IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 41 of 2018

BETWEEN : **JUXTA BEACH (FIJI) LIMITED** a limited liability company having its registered office at 74 Ellis Place, Fantasy Island, Nadi.

PLAINTIFF

A N D : **EXTREAM SPORT FISHING (FIJI) LIMITED** a limited liability company having its registered office at HLB Crosbie & Association, Chartered Accountants, Top Floor, HLB House, 3 Cruickshank Road, Nadi Airport, trading as **FANTASIA RESORT**

DEFENDANT

Counsel : **Mr. Adish Kumar Narayan for the plaintiff**
: **Mr. Kevueli Tunidau for the defendant**

Date of hearing : **Friday, 05th October, 2018**
Date of ruling : **Friday, 29th March, 2019**

RULING

(A) INTRODUCTION

(1) The matter before me stems from the plaintiff's application for 'summary judgment' and/or "trial of a preliminary point of illegality against the defendant", by way of summons dated 01st March, 2018 made pursuant to Order 14, rule 1, 2, 3 and 8 and Order 33, rule 3 and 7 of the High Court Rules, 1988 and pursuant to the inherent jurisdiction of the court.

(2) The summons is supported by an affidavit of **'Abbas Ali'**, the managing director of the plaintiff company, sworn on 13th March 2018 (which for the sake of brevity, I shall hereafter refer to as **'Ali's affidavit'**).

(3) The plaintiff by the summons filed seeks the following orders;

> *[1] A final judgment against the Defendant, its servants, agents, contractors and tenants to forthwith refrain from entering the Plaintiff's iTaukei Lease 32908 and to remove all structures and fittings constructed thereon.*
>
> *[2] The Defendant to pay damages to the Plaintiff to be assessed.*
>
> *[3] Costs of an incidental to this application in favour of the Plaintiff on a full Solicitor/Client indemnity basis; and*
>
> *[4] Such further or other orders as this Honourable Court deems just.*

(4) The application for 'summary judgment' and 'trial of a preliminary point' is strongly resisted by the defendant.

(5) The defendant filed an affidavit in opposition sworn by '**John Sofianopoulos**', the managing director of the defendant company sworn on 04th April 2018 opposing the plaintiff's application followed by an affidavit in reply thereto.

(B) FACTUAL BACKGROUND

(1) What are the circumstances that give rise to the present application?

(2) The statement of claim which is as follows sets out sufficiently the facts surrounding this claim from the plaintiff's point of view as well as the prayers sought by the plaintiff.

> 1. *The Plaintiff is a developer and the registered proprietor of the iTaukei Lease Number 32908 known as "Naikabula" (part of) Lot 1 & 2 on SO 6564 comprising an area of 1.4199 hectares part of which was formerly Lot 2 on plan SO 4655 comprising an area of approximately 4000m² covered by atilt Reference Number 4/10/7357 situated in Wailoaloa, Nadi.*
>
> 2. *On or about 6th May, 2011 the Plaintiff and the Defendant contemplated entering into a Memorandum of understanding for the Defendant to purchase Lot 2 on Plan SO 4655 (the Land) for $90,000.00 plus VAT at 15% on conditions that the Defendant would pay a deposit and part payment of $40,000.00 on execution, with the balance payable in instalments, the transfer to be given on completion of subdivision to*

occur within 6 months and the parties to enter into a formal Sale and Purchase Agreement on approval of the subdivision scheme plan.

3. *The Memorandum of Understanding was not executed, a formal contract was not entered, the subdivision scheme plan was not approved within 6 months.*

4. *The Defendant did not pay the deposit and part payment as envisaged and made payments as follows:*

6/05/11	*$10,000.00*
12/05/11	*$15,000.00*
20/05/11	*$ 5,000.00*
26/05/11	*$ 5,000.00*
TOTAL:	*$35,000.00*

No further sums were paid thereafter.

5. *The Plaintiff refunded the sum of $35,000.00 to the Defendant on or about 20th July 2017 and to the Defendant's solicitors on 2nd August 2017 which was declined and returned by the Defendant and/or its Solicitors on or about 20th July 2017 and on or about 29th August, 2017 respectively.*

6. *The subject land is iTaukei land subject to the iTaukei Lands Trust act.*

7. *No consent of the iTLTB was obtained for the contemplated dealing with the Land between the Plaintiff and the Defendant.*

8. *Notwithstanding the failure to enter into a formal dealing and the absence of the consent of the iTLTB in or about August, 2017 the Defendant by its servants, agents, contractors or tenants forcibly and without any authority or approval of the Plaintiff, entered into possession of the subject land now comprised in iTLTB Lease Number 32908 and constructed a driveway and other structures on the Plaintiff's iTLTB Lease 32908.*

9. *The entry, development and occupation of the Land by the Defendant, its servants, agents, contractors or tenants is without the consent of the iTLTB is illegal.*

10. *Alternatively, and any rights which may have accrued from the contemplated dealing is now statute barred under section 4 of the Limitation Act.*

11. *The Plaintiff issued a notice on 24th August, 2017 to the Defendant's Solicitors to remove encroachments and trespass on its land which the Defendant, its servants, agents, contractors or tenants have failed and/or refused to comply with and continue with the illegal and unlawful occupation and use of the Land.*

12. *The Defendant's trespass has caused delay in the developments of the Plaintiff's iTaukei Lease No. 32904 by reason of which the Plaintiff has suffered loss and damage.*

PARTICULARS

Full particulars of loss and damages will be provided at discovery

(3) The plaintiff claims from the defendant;

1. *An order for the Defendant, its servants, agents, contractors and tenants forthwith refrain from entering the Plaintiff's ITaukei Lease 32908 and to remove all structures and fittings constructed thereon.*

2. *Damages.*

3. *Costs.*

(4) Let me now turn to the affidavits filed.

