid for according to the Stinson Pearce Group's records.

Attached is a folder of documents that I have had photocopied from the files held here in Sydney which evidences that the 22 lots have been paid for. Of these 22 lots, the files relating to reference 6 (DP No. 4815 lot 10 - SPG reference - 2B 55) on annexure 4 and reference 15 (DP No. 4805 lot 31 - SPG reference - 5010) on annexure 4 have to date not been able to be located.

In relation to reference 15, however, I have been able to locate via Munro Leys & Co. a letter dated 11 October 1994 from the purchaser of the relevant lot (5010) that they have "fully paid for this property" but are, for reasons set out in that letter, "relinquishing claim to the property". I am endeavouring to make contact with that purchaser to ensure that they do not wish to change their mind given that getting title soon is now a real possibility. If the purchaser is still content to relinquish its claim, TEL, in the spirit of the deed, is agreeable to allow that lot to form part of the

transaction, notwithstanding that fully paid lots are to be excluded. A copy of that letter is included in the folder of documents.

In relation to reference 6, however, I have been able to locate, also via Munro Leys & Co. a copy of letters evidencing payment in full of the relevant lot (2B 55). Copies of the relevant letters are also included in the folder of documents.

Annexure references 23 to 40 relate to lots sold to Trois but which were not assigned back to the Stinson Pearce Group. To the extent that the sale agreements relating to lots were not assigned back to Stinson Pearce Holdings Limited, beneficial title to those lots does not rest with the Stinson Pearce Group but rather with Trois or any lot purchaser that may have subsequently acquired the lot after it was purchased by Trois.

Accordingly, no company in the Stinson Pearce Group is in a position to transfer those lots to the NBF. TEL received payment on 28 April 1978 for the 300 odd lots it sold to Trois (which would have included those relevant to annexure references 23 to 40) and it is my recollection that such evidence of payment was provided by me to the NBF back in 1984/85.

Although not relevant to the issue of whether the Stinson Pearce Group has been fully paid, I have nevertheless also included in the folder of documents, copies of documents which happen to be in the possession of the Stinson Pearce Group that I have located which evidences payment in full to Trois by the end purchaser.

Based on the above, with the possible exception of annexure 4 reference 15, it would appear that the 40 certificates of tile numbers will therefore not form part of the transaction. To the best of my knowledge and belief there are no other titles which are unencumbered.

As you are aware, the NBF or its solicitors wrote to a number of lot owners some years ago seeking certain information and it may well be that the NBF has further evidence in its possession in connection with whether or not the above lots have been paid for in full.

Should you require any further information please let me know.

Yours sincerely

Signed
Frank Fischl"

225. Plaintiff relied on following Statement of Lord Herschell in **Derry v Peek** (1889) 14 App Cas 337.

> *"……I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord Blackburn in Brownlie v. Campbell (1), a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false."*

(pages 375, 376)

226. Plaintiff submits that Plaintiff had not sought to have the thirty-eight (38) lots transferred to it pursuant to clause 13(b) of DOC because of First Defendants fraudulent misrepresentation by its letter.

227. The First Defendant by its Counsel submit that the remaining thirty-eight (38) lots are held in trust by First Defendant for third parties who purchased those lots and that First Defendant has complied with clause 13(b).

228. First Defendant in support of that submission relies on:-

(i) The fact that Messrs G. P. Lala & Associates sent the Titles to those lots to First Defendant;

(ii) Messrs G. P. Lala & Associates excluded those lots from the Transfer dated 24 June 1995 (Exhibit P10);

(iii) PW3 (Mr Ambika Prasad) swore an Affidavit in Civil Action No. 386 of 2005 (Exhibit D2) where he stated as follows in respect to those lots:-

> *"2. Since the commencement of this action, and following settlement talks between the Plaintiff and Taveuni Estates Limited, my solicitor was shown a letter dated 9 June 1995 from Frank Fischl of Messrs Price Waterhouse to Messrs GP Lala & Associates, the Bank's former solicitors* ***and various supporting documents evidencing payment of 40 titles, including those of the Defendant****. Albeit 10 years after the Deed was executed,* ***the plaintiff now accepts this as prima facie evidence satisfying clause 13 of the Deed referred to in clause 6 of my previous affidavit****."*
>
> ***(emphasis added)***

(iv) Mr Peter Stinson's evidence that all those titles are held in Trust for third parties.

229. PW3 in cross-examination confirmed his statement in the Affidavit (Exhibit D2) as correct.

230. Mr Stinson in his evidence in chief stated that the Messrs G. P. Lala & Associates, Solicitors for Plaintiff released those Titles to First Defendant and did not include them in the Transfer dated 27 June 1995 (Exhibit P10).

231. In cross-examination he stated that all lots subject to clause 13(b) DOC has been transferred except for five (5) or six (6) lots which are held in trust by First Defendant until such time they can locate the owners.

232. In the absence of any other evidence apart from what was presented in Court, this Court has no option but to hold that Plaintiff and First Defendant had understanding that the thirty-eight (38) lots in Annexure 4 of the DOC (Exhibit P18) did not belong to First Defendant to enable it to transfer them to Plaintiff.

233. There has been no evidence from the Plaintiff that the representation made in the letter written by Mr Frank Fischl (Exhibit D10) was fraudulent and Plaintiff relied solely on that letter to say that those lots were not owned by First Defendant.

234. In fact the statement in Ambika Prasad's Affidavit (Exhibit D2) taken on oath is very clear that Plaintiffs Solicitors were shown the letter (Exhibit D10) **with supporting documents**.

235. Hence it is proven Plaintiff did not rely on the letter only.

236. The Plaintiff therefore is estopped from seeking transfer of lots pursuant to clause 13 of DOC.

Whether Plaintiff breached clause 6 of the DOC allegedly by failing to pass the obligation to KFL

237. Clause 6 of the DOC (Exhibit P18) provides as follows:-

> *"That said lots which the Transferee is having transferred to it will be initially managed by the Transferee and the Transferee will not be liable to pay rates to the Transferor, however if the said lots are sold, then on such sale the Transferors may levy rates as and when the sale is completed to a new purchaser. The Transferee covenants with the Transferors that any future sale and purchase agreements will be in accordance with the terms and conditions contained in the sale and purchase agreement attached hereto as annexure 1 a completed copy of which will be provided to the Transferors on the occasion of each sale."*

238. First Defendant submitted that Plaintiff breached Clause 6 of DOC by failing to enter into a Deed of Covenant with KFL when it sold some 107 lots to KFL that was required pursuant Clause 6 of DOC.

239. It is undisputed that no formal Deed of Covenant was signed between Plaintiff and KFL.

240. **There is nothing in Clause 6 which required Bank/Plaintiff to have the purchaser enter into a Deed of Covenant with First Defendant**.

241. PW3 (Ambika Prasad) in his evidence (paragraph 124 (xxiii) of this Judgment) stated that Plaintiff had passed the obligation to pay charges to KFL.

242. PW4, the Director for KFL stated that it did not pay charges to First Defendant because no service was provided by First Defendant to lots owned by KFL and it had no contract with First Defendant which evidence this Court has no reason to disbelieve.

243. No evidence was provided to prove that KFL did not pay any charges only because no Deed of Covenant was signed between Plaintiff and KFL.

244. Furthermore, DOC together with Proforma Sale and Purchase was attached to the Sale and Purchase Agreement dated 16 June 2006, between Plaintiff and KFL (Exhibit D4).

245. The Court accepts PW3's evidence that Plaintiff passed the obligation to KFL for payment of any charges for services provided by First Defendant to First Defendant.

246. In view of PW4's evidence in respect to non-payments of invoices sent by First Defendant to KFL this Court is of the view that it is a matter between First Defendant and KFL.

Whether Clause 7 of DOC is void for uncertainty?

247. Clause 7 of DOC (Exhibit P18) provides as follows:-

> *"The Transferee covenants with the Transferors that the public facilities to be transferred to the Transferee, specifically defined as:*
>
> *Lot 6 on DP 4797*
>
> *Lot 1 on DP 4918*
>
> *Lot 1 on DP 4912*

will remain available for the exclusive use of all Taveuni Estates lot owners and purchasers free of charge in perpetuity."