(5) 'Abbas Ali', the managing director of the plaintiff company, in his affidavit in support of summons, sworn on 13th March, 2018, deposed *inter alia;*

1. *I am the Managing Director of the Plaintiff company and have been duly authorised to make this Affidavit on behalf of the Plaintiff. I now produce an authority from the Plaintiff marked "AA-1"*

2. *Unless stated otherwise I make this affidavit from matters within my own knowledge and from the knowledge acquired by me from my position with the Plaintiff in handling the files relating to the Defendant.*

3. *I have read the Statement of Claim filed herein on behalf of the Plaintiff which I verify.*

4. *I now produce a copy of the Plaintiff's iTaukei Lease number 32908 marked "AA-2".*

5. *On or about 6th May 2011 I had been engaged negotiations with Mr John Sofianopoulos who is a director of the Defendant Company. The discussion led to a draft of a Memorandum of Agreement (MOU) being prepared. This was not executed by the parties. However, the Defendant did pay the total sum of $35,000.00 on various occasions until 25th May 2011. I now produce copies of the draft Memorandum of Understanding and the receipts for the payments marked "AA-3", "AA-4", "AA-5", "AA-6" and "AA-7" evidencing the payments.*

6. *The Defendant failed to pay the full deposit amount of $40,000.00 The subdivision was not undertaken or completed within 6 months. The parties did not enter into a Sale and Purchase Agreement as envisaged. The land in question is marked as Lot 2 in yellow on the plan now produced by me marked "AA-8".*

7. *The area referred to as Lot-2 in the Memorandum of Understanding forms one of the lots (Lot 1) in the total area of the lands included in iTaukei Lease number 32908. Lot 1 in the circle in Annexure "AA-8" shows the existing land in the ownership of the Defendant.*

8. *The lands comprised in iTaukei Lease number 32908 had originally been bought by the Plaintiff from a third party on or about 2nd March 2011. At the time of acquisition it was an undeveloped and unregistered iTaukei Land held by the Vendor under an agreement for lease. The transfer to the Plaintiff was completed after obtaining consent of the iTLTB. It had to be registered with the Registrar of Deeds as the land was not covered by a Land Transfer Act title. The whole of this land is now covered by the registered iTaukei Lease 30298. I now produce a copy the transfer, area plan and consent of the iTLTB marked "AA-9", "AA-10" and "AA-11" respectively.*

9. *On 20th July 2017 the Plaintiff's solicitors attempted to refund the sum of $35,000.00 to the Defendant. The Defendant advised the bailiff engaged by the Plaintiff's solicitors to send the money to the Defendant's solicitors. The Plaintiff's solicitors did send the money as advised. However, the Defendant's then solicitors did not accept the payment which was returned. I produce herewith the correspondence from the Plaintiff's solicitor's to both the Defendant and also to its solicitors marked "AA-12", "AA-13" and "AA-14" respectively.*

10. *The both solicitors then entered into correspondences with each other. The Defendant who had entered the subject land in or around*

August 2017 has remained in occupation of the land to date and has been utilising it for its own benefit. I now produce copies of the correspondences exchanged marked "AA-15" and "AA-16".

11. *The Defendant erected a concrete drive through the subject land leading to its property and had other structures such as a sewer pump. I now produce copies of a photograph marked "AA-17" showing the concrete drive/road way and "AA-18" showing a sewer pump structure.*

12. *The iTaukei Land Trust Board has not consented to any dealing or occupation by the Defendant. I produce a letter from our Solicitors to the iTaukei Land Trust Board enquiring as to the matter of consent marked "AA-19". The iTLTB replied to our Solicitors advising that it had no knowledge of the Defendant. I produce the reply marked "AA-20".*

13. *There is no valid agreement for any dealing between the Plaintiff and the Defendant. I am advised by the Plaintiff's solicitors and verily believe that there is no defence to this action except as to any damages payable by the Defendant. There is no agreement or dealing between the Plaintiff and Defendant.*

14. *Moreover, there is no consent from the iTaukei Land Trust Board to any dealing between the Plaintiff and the Defendant or as to the Defendant's taking of possession and exercise of proprietary rights over the subject land.*

15. *I pray for summary judgment and/or judgment on the preliminary point of illegality as follows:-*

    [1] A final judgment against the Defendant, its servants, agents, contractors and tenants to forthwith refrain from entering the Plaintiff's iTaukei Lease 32908 and to remove all structures and fittings constructed thereon;

    [2] The Defendant to pay damages to the Plaintiff to be assessed.

    [3] Costs of and incidental to this application in favour of the Plaintiff on a full Solicitor/Client indemnity basis.

(6) The defendant opposed the plaintiff's application for 'summary judgment and/or trial of a preliminary point' and supported its opposition by an

affidavit of 'John Sofianopoulus' the managing director of the defendant company, sworn on 04th April, 2018, which is as follows;

1. *I am the Managing Director of the Defendant Company and have been duly authorised to make this Affidavit on behalf of the Defendant. I now produce an authority from the Plaintiff marked "JS-1".*

2. *Unless it is otherwise stated I make this affidavit from matters within my own knowledge and those acquired by me from my position with the Defendant with regard to all issues and transactions with the Plaintiff and matters that are not within my own knowledge. I verily believe as true.*

3. *I have read the Plaintiff's Statement of Claim referred to at paragraph 3 of the Affidavit of Abbas Ali filed on 14 March, 2018 (herein referred to as "the Affidavit").*

4. *The Defendant filed its Statement of Defence and Counter-claim on 19 March 2018 and served on the Plaintiff city agents Messers Young & Associates on 20 March, 2018.*

5. *In response to paragraphs 4 to 14 of the Affidavit, I say as follows:*

5.1 *That I was approached by Abbas Ali the Plaintiff's Managing Director sometimes in the first week of May, 2011 and asked whether my company was interested in a piece of undeveloped native land next to Fantasia Resort and offered it to me for $90,000.00 (Ninety Thousand Dollars).*

5.2 *At the time Abbas made the offer he also showed me a one page copy of an AGREEMENT FOR LEASE for the same piece of undeveloped native land he was selling which I recognised in its locality diagram as next to my crown lease.*

5.3 *I recognised and identified a copy of the same one page Agreement for Lease that was shown to me by Abbas Ali as annexure "AA-11" in the Affidavit.*

5.4 *The undeveloped native land under Agreement for Lease has a land area totalling 1.5866 hectares and borders my crown lease on the Nadi Bay direction.*

5.5 *I asked Abbas Ali what the Agreement for Lease was for and he said that it was for tourism and I advised him that a tourism lease will not serve my purpose unless the lease is a commercial lease.*

5.6 *Abbas Ali assured me that the process of transferring the Agreement for Lease to a commercial lease was already under way and if I want to buy the undeveloped land he undertook to have the transfer finalised in six (6) months.*

5.7 *Premised upon Abbas Ali's verbal promise and undertaking to transfer the tourism lease to a commercial lease, I accepted the offer to purchase the undeveloped land for $90,000.00 plus VAT.*