248. In **Lee v. Kissun** [1966] 12 FLR 4, his Lordship Justice Marsack V.P. quoted with approval the following statement from Warrington J in Ryan v. Thomas (1911) 55 S.J. 364:-

> *"Now, in dealing with an ordinary contract, the court is not bound to find some meaning for the words used. It is not my business to expand the words of a contract; if a contract does not contain certain stipulations, it is not for me to make them. I must let the actual words stand. The case cited has no bearing on the case before me. Here people have purported to come to an agreement, but, in fact, have not come to any agreement at all, because the terms of the agreement are not expressed. The words 'first option' by themselves have no meaning; there is no mention of price, or time, or anything else. I hold that there was no contract, and therefore the defence fails, and the plaintiff is entitled to have the lease set aside."*
>
> *(Page 21 - paragraph A)*

249. His Lordship Justice Marsack V.P. further went on to state as follows:-

> *"In the result I am of opinion that Clause 7 is void for uncertainty. With respect I do not feel that the interpretation of that clause adopted by both the learned trial Judge and Sir Trevor Gould follows logically and inevitably from the words used in that clause. I am fully aware of the desirability of giving effect to a contract where the terms of that contract are clear from the express wording of the contract or necessary inference from the words used. In the present case I feel that it would be possible to place several interpretations upon the clause considered as a whole. As the clause is drawn it is obscure and lacking in the essentials of a clear and ascertainable contract. No doubt the agreement between the parties concerning Allotment 8 could have been ascertained and correctly set out in the document. But this has not been done. The only method of making Clause 7 a binding contract between the parties would, in my opinion, be for the Court itself to supply the missing terms, by choosing*

among the available possibilities. But that is not the function of the Court. It is not a question of what would be reasonable. It is a matter of deciding by the express terms of the contract, or necessary inference therefrom, exactly what was agreed, and what it is that the Court is asked to enforce. That to my mind cannot be done here. It is for these reasons that I would hold Clause 7 void and unenforceable on the ground of uncertainty."

(Page 21 - paragraphs C to E)

250. Brief facts in **Lee v. Kissun** are as follows:-

(i) In 1957, Mitlal in writing agreed to sell Allotment 7 to Kissun;

(ii) The Agreement for Sale included Clause 7 as follows:-

"7. The vendor undertakes not to sell allotment No. 8 being part of lease No. 21087 which in turn is part of Native Lease No. 3238 to anyone other than the purchaser and shall give the purchaser right to first refusal."

(iii) In 30 August 1963, Mitlal entered into a Sale Note to sell Allotment 8 to Lee for £1,400 and that money was paid in Lawyers Trust Account;

(iv) On 2 September 1963, Kissun through his Solicitors wrote to Mitlal informing that Sale of Allotment 8 would be in contravention of Clause 7;

(v) Both Lee and Kissun lodged Caveat;

(vi) High Court held that Clause was not void;

(vii) Lee appealed to Court of Appeal;

(viii) Court of Appeal held that Clause 7 was void for uncertainty on the ground that the price for Allotment 8 was not agreed between Mitlal and Kissun and that there was no way the price could be ascertained.

251. In **Trawl Industries of Australia Pty Ltd v. Effem Foods Pty Ltd** (1992) 27 NSWLR 326 His Honour Justice Kirby stated as follows:-

> *"No external decision-maker is provided to resolve differences which might arise at or after the promised conferences: cf Godecke v Kirwan (1973) 129 CLR 629 at 641f. Nor is there a readily accessible external standard to which a court might look to add flesh to the provisions which are otherwise unacceptably vague or uncertain or apparently illusory: cg Meehan v Jones (1982) 149 CLR 571 at 589. Nor is this contract one of the kind with which courts have a lawyerly familiarity: so that they may feel confident enough in their ability to fill in the gaps which the parties have left: cg Charalambous v Ktori [1972] 1 WLR 951 at 953; [1972] 3 All ER 701 at 702-703."*

252. In **Whitlock v Brew** (1967-1968) 118 CLR 445 a written contract of sale between the parties contained following clause:-

> *"Portion of the land sold is used for the sale of petroleum, oils and greases and petroleum products of the Shell Co. of Australia Limited. The purchaser covenants that he will immediately upon taking possession hereunder grant a lease of that portion of the land sold as is now used for the sale of the abovementioned products to the Shell Co. of Australia Limited upon terms that the said land leased as aforesaid be used by Shell or their sub-tenant or licensee for the sale of such products and upon such reasonable terms as commonly govern such a lease."*

The Court held the clause as "uncertain" because of the words **"upon such reasonable term as commonly govern such a lease"** on the ground that the term **"does not refer to either the period for which the contemplated lease is to subsist or to the rent payable thereunder"** (Taylor J, Menzies J and Owen J at page 460)