5.8 *The agreement to purchase the undeveloped land was made verbal and includes the following conditions:*

a) *the purchase price for the land as $90,000.00 plus vat;*

b) *a ten percent (10%) deposit of $10,000.00 (Ten Thousand Dollars) to be paid on by 6th May, 2011.*

c) *the date of settlement to be in six months from 6th May, 2011.*

d) *The Plaintiff as vendor to formalize the agreement in writing by way of a sale and purchase agreement as soon as possible after 6th May 2011;*

e) *The Plaintiff as vendor to finalise the process of obtaining a commercial lease under the Defendant's name on the settlement date;*

f) *The Plaintiff to deliver to the Defendant a registered commercial lease and the Defendant to pay the Plaintiff the full balance of the purchase price on the date of settlement; and*

g) *The Plaintiff to include all the above in the written sale and purchase agreement.*

5.9 *In the morning of 6th May, 2011 I, on behalf of the Defendant paid Abbas Ali, on behalf of the Plaintiff, by cheque the sum of $10,000.00 (Ten Thousand Dollars) being the 10% deposit of the purchase price of $90,000.00 pursuant to the verbal contract made.*

5.10 *I demanded a receipt for the deposit sum paid and Abbas Ali gave the receipt referred to and marked as annexure "AA-4" in the affidavit.*

5.11 *To my understanding, the verbal contract made between me and Abbas Ali, for and on behalf of our respective companies was confirmed by the 10% deposit amounting to $10,000.00 paid on 6th May, 2011.*

5.12 *On receipt of the $10,000.00 deposit, Abbas Ali reassured me that he will work on the written sale and purchase agreement as soon as possible since I have paid the deposit as agreed.*

5.13 *In the afternoon of 6th May, 2011 Abbas Ali brought a written Memorandum of understanding (herein referred to as the "MOU) and referred to as annexure "AA-3" in the affidavit. Upon reading the MOU I became very disappointed with Abbas Ali and rejected the MOU outright. I rejected the MOU because:*

(a) A verbal agreement on the sale of the undeveloped native land and its transfer was made between the Plaintiff and Defendant as evidenced by the deposit paid earlier that morning.

(b) An MOU was never the subject of discussion and agreement between the parties from the time Abbas Ali first approached me and made the offer to sell the undeveloped land for $90,000.00 till the deposit of the purchase price amounting to $10,000.00 was paid.

(c) The MOU requires a $40,000.00 deposit was contrary to the deposit earlier agreed and paid by me that morning.

(d) I suspected that the status of the MOU was fraudulent because of the reference to subdivisions as this would subject the Defendant to long delays in its investment plans and Abbas made no reference to the subject whatsoever.

(e) That on the above grounds I refused to sign the MOU.

5.14 *That I asked Abbas Ali as to why he made an MOU and not a written sale and purchase agreement as verbally agreed? I also queried as to why a deposit of $40,000.00 was in the MOU as opposed to the agreed and paid up deposit of $10,000.00?*

5.15 *Abbas Ali said that he was in financial difficulties to pay his staffs' wages and made the MOU to reflect a higher deposit of $40,000.00 to offset the wages.*

5.16 *That I very disappointed with Abbas Ali as he was untruthful and started playing little dirty tricks on me. I therefore demanded the full refund of the $10,000.00 deposit paid that day forthwith.*

5.17 *That Abbas Ali then begged me not to withdraw the deposit paid and promised that the verbal agreement made would still remain. He then negotiated the possibility of further payments on the purchase price to assist his pressing financial difficulties.*

5.18 *After discussions with my wife I agreed not to withdraw the deposit made and to make further payments to the Plaintiff to alleviate his financial difficulties at the time. For the further payments to be made, it was agreed between me and Abbas Ali that these would to be deducted from the purchase price of $90,000.00*

5.19 *The further payments made to the Plaintiff are those reflected in receipts marked as annexures "AA-5", "AA-6" and "AA-7" respectively in the Affidavit and amounted to $25,000.00 (Twenty Five Thousand Dollars). This amount, in addition to the deposit paid, totalled $35,000.00 (Thirty Five Thousand Dollars).*

5.20 *The amount of $35,000.00 paid by the Defendant to the Plaintiff was paid in the month of May, 2011 to meet the pressing financial difficulties encountered by the Plaintiff as requested.*

5.21 *The amount of $35,000.00 paid by the Defendant in May 2011 was never intended or in contemplation whatsoever by me or the Defendant to be part of the deposit reflected in the MOU as contended by the Plaintiff.*

5.22 *On 26th May, 2011 Abbas Ali, on behalf of the Plaintiff, advised me that the Defendant, if it so wished, could commence its use and development of the undeveloped native land under the Agreement for Lease whilst the transfer to a commercial lease was forthcoming.*

5.23 *In the months after May, 2011 I made several queries to Abbas Al and the Plaintiff in regard to the status of the commercial lease processed and the formal sale and purchase agreement. Abbas Ali kept assuring me that both documents were soon to be finalised.*

5.24 *After six months from 6th May, 2011 I was ready with the balance of the purchase price to pay the Plaintiff but was advised by Abbas Ali that due to the sale and purchase agreement and commercial lease still under process by its Solicitors, the date of settlement would be deferred.*

5.25 *Abbas Ali assured me always not to worry as the transfer of Lease to my company would be attended to.*

5.26 *That in accordance with sub-paragraph 5.22 hereinabove the Defendant commenced its development on the land. The following was done:*

(i) *Engagement of engineers and architect to draw up architectural and engineering plans for a multimillion dollar building project on the land;*

(ii) *Construction of a 15,000 litres sewer tank;*

(iii) *Construction of borehole and power generated pumping system;*

(iv) *Construction of water and sewer line system;*

(v) *Purchase of a $95,000.00 350 KVA generator;*

(vi) *Laying of power cables;*

(vii) *Hired contractors for the development work.*

5.27 *The development works done were with the full approval of Abbas Ali who himself donated a big power lamp for the work site.*

5.28 *The estimated costs so far made on developments is $2,000,000.00 (Two Million Dollars) as these were earth works below the ground.*

5.29 *From the documents disclosed in the Affidavit, I am legally advised and believe as true of the following:*

(i) *The Agreement for Lease that was given to me by Abbas Ali in the beginning of May 2011 and annexed as "AA-11" in the Affidavit (see subparagraph 5.3 hereinabove) was issued by the Tourism Department of the iTaukei Land Trust Board South West Region at Namaka, Nadi to the Trustees of Tokatoka Vunatawa in NLTB Reference File No. 4/10/7357 for the area of 1.5866 hectares on 14th September, 2005.*

(ii) *The Trustees for Tokatoka Vunatawa of Saunaka Village, Nadi as tenants under the Agreement for Lease under NLTB File Reference No. 4/10/7357 applied for consent to assign their tenancy of the land to the Plaintiff via an APPLCIATION FOR CONSENT TO ASSIGN lodged with the iTaukei Land Trust Board and approved on 2nd March, 2011 as per annexure "AA-10" of the Affidavit. The amount in consideration was $40,000.00 (Forty Thousand Dollars).*

(iii) *That a sale and purchase agreement between the Plaintiff and the Trustees of Mataqali Vunatawa of Saunaka village was executed by them before the 2nd day of March, 2011. The sale and purchase agreement was not disclosed by the Plaintiff in the Affidavit.*

(iv) *That upon the grant of consent to assign Agreement for Lease Reference File No. 4/10/7357 to the Plaintiff as the assignee, the Plaintiff solicitors namely Babu Singh & Associates of Nadi, lodged the transfer with the Registrar of Deeds and the transfer of the Agreement for Lease was registered on the 1st day of June, 2011 as shown under annexure "AA-9" of the Affidavit to the Plaintiff.*

(v) *That the Agreement for Lease File Reference No. 4/10/7357 was then surveyed and a registered lease title was issued and duly registered with the Registrar of Titles office on 5th September, 2016 and now bearing registered Lease number 32908 as referred to under annexure "AA-2" of the affidavit.*

(vi) *The Lease No. 32908, described as Naikabula (PT of) Lot 1 & 2 has an area of 1.4199 hectares. The land area decreased after survey from that contained in the Agreement for Lease. The lease issued remained as a tourism lease.*

(vii) *That the tourism lease held by the Plaintiff is non-transferable directly to a commercial lease.*

(viii) *That the Plaintiff must surrender its tourism lease and then apply for a commercial lease. If the application is granted, an offer for a commercial lease will be made by the iTaukei Land Trust Board accordingly.*

(ix) *The survey process itself is lengthy as it deals with the following:*

(a) *the tenant engaging a private surveyor and enter into a survey agreement;*

(b) *the surveyor then acquires survey instructions from the iTaukei Land Trust Board;*

(c) *survey works are then conducted;*

(d) *survey plans lodged with relevant authorities, mainly the Director Town & Country Planning who assess the scheme plan for approval;*

(e) *Director Town & Country Planning makes referrals to relevant offices namely the local authority, Fiji Roads Authority, Health etc.*

(f) *referrals upon receipt by Director Town & Country Planning are then assessed and then approval/rejection issued;*

(g) *if approved an Approved Survey Plan is issued with appropriate SO reference; and*

(h) *if declined, the surveyor to further liaise with the iTaukei Land Trust Board.*

5.30 *That the trail of documents and transactions referred to at sub-paragraph 5.30 hereinabove, when pieced together, clearly showed that Abbas Ali and the Plaintiff had committed fraud against me and the Defendant as follows:*

(a) *Offering for sale an undeveloped native land with a one page copy of an Agreement for Lease as per annexure "AA-11" of the Affidavit with the full knowledge that the Agreement for Lease as of the first week of May, 2011 was under the Trustees for Mataqali Vunatawa of Saunaka village, Nadi.*

(b) *By deceptively presenting the Plaintiff as the proprietor of Agreement for Lease as per annexure "AA-11" of the Affidavit.*

(c) *When making the offer for sale of land the subject of Agreement for Lease marked as annexure "AA-11" of the Affidavit, Abbas Ali and the Plaintiff deceptively made a material non-disclosure to me and the Defendant of the conveyancing documents and transaction referred to at sub-paragraph 5.30 (i), (ii) and (iii) respectively hereinabove.*

(d) *Accepting $35,000.00 (Thirty Five Thousand Dollars) in May, 2011 as part payments of the purchase price without disclosing the true status of the land on the Agreement for Lease.*

(e) *Approval and acquiescence to the development works carried out by the Defendant without disclosing the true status of the land under Agreement for Lease.*

(f) *Failure to inform and/or advise me or the Defendant that the tourism lease was non-transferable directly to a commercial lease.*

(g) *Creating deceit and lies on many occasions to the Defendant and me as to the real status of the formal sale and purchase agreement and transfer of tourism lease to a commercial lease.*

(h) Failing to advise me and the Defendant of the process and transaction carried out as per sub-paragraph 5.29 (iv), (v) and (ix) hereinabove with regard to status of the land in question.

(i) Retention of a MOU in the pretext of showing that its contents reflects the contemplation of the parties on 6th May, 2011 when the MOU was not executed by the Defendant and rejected by me for reasons referred to at sub-paragraph 5.13 hereinabove.

5.31 *That as a result of the fraud referred to at sub-paragraph 5.30 hereinabove, the Defendant suffered a substantial loss of money by way of the $35,000.00 part payment of purchase price referred at sub-paragraphs 5.19 and 5.20, development works carried out and referred to at sub-paragraph 5.26 hereinabove and loss of investment opportunities between the years 2011 to 2015.*

6. *That as per the Plaintiff's lease referred to as annexure "AA-2" in the affidavit, such lease was only registered to the Plaintiff on 5th September, 2016 whereas the development works carried out by the Defendant was from 2011 to 2014.. The Plaintiff cannot contend that the Defendant encroached and trespassed onto its lease after 5th September, 2016 when development works by the Defendant was before Lease No. 32908 was registered to the Plaintiff.*

7. *As to the issue of non-consent by the iTaukei Land Trust board I verily believe this was vitiated by fraud committed by Abbas Ali and the Plaintiff.*

8. *I therefore pray for :*

a) The specific performance of contract made between the Plaintiff and Defendant in May, 2011;

b) The Plaintiff to pay damages to the Defendant to be assessed.

c) Costs in favour of the Defendant on a full Solicitor/client indemnity basis.