253. Plaintiff relied on following Statement of McLure J in **Australian Goldfields NL (In Liq) v North American Diamonds NL** [2009] WASCA 98 (5 June 2009)

> *"6. There are two limbs to the uncertainty doctrine. A contract (or a term thereof) is void for uncertainty if (1) all the essential and critical terms of the bargain have not been agreed upon or (2) the language used in so obscure and incapable of any precise or definite meaning that the court is unable to attribute to the parties any particular contractual intention: Upper Hunter County District Council v Australia Chilling and Freezing Co Ltd (1968) 118 CLR 429, 436-437; Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd (2000) 22 WAR 101. Under the first limb, the contract is incomplete. Under the second limb, the court is unable to attribute a meaning to the language used by the parties. I refer to the latter as linguistic uncertainty. Both limbs apply only to essential terms."*

254. Plaintiff's Counsel submits that Plaintiff and First Defendant did not agree, as what following terms meant:-

(i) "Public Facilities"

(ii) "Exclusive Use"

(iii) "Taveuni Estate lot owners and purchasers"

255. Plaintiff also submits that it is not clear how facilities such as club house, golf course, tennis court, croquet lawn, swimming pool and other improvements could be provided "free of charge in perpetuity".

256. First Defendant submits that clause 7 of DOC was for benefit of third parties who were not party to DOC and yet no less affected by these proceedings" (para 14 of First Defendant's Submission in Reply).

257. At paragraph 15 of First Defendant's Submission in Reply it is submitted as follows:-

> *"The Court of Appeal considered the matter and gave judgment in Fiji Court of Appeal No. ABU 67/2006 (Exhibit D21) and held that, although it*

might have been better expressed, Clause 7 of the Deed of Conveyance was sufficiently certain for one of the lot owners to maintain their caveat over the property. These other owners are now denied the opportunity to take action against the Bank to enforce these rights; and as a transfer has not been affected in favour of KFL, these third parties and TMSL are prejudiced accordingly. The clause should be upheld and left undisturbed in our submission. It was the basis upon which the Bank and TMSL settled matters between them on 27 June 1995; and the Bank confirmed on 30 November 1998 that the Bank had no intention, other than to act in a way compliant with the 2 June 1994 Agreement (See Exhibit D16). Again KFL and Mr. Morias cannot expect to be rewarded with a different outcome. They made their deal with the Bank as well for better or worse. Using the Bank to argue for an improved position should be met with having to pay the costs of these proceedings in our respectful submission."

258. In respect to First Defendant's submission it is noted that the DOC is between the Bank and/or its successor and First Defendant and it was for Plaintiff to comply with the obligation in clause 7. Hence, the Plaintiff has all the right to raise any objection it has to any clause in the DOC.

259. In relation to First Defendant's Submissions in respect to Court of Appeal Judgment in Civil Appeal No. ABU67 of 2006 (25 June 2007) between Plaintiff and Nasau Ltd this Court with due respect do not agree that the issue of "uncertainty" of clause 7 as raised in this action was before the Court of Appeal.

260. Court of Appeal dealt with Nasau Ltd's (being a third party) right to maintain a second caveat over Lot 1 on DP 4812 comprised and described in CT No. 28574.

261. This Court will now consider whether certain terms of Clause 7 of DOC are uncertain or not.

Public Facilities

262. Clause 7 states that "public facilities is specifically defined as:-

Lot 6 on DP 4797

Lot 1on DP 4919 (should read 4918)

Lot 1on DP 4412"

263. I uphold Plaintiff's Submission that "public facilities" should have been properly defined for parties to have a clear understanding of what it is.

264. Just putting the land details does not in any way state what the public facilities are.

265. Is putting land description may mean that anything constructed on the purchased land or even carried on will be subject to the clause?

266. Hence, this Court agrees with Plaintiff's submission the words "public facilities" in clause 7 of DOC should have been properly defined.

Will remain available for the exclusive

267. Plaintiff at paragraph 74 of Plaintiff's Submission filed on 25 May 2017 stated as follows:-

> *"74. What does "will remain available for the exclusive use" mean in the context of Clause (7)? It is not clear whether "use" means simply that the Taveuni Estates lot owners and purchasers (even if that term can be construed) can use the improvements on the Country Club Lot in the direct sense of that term. In other words, does it mean that they can play golf, play tennis, use the clubhouse, swim in the swimming pool and play croquet on the croquet lawn? On the other hand, does it mean that they can do all of that AND put it to their use in the sense that they can run a business on the Country Club Lot? Such a business might produce income by charging fees to the "public", that is people who are not Taveuni*

Estates lot owners or purchasers, for the direct use of the facilities."

268. This Court also takes note that First Defendant being the party to DOC and the transferor named in DOC had some issues with Clause 7 as is seen in facsimile dated 1st February 1996, from Mr Jay Pala to Mr Peter Stinson and Mr Murray Cockburn (Exhibit P40). Under the heading **"Clause 7"** on second page of Exhibit P40 Mr J. L. Pala states as follows:-

> *"**Clause 7** states,*
>
> *"The transferee (NBF) covenants with the Transferors (TEL/STINPAC) that the public facilities to be transferred to the Transferee, specifically defined as etc…… will remain available for the exclusive use of all Taveuni Estate lot owners and purchasers, free of charge in perpetuity."*
>
> *b) This clause does not specifically state that the Transferee (NBF) will maintain the facilitation*
>
> *c) Secondly, it refers to the use being free of charge to lot owners. The lot owners are not party to this agreement so I do not know whether it is binding on them.*
>
> *Can TEL charge the lot owners a fee?*
>
> *d) Should Ian after reading the Deed raise the issue of maintenance we may have a problem with them agreeing to underwrite the shortfall.*
>
> *e) We may be able to convince them that the management company be allowed to charge a fee providing the facilities. However, this would still leave the question of who finds the shortfall.*
>
> *f) Ian could possibly want TEL to pick up this out of rates income. We could live with that possibly?"*

269. Also does exclusive mean no member of the public can use any of the facilities like golf club, golf course, tennis court and any other similar facilities provided on the subject lots.

270. Mr Peter Stinson gave evidence that when First Defendant was managing the golf course, country club and tennis court members of the public were permitted to use these facilities on payment of a fee.

271. This Court holds that as is submitted by Plaintiff's Counsel and raised by Mr J. L. Pala in Exhibit P40, these terms are ambiguous and create uncertainty.

Taveuni Estate Lot Owners and Purchasers

272. At paragraph 75 of Plaintiff's Submission filed on 25 May 2017, Plaintiff submits as follows:-

> *"If a lot owner is a company and has a board of directors numbering fifty, does in include all fifty? If there are one hundred shareholders in the company does it include all the shareholders? Surely not, because a company only has human interaction with the world, so to speak, through its directors, not through its shareholders. Does it just mean, on the other hand, that that lot owner cannot make use of any of those lots because it is a company and as a legal person therefore has no human/tangible form? If there are thirty joint owners of a lot, does it include all thirty? Would a sole individual lot owner be entitled to object if thirty or fifty or one hundred people associated with another lot all had the same right to use the Country Club Lot as him? If a husband and father is the sole individual lot owner of a particular lot, would the right of "exclusive use" extend to his wife and/or his children, or his guests? If not, would they have to pay to use the facilities or would they simply be excluded from using the facilities because the lot owners' right (as a group) to use the facilities was in fact exclusive?"*

273. This Court has no hesitation in accepting Plaintiff's submission as stated above. In view of the fact the subdivision is quite big with more than three hundred lots, and that few limited liability companies own several lots "Taveuni Estate Lot Owners" should have been properly defined in the DOC to avoid uncertainty and confusion.

Free of Charge in perpetuity

274. At paragraph 76 of Plaintiff's Submission, Plaintiff submits as follows:-

> *"If the Taveuni Estates lot owners and purchasers (however that term is construed) are not going to pay to use the facilities, then who is going to pay? Is it supposed to entitle "lot owners" to receive food and beverages in the clubhouse free of charge on? Further, how could that person fund the maintenance and/or improvement of those facilities in perpetuity? It was accepted by Mr Stinson in evidence that if capital were to be set aside to produce income to fund that maintenance and/or improvement, it would need to be an amount in the millions of dollars. The lot would therefore necessarily have a negative value to that extent. To please a negative value on real estate as a consequence of a covenant is simply not possible. Submissions will be made in that regard in response to the First Defendant's submissions."*

275. Mr Stinson (DW) in his evidence states that First Defendant maintained the golf course and country club house from proceeds of sale of lots which amounted to million of dollars.