(7) The plaintiff filed an affidavit in rebuttal deposing *inter alia;*

1. *I am the Managing Director of the Plaintiff company and have been duly authorised to make this Affidavit on behalf of the Plaintiff. I now produce and annex a copy of the continuing authority given to me by the Plaintiff marked as "AA-1".*

2. *I have read the affidavit of John Sofianopoulos sworn on 4th April, 2018 (hereinafter referred to as "John's Affidavit) in reply to my affidavit in support of the application for summary judgment and/or trial of a preliminary point and now respond to the hereunder. Unless stated otherwise I make this affidavit from matters within my own knowledge gained from my position with the Plaintiff.*

3. *As to paragraph 4 of John's affidavit I have read the Defence and Counter claim which appears to have been hurriedly filed. I am advised by the Plaintiff's solicitors that a Defence should not have been filed once the application for Summary Judgment had been filed and served. I am further advised that there is no need to file a reply to the Defence in view of the Plaintiff's pending application. I am informed and verily believe that the Defence and Counter claim have no merit in any event and do not provide a Defence to the Plaintiff's claim and the pending application for summary judgment and/or trial of a preliminary point.*

4. *As to paragraph 5.1 of John's affidavit, in actual fact the proposal to purchase a section of 4/10/7357 first came from Mr. Mohammed Harun of HLB Crosbie & Associates on behalf of the defendant. This was after Mr Sofianopoulos became aware that the Plaintiff had already purchased the land from the Tokatoka Vunatawa with whom the Defendant had been negotiating to purchase for itself. I am aware that Mr Sofianopoulus tried to offer the landowners more money and asked them to cancel the dealing with the Plaintiff. The Defendant required his land to extend its access road and services as there was no room on its existing State land to accommodate this without altering the existing buildings on its land.*

5. *As to paragraphs 5.2, 5.3 and 5.4 of John's affidavit the MOU was prepared at the office of HLB Crosbie & Associates after negotiations. Mr. Mohammed Harun acting as the Defendant's accountant had informed the Defendant and I that a sale and purchase agreement could not be made in the absence of a registered title and consent of TLTB. The Defendant had at all-time collaborated with Mr Harun's and the Plaintiff in the preparation of the MOU. The Defendant then paid the first instalment of $10,000.00 on the same day. I deny that the defendant did not know the location of the land in question prior to sighting the Agreement for Lease diagram as in annexure "AA-11". The Plaintiff's land is adjacent to the Defendant's State lease.*

6. *As to paragraph 5.5 I deny that there was any request for the area intended to be purchased being commercial. There was no discussion on zoning as Mr Sofianopoulos had already instructed his*

consultant Mr. Mohammed Harun that he was satisfied with the price and contents of the MOU.

7. *I deny the allegations in paragraphs 5.6 and 5.7 of john's affidavit. The whole process was handled by the Defendant's accountants on its behalf. The MOU speaks for itself as to what the discussion had concluded on.*

8. *I deny paragraph 5.8 of John's affidavit. The MOU records the agreement of the parties which was prepared for the Defendant on the advice of its accountants and on which the Plaintiff relies on in answer to the allegations now being made by the Defendant.*

9. *As to paragraphs 5.9, 5.10, 5.11 and 5.12 of John's affidavit I confirm that the first instalment of $10,000.00 towards the deposit amount of $40,000.00 was made as per the MOU. I deny the allegations by the Defendant which is not recorded in the MOU. The Defendant failed to pay the full deposit amount recorded in unexecuted MOU. The Plaintiff issued a receipt for the payment. The Defendant's stand and what is being said by Mr Sofianopoulos is not consistent with the actual facts. I repeat the agreement of the parties as to the dealing and action to be taken is recorded in the MOU accepted by the Defendant's accountant. I deny anything being said on behalf of the defendant inconsistent with the MOU. I had no other personal dealing with the Defendant or Mr Sofianopoulos.*

10. *As to paragraph 5.13 of John's affidavit I deny the allegations therein. The Defendant did not reject the MOU which had been accepted by its consultant. A copy was taken by both the Defendant and the Plaintiff on the morning on 6th May, 2011. The Defendant gave a cheque for the amount of only $10,000.00 in the afternoon. I have no idea why the Defendant did not sign the MOU but it continued to make payment which was received and acknowledged by the Plaintiff as Mr Sofianopoulos had told me that he would pay the full deposit amount by instalments within one month. The Plaintiff had not signed the MOU as the payment of the full deposit was still outstanding. The executed MOU would have at least bound both parties to move towards formalising a contract by way of sale and purchase agreement. The defendant should have carried out its own due diligence when buying a property. The Plaintiff was not being fraudulent in any manner whatsoever. The Plaintiff did not sign the MOU as the full deposit of $40,000.00 had not been paid to comply with the MOU pertaining to its execution.*

11. *I deny that any such conversation had taken place as alleged in*

paragraphs 5.14, 5.15, 5.16, 5.17 and 5.18 of John's affidavit. The inconsistency with his earlier statements is quite apparent.

12. *As to paragraph 5.19 of John's affidavit I repeat the contents of the preceding paragraphs herein and also say there was still a shortfall of $5,000.00 of the deposit amount which should have been paid prior to the execution of the MOU by the Plaintiff.*

13. *I deny the contents of paragraph 5.20, 5.21, 5.22, 5.23, 5.24, 5.25 of John's affidavit. The $35,000.00 was only part payment of the deposit and no further steps were taken either by the Defendant or the Plaintiff as there had been a default and the MOU had still not been signed off. After six months I was told by his accountants that the Defendant was financially broke. This is evident from the last payment of $5,000.00 which was made by HLB Crosbie & Associates on behalf of the defendant (annexure AA-7). This payment by cheque is proof that HLB Crosbie & Associates acted for and on behalf of the defendant in this matter.*

14. *As to paragraph 5.26, 5.27, 5.28 of john's affidavit I deny the contents thereof. I find it difficult to believe the Defendant would have incurred any substantial expenditure as according to his accountants the Defendant was in a bad financial position. Any developments carried out by the Defendant on the subject land was unilaterally done and without the Plaintiff's or TLTB consent. The Defendant had developed its own State lease which is adjacent to the subject land.*

15. *As to paragraph 5.29 of john's affidavit I am informed by the Plaintiff's solicitors that the matters raised therein are irrelevant to the issues in this case and matters of legal submissions or legal advice do not require to be addressed by an affidavit. The legal advice must also be based on facts and evidence.*

16. *I deny the contents of paragraphs 5.30 and 5.31 of John's affidavit and refer to the preceding paragraphs herein.*

17. *As to paragraph 6 of John's affidavit the land has been in the ownership of the Plaintiff from the time of its initial acquisition and it has throughout been the lessee of the TLTB. The land has always been iTaukei Land. The Plaintiff is the registered proprietor of the current lease which replaced the previous unregistered title.*

18. *I am advised by the Plaintiff's solicitors that I do not have to respond to paragraphs 8 and 9 of John's affidavit as this is a legal matter for counsel to deal with at the hearing. I have noted that the Defendant does concede that it has no consent to any dealing and*

thus has no right to be on any part of the subject land. It would not be entitled to any relief it seeks.