276. Mr Stinson's evidence was that First Defendant subsidized the running of golf course, country club from sale of lots. The question then arises is that how will the facilities be maintained for use by lot owners free when all lots are sold.

277. DW (Mr Peter Stinson) during cross-examination agreed that the lot owners would have to be infinitely healthy to provide the services free of charge in perpetuity and that the Bank and he did not expect the Bank to be infinite wealthy (paragraph 134 lxxix and lxxx of this Judgment).

278. Letter from Mr J. Pala (Exhibit P40) also raises issues in respect to providing service free of charge in perpetuity (refer to page 107 of this Judgment).

279. There is doubt if this part of clause can be enforceable given what is stated in the preceding paragraph.

280. After careful analysis and consideration of the submission and evidence in respect to Clause 7 of DOC this Court finds the Clause is void for uncertainty in that the essential words of the Clause being "public facilities" "will remain available for exclusive use"; "Taveuni Estate lot owners and purchasers" and had to be defined properly and is uncertain.

281. Also, whether Plaintiff and/or its successor could provide the services in respect to golf course, clubhouse and tennis court free of charge in perpetuity is very much doubtful.

282. It is doubtful as whether parties did intend to have services provided free of charge in perpetuity.

283. Court is of the view that the transferee would not have agreed to provide such service free of charge in perpetuity if the term stated hereinbefore would have been defined properly.

284. This Court after what has been stated at paragraphs to 283 has no hesitation in holding that Clause 7 of DOC is void for uncertainty.

Whether First Defendant is entitled to Damages due to Plaintiff's failure to get KFL enter into Deed of Caveat with First Defendant

285. Having that:-

(i) There was no obligation on the Plaintiff to get KFL to enter into a Deed of Covenant with First Defendant; and

(ii) When Plaintiff entered into the Sale and Purchase Agreement with KFL it annexed the Deed of Conveyance to Proforma Sale & Purchase Agreement to the said Agreement;

(iii) The Plaintiff had passed obligation to pay rates under the DOC to KFL.

(iv) First Defendants claim for damages for Plaintiff's alleged failure to obtain Deed of Covenant from KFL must fail.

286. If First Defendant upon basis of legal advice intends to pursue claim for rates and service charges it must claim against KFL and not Plaintiff.

Estoppel

287. First Defendant has raised issue estoppel in respect to Water and Rubbish Dump Lots and submitted it has taken almost twenty-two (22) years for Plaintiff to enforce its rights.

288. It appears that Counsel for First Defendant included the period this matter was pending in Court as part of First Defendant's Submissions.

289. This Court after hearing evidence made following finding of facts:-

(i) Plaintiff became aware that Duplicate CT held by them over Water and Rubbish Dump Lots had defects in the year 1999;

(ii) PW3 gave evidence that when they detected the defect Plaintiff was of the view that it was an error on part of ROT and it was in 2002, Plaintiff became suspicious;

(iii) Soon after becoming aware about the problem Plaintiff started communicating with ROT and instructed Solicitors to rectify the defects;

(iv) When the Solicitors could not have the defect ratified Plaintiff commenced legal proceedings against First Defendant within six years.

290. Also the twenty-two (22) year includes fourteen (14) years this matter has been pending in Court.

291. Estoppel is an equitable remedy like any other equitable remedy is only available to parties which come to Court with clean hands.

292. Therefore, having held that properties subject to CT 28820 and 31921 was held in trust by First Defendant for Plaintiff and that Titles were obtained as a result of fraudulent conduct, it is doubted if First Defendant can rely on doctrine of estoppel.

Conclusion

293. This Court holds as follows:-

(i) **DOC is Deed or Contract?**

DOC is Deed and not a Contract.

(ii) **Duplicate CT Nos. 28202 and 28286**

No evidence has adduced to show that the Duplicate CT 28202 and 28286 were issued without the Original CT being created or entered into the Register kept at ROT due to fraudulent conduct of the First Defendant or that the First Defendant colluded with ROT.

(iii) **CT Nos. 28820 and 31921**

The properties subject to CT 28820 and 31921 have from date of issuance been held by First Defendant in trust for the Plaintiff.

Also the First Defendant obtained CT Nos. 28820 and 31921 as a result of fraudulent conduct of its part and as such these Titles are defeasible.