(C) THE LAW

(1) Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing summary judgment.

(2) In my view, it is necessary to refer to first the applicable law and the legislation, and take a fresh look at the principles.

(3) The law relating to summary judgment is contained in Order 14 of the High Court Rules of 1988.

(4) I should quote Order 14, which provides;

SUMMARY JUDGMENT

Application by plaintiff for summary judgment (O.14, r.1)

1. (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

(2) Subject to paragraph (3), this rule applies to every action begun by Writ other than –

(a) An action which includes a claim by the plaintiff for libel, slander, malicious prosecution or false imprisonment.

(b) An action which includes a claim by the plaintiff based on an allegation of fraud.

(3) This Order shall not apply to an action to which Order 86 applies.

Manner in which application under Rule 1 Must be made (O.14, r2)

2. (1) An application under rule 1 must be made by summons supported

by an affidavit verifying the facts on which the claim, or the part of a claim to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the cause may be, or no defence except as to the amount of any damages claimed.

(2) Unless the Court otherwise directs, an affidavit for the purposes of this rule may contain statements of information or belief with the sources and grounds thereof.

(3) The summons, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant not less than 10 clear days before the return day.

Judgment for Plaintiff (O.14, r.3)

3. (1) Unless on the hearing of an application under rule 1, either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the claim or part as may be just having regard to the nature of the remedy or relief claimed.

(2) The Court may by order, and subject to such conditions if any, as may be just, stay execution of any judgment given against a defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action.

(5) Reading as best, I can between the lines of order 14, it seems to me that the whole purpose of a summary judgment procedure is to obtain a quick Judgment, where there is no defence to a claim and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights. The onus remains on the plaintiff throughout to establish that the defendant has no defence.

(6) I bear in mind the principle behind the power to give summary judgment under Order 14, namely that it is:

> *"..... intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay"*
>
> **(Jones v Stone** [1894] A.C. 122).

It has been held that:

> *"As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bonafide defence, he ought to have leave to defend." (**Saw v Hakim** (1889) 5 T.L.R. 72].*

On the authorities it is quite clear that:

> *"leave to defend must be given unless it is clear that there is no real substantial questions to be tried' (**Codd v Delap** (1905 92 L.T. 510 H.L.) That there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment (**Jones v Stone** (1894) A.C. 122).*

(7) Recently the court of Appeal in **Carpenters Fiji Ltd v Joes Farm Produce Ltd**, Civil Appeal number ABU 0019/2006 comprehensively listed principles at page 9 and 10 of the judgment as follows:-

> "Here it is timely to state some of the well-established principles relating to the entry of summary judgment:
>
> (a) *The purpose of Order 14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, a bonafide defence or raise an issue against the claim which ought to be tried.*
>
> (b) *The defendant may show cause against a plaintiff's claim on the merits e.g. that he has a good defence to the claim on the merits or there is a dispute as to the facts which ought to be tried or there is a difficult point of law involved.*
>
> (c) *It is generally incumbent on a defendant resisting summary judgment to file an affidavit which deals specifically with the plaintiff's claim and affidavit and states clearly and precisely what the defence is and what facts are relied on to support it.*
>
> (d) *Set off, which is a monetary cross claim for a debt due from plaintiff, is a defence. A defendant is entitled to unconditional leave to defend up to the amount of the set of claimed. If there is a set off at all, each claim goes against the other and either extinguishes or reduces it **Hanak v. Green** (1958) 2 QB 9 at page 29 per Sellers LJ.*
>
> (e) *Likewise when a defendant sets up a bona fide counterclaim arising out of the same subject matter of the action and connect with the grounds of defence, the order should not be for Judgment on the*

claim subject to a stay of execution pending the trial of the counter claim but should be for unconditional leave to defend, even if the defendant admits whole or part of the claim; ***Morgan and Son Ltd v. S.Martin Johnson Co*** *(1949) 1 KB 107 (CA).*

(8) In **Halsbury's Laws of England (4th Ed) Volume 37 paras 413 – 415**, the relevant portions of which read:

> *Where the plaintiff's application for summary judgment Under Order 14 is presented in proper form and order, the burden shifts to the defendant and it is for him to satisfy the court that there is some other reason to be a trial. Unless the defendant does so, the court may give such Judgment for the plaintiff against the defendant as may be just .....*
>
> *The defendant may show cause by affidavit or otherwise to the satisfaction of the court. He must 'condescend upon particulars', in all cases, sufficient facts and particulars must be given to show that there is a genuine defence.*
>
> *And in a note (Note 4) to the paragraph it is stated that:*
>
> *"The normal everyday practice is for the defendant to show cause by affidavit, and except in a clear case, it is rare for the court to allow a defendant to show cause otherwise than by affidavit. A defence already served may be a sufficient mode of showing cause, but not if it is a sham defence served early to avoid showing cause by affidavit: see* ***McLardy v. Slateum*** *(1890) 24 Q.B.D. 504.*

(9) Once a claim is established, the evidential and persuasive burden shifts to the defendant (see Thomas J in **Hibiscus Shopping Town Pty Ltd –v- Woolworths Ltd** [1993] FLR 106 at 109) who must adduce affidavit evidence dealing specifically with the plaintiffs claim and affidavit and also state clearly and precisely what the defence is and what facts he relies on to resist the entry of summary judgment: **Magan Lal Brothers Ltd –v- L.B. Masters & Company** Civil Appeal No: 31/84.

If the defendant has not filed an affidavit but a defence, the Court must then direct its mind on the issues raised in the defence to see whether it has merits and is not just a sham defence to delay judgment or avoid the necessity of showing cause by affidavit (See the Fiji Court of Appeal in **Magan Lal brothers Ltd –v- L.B. Masters** (supra); see also Halsbury's Laws of England (4th Edition) Volume 37 Para 413 – 415, note 4).

(10) In **Vatukoula Gold Mines Ltd –v- Anand** [2010] FJHC 46 HOBC 219 of 2008 it has been held:-

> *"Order 14 summary judgment procedure is available to any plaintiff who desires a quick judgment on his or her claim where there is no defence to a claim. It is also available where any defence raised is either not a bona fide defence or discloses no triable issues so as to merely delay a Judgment in favour of the plaintiff."*

(11) The onus is on the plaintiff in a summary judgment and the way it can be resisted was discussed by Fatiaki J in **Fiji Development Bank –v- Inoke Moto & others [1995] 41 FLR 236**, where his Lordship quoted a New Zealand decision and stated:

> *The correct approach to an application for summary judgment is succinctly summarised in my view in the head note to the New Zealand Court of Appeal decision in* ***Pemberton v Chappel*** *[1987] 1 NZLR 1 where it was said of the N.Z. equivalent of Order 14.*
>
> *"Held:...the High Court Rules cast onto the plaintiff the onus of convincing the Court that the Defendant has no fairly arguable defence. Normally that onus will be satisfied by the plaintiff's affidavit verifying the allegations in the Statement of Claim and his oath that he believes that the defendant has no defence to the claim ....If a defence is not evident on the plaintiff's pleading and the defendant wishes to resist summary judgment, the defendant must file an affidavit raising an issue of fact or law and give reasonable particulars of the matters which he claims ought to be put in issue. Where the only arguable defence is a question of law which is clear-cut and does not require findings on disputed facts or the ascertainment of further facts, the Court may, and normally should, decide it on the application for summary judgment. But where the defence raises questions of fact on which the outcome of the cause may turn it will not often be right to enter summary judgment."*
>
> *Over a century earlier in 1880 Lord Blackburn in* ***Wallingford v. Mutual Society*** *[1880] 5 A.C. 685 said of the nature of the affidavit required from a defendant in opposing an Order 14 application at p.704 and he quoted:- "I think that when the affidavits are brought forward to raise (a) defence they must, if I may use the expression, condescend upon particulars. It is not enough to swear "I say I owe the man nothing". Doubtless, if it was true, that you owed the man nothing as you swear, that would be a good defence. But that is not enough. You must satisfy the judge that there is reasonable grounds for saying so..... And in like manner as to illegality, and every other defence that might be mentioned."*

(12) The plaintiff has alternatively sought the same Orders under Order 33 of the High Court Rules, 1988.

Order 33 provides;

Split trial: offer on liability *(O.33, r.5)*

5.-(1) This rule applies where an order is made under rule 4(2) for the issue of liability to be tried before any issue or question concerning the amount of damages to be awarded if liability is established.

(2) After the making of an order to which paragraph (1) applies, any party against whom a finding of liability is sought may (without prejudice to his defence) make a written offer to the other party to accept liability up to a specified proportion.

(3) Any offer made under the preceding paragraph may be brought to the attention of the Judge after the issue of liability has been decided, but not before.

(D) CONSIDERATION OF THE APPLICATION

(1) Counsel for the plaintiff and the defendant have tendered extensive written submissions in support of their case.

I am grateful to counsel for those lucid and relevant submissions and the authorities therein collected, which have made my task less difficult than it otherwise might have been. I may add that the submissions are careful and competent.

If I do not refer to any particular submission that has been made, it is not that I have not noted that submission or that that submission is not relevant; it is simply that, in the time available, I am not able to cover in this decision every point that has been made before me.

(2) This is an application by the plaintiff under Order 14 of the High Court Rules for summary judgment. The plaintiff seeks, inter alia, the reliefs in the form of an order for the defendant, its servants, agents, contractors and tenants forthwith to refrain from entering the plaintiff's land (iTaukei Lease number 32908) and to remove all structures and fittings constructed thereon.

THE SUIT IS BASED ON A MEMORANDUM OF UNDERSTANDING

(3) The principal assertion in the affidavit of 'Abbas Ali' is that; *"On or about 06th May 2011 I had been engaged negotiations with Mr. John Sofianopoulos who is a director of the defendant company. The discussions led to a draft of a Memorandum of Agreement (MOU) being prepared. This was not executed by the parties....."*(See paragraph 5).

(4) The plaintiff's suit is based on a 'memorandum of understanding' for the sale of leasehold interest in iTaukei land (Lease Number 32908) from the plaintiff to the defendant. The plaintiff's claim is that the defendant failed to pay the requisite deposit and part payment. The plaintiff alleges a breach of the 'memorandum of understanding' **after six (06) years**. (See annexure AA-15 and AA-16).

(5) The 'memorandum of understanding' (annexure marked AA-3) has not been executed. **For any agreement to have binding effect both parties must sign it.**

There is a further requirement.

(6) **The 'memorandum of understanding' has not been stamped. It has to be stamped to have a binding effect.** The relevant legislation to consider is the 'Stamp Duties Act 1920', and the relevant section thereof is section 41 which reads;

> *"Except as aforesaid, no instrument executed in Fiji or relating (wheresoever executed) to any property situate or to any matter or thing done or to be done in any part of Fiji shall, except in criminal proceedings, be pleaded or given in evidence or admitted to be good, useful or available in law or equity,* ***unless it is duly stamped in accordance with the law in force at the time when it was first executed."***
>
> (Emphasis added)

(7) So, without travelling further into the detail of foundation of the action, I should confine myself to saying that the affidavit by the plaintiff does show an arguable question of law worthy of trial. Can it be said that the 'memorandum of understanding' which is relied on by the plaintiff is a

binding legal instrument to found an action? What weight should attach to the 'memorandum of understanding?

THE SUBJECT MATTER OF MEMORANDUM OF UNDERSTANDING

(8) In paragraph one (1) and two (2) of the statement of claim the plaintiff pleads;

> 1. *The Plaintiff is a developer and the registered proprietor of the I-Taukei Lease Number 32908 known as "Naikabula" (part of) Lot 1 & 2 on SO 6564 comprising an area of 1.4199 hectares part of which was formerly Lot 2 on plan SO 4655 comprising an area of approximately 4000m² covered by ITLTB Reference Number 4/10/7357 situated in Wailoaloa, Nadi.*
>
> 2. *On or about 6th May, 2011 the Plaintiff and the Defendant contemplated entering into a Memorandum of understanding for the Defendant to purchase Lot 2 on Plan SO 4655 (the Land) for $90,000.00 plus VAT at 15% on conditions that the Defendant would pay a deposit and part payment of $40,000.00 on execution, with the balance payable in instalments, the transfer to be given on completion of subdivision to occur within 6 months and the parties to enter into a formal Sale and Purchase Agreement on approval of the subdivision scheme plan.*

(9) In paragraph five (05) of his affidavit, Abbas Ali states;