(iv) **Whether Plaintiff passed obligation to KFL to pay rates and charges to First Defendant?**

This Court finds that the obligation to pay rates and charges was passed by Plaintiff to KFL and there was no requirement for Plaintiff to obtain Deed of Covenant from KFL.

Hence, First Defendant is not entitled to any damages against Plaintiff for alleged failure by Plaintiff to obtain Deed of Covenant from KFL to pay rates and charges;

(v) **General and Exemplary Damages claimed by Plaintiff**

Plaintiff has not provided any evidence as to show what sort of damages it suffered as a result of Defendant obtaining CT 28820 and 31921 and as such Plaintiff's claim for damages must fail;

(vi) **Clause 13 of DOC**

First Defendant has complied with Clause 13 of DOC as per the evidence of PW3 and the fact Plaintiff's then Solicitor returned the subject titles to First Defendant the Plaintiff is estoppel from enforcing Clause 13;

(vii) **Clause 7**

This Court holds that Clause 7 of DOC is void for uncertainty;

(viii) **Estoppel - Water and Rubbish Dump Lots**

First Defendant defence on estoppel is refused for reasons stated at paragraphs 287 to 291 of this Judgment;

(ix) **Limitation**

Having held that DOC is a Deed, First Defendant held CT over Water and Rubbish Dump Lots from 1999 in trust for Plaintiff; and First Defendant obtained CT Nos. 28820 and 31921 by means of fraudulent conduct the action commenced was made within the limitation period.

294. It must be noted that what is stated in preceding paragraph is only a summary of Court finding with reasons for such finding published in the Judgment.

Costs

295. This Court takes into consideration the following factors:-

(i) Trial lasted for four (4) days;

(ii) Plaintiff and First Defendant filed Submissions and Reply to Submissions;

(iii) Some of the evidence produced in Court in particular by PW5 and part of DW's evidence were not relevant to the issues before the Court;

(iv) CT Nos. 28820 and 31921 over Water and Rubbish Dump Lots were obtained by First Defendant as a result of fraudulent conduct and First

Defendant failed to return CT 28820 to ROT as required by ROT and then Solicitors of the Plaintiff.

Declaration/Orders

296. This Court makes following Declaration/Orders:-

Declaration

(i) The First Defendant is holding CT Nos. 28220 and 31921 in trust for the Plaintiff and has been doing so since 16 April 1999;

(ii) First Defendant has complied with Clause 13 of Deed of Conveyance dated 2 June 1995, between National Bank of Fiji and First Defendant;

(iii) Clause 7 of Deed of Conveyance dated 2nd June 1995, between National Bank of Fiji and First Defendant is void for uncertainty;

(iv) Plaintiff passed to Kawakawadawa (Fiji) Ltd the obligation to pay rate and charges to First Defendant.

Orders

(v) First Defendant within seven (7) days from date of this Judgment deliver Duplicate Certificate of Title Nos. 28820 and 31921 to Plaintiff's Solicitors for onforwarding to the Plaintiff;

(vi) Upon receipt of Duplicate Certificate of Title Nos. 28820 and 31921, Plaintiff through its Solicitors prepare and forward Transfer in respect to property comprised and described in CT Nos. 28820 and 31921 to First Defendant's Solicitors for execution by First Defendant;

(vii) First Defendant do execute and return the Transfer in paragraph 296(vi) to Plaintiff's Solicitors within fourteen (14) days from date of receipt of the Transfer by First Defendant's Solicitors.

(viii) No stamp duty or capital gains tax be assessed or be payable on the Transfer of CT 28820 and 31921 by First Defendant to Plaintiff pursuant to this Judgment;

(ix) Third Defendant upon receipt of Transfer of CT 28820 and 31921 pursuant to this Judgment do immediately register the Transfer and release the Duplicate CT Nos. 28820 and 31921 to Plaintiffs Solicitors;

(x) Plaintiff's claim for general and exemplary damages against First Defendant is dismissed and struck out;

(xi) First Defendant's counter-claim for damages is dismissed and struck out;

(xii) First Defendant do pay Plaintiff's cost assessed in the sum of seven thousand dollars ($7,000.00) within fourteen (14) days from date of this Judgment.

K. Kumar
JUDGE

At Suva
25 May 2018

KS Law for the Plaintiff
Cromptons for the First Defendant
Office of the Solicitor-General for the Second/Third Defendants