> 5. *On or about 6th May 2011 I had been engaged negotiations with Mr John Sofianopoulos who is a director of the Defendant Company. The discussion led to a draft of a Memorandum of Agreement (MOU) being prepared. This was not executed by the parties. However, the Defendant did pay the total sum of $35,000.00 on various occasions until 25th May 2011. I now produce copies of the draft Memorandum of Understanding and the receipts for the payments marked "AA-3", "AA-4", "AA-5", "AA-6" and "AA-7" evidencing the payments.*

In paragraph six (06) of the affidavit Abbas Ali states;

> 6. *The Defendant failed to pay the full deposit amount of $40,000.00 The subdivision was not undertaken or completed within 6 months. The parties did not enter into a Sale and Purchase Agreement as envisaged. The land in question is marked as Lot 2 in yellow on the plan now produced by me marked "AA-8".*

(10) In the 'memorandum of understanding' (annexure AA-3) the land that is in question in the instant case, ie, the subject matter of memorandum of understanding, had been described as 'Naikabula', Lot-2 on SO-4655 TLTB Ref 4/10/7357 having an area size of not less than 4000m².

The defendant stoutly denies there was any such 'memorandum of understanding'. The defendant says there was an oral agreement to sell the land. According to the defendant, the agreement made was a parole agreement for the sale of plaintiff's leasehold interest in native land. **Mr. John Sofianopoulos**, the managing director of the defendant company states in his affidavit;

> 5.1 *That I was approached by Abbas Ali the Plaintiff's Managing Director sometimes in the first week of May, 2011 and asked whether my company was interested in a piece of undeveloped native land next to Fantasia Resort and offered it to me for $90,000.00 (Ninety Thousand Dollars).*
>
> 5.2 *At the time Abbas made the offer he also showed me a one page copy of an AGREEMENT FOR LEASE for the same piece of undeveloped native land he was selling which I recognised in its locality diagram as next to my crown lease.*
>
> 5.3 *I recognised and identified a copy of the same one page Agreement for Lease that was shown to me by Abbas Ali as annexure "AA-11" in the Affidavit.*
>
> 5.4 *The undeveloped native land under Agreement for Lease has a land area totalling 1.5866 hectares and borders my crown lease on the Nadi Bay direction.*

The defendant says that the land contracted to sell is lot-01 on SO-6564 and not lot-02 on SO-4655. (See paragraph 1.7 of the written submissions filed by the defendant on 10th December 2018)

(11) In the present case the court is "***totally in the dark***" about what precisely is the land contracted to sell. Such a conflict cannot be disposed of on affidavit evidence only. It leaves a serious question to be tried.

THE PLAINTIFF'S TITLE TO THE LAND

(12) The arrangement contained in the 'memorandum of understanding' is dated **06th May, 2011**, by which the plaintiff agreed to sell to the defendant the plaintiff's leasehold interest in native land referred to as **LD/4/10/7357**. I reiterate that in the 'memorandum of understanding' (annexure AA-3) the land that is in question in the instant case had been described as 'Naikabula', Lot-2, on SO-4655, TLTB Ref: **04/10/7357**, having an area size of not less than 4000m². The "memorandum of understanding" reads;

BETWEEN : **JUXTA BEACH FIJI LIMITED**
"The Vendor"

A N D : **EXTREME SPORT FISHING (FIJI) LIMITED**
"The Purchaser"

MEMORANDUM OF UNDERSTANDING made this 6th day of May, 2011.

BETWEEN : **JUXTA BEACH FIJI LIMITED** a limited liability Company having its registered office at Nadi, Fiji (hereinafter called "the Vendor") of the first part.

A N D : **EXTREME SPORT FISHING (FIJI) LIMITED** hereinafter referred to as the "the Purchaser" of the other part.

WHEREAS IT IS AGREED AS FOLLOWS:

1. ***THE*** *Vendor will sell to the Purchaser who will purchase all that Native Lease and all the right to the title and interest of the Vendor in the said Lease over that piece of land described as native Land known as LD 4/10/7357 Naikabula showed in the subdivision plan No. SO 4655 as* ***Lot 2*** *having an area size of not less than 4000m2 at or for the price (****NINETY THOUSAND DOLLARS $90,000.00) PLUS 15% Value Added Tax*** *which shall be paid to the Vendor by the Purchaser in the following manner:-*

*(a) The sum of (****FOURTY THOUSAIND DOLLARS $40,000.00)*** *to be paid by way of deposit and part payment upon execution of this document to be held by the Vendor pending completion of the transaction mentioned herein.*

*(b) The balance sum of (**FIFTY THOUSAND DOLLARS $50,000.00**) shall be paid as mutually agreed until the whole amount is paid by instalments whereupon the Vendor shall provide a registered transfer of lease over the subject Lot free of all encumbrances upon completion of the said subdivision.*

2. SETTLEMENT

The Date of Settlement shall be upon completion of the subdivision within 6 months' time.

3. SALE AND PURCHASE AGREEMENT

The Vendor agrees to enter into a sale and purchase agreement with all covenants and conditions pertinent to this memorandum of understanding after the receipt of a approved subdivision scheme plan.

Where a document or preliminary agreement is expressed to be subject to contract, it means and applies that the parties do not intend to be bound until another document embodying all the terms of the agreement between them is signed by them and become binding on them.

From the terms of the 'memorandum of understanding', is it a settled deal? Whether a contract is formed?

In determining whether objectively the parties intended to enter into a contract I take the relevant principles from a ruling of Judge Faire in '**Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd' (2002) 2 NZLR 436.** I adopt the summation of the principles, which are as follows:

(a) Whether a contract is formed is a question to be determined objectively;

(b) It is permissible to look beyond the words of the agreement, to the background circumstances from which the agreement arose;

(c) Evidence of the negotiations and surrounding circumstances is admissible, as is evidence of subsequent conduct;

(d) The Court takes a neutral approach on the question of whether the parties intended to enter into a contract. There is no presumption one way or the other;

(e) An agreement which omits an essential term, or a means of determining such a term, is not necessarily prima facie supportive of the conclusion that there is no contract. The issue is, is the Court satisfied that the parties intended to be bound? If so, the Court will strive to fill the gap;

(f) If the Court takes the view that the parties did not intend to be bound unless they, themselves, filled the gap, the agreement will not be binding;

(g) If an essential matter is not agreed and is not to be determined by recourse to some mechanism or to a formula or to an agreed standard that may mean that the Court simply cannot fill the gap;

(h) The deferral of an important term to be settled in the future does not mean, necessarily, that there is no intention to be bound;

(i) Only if the lack of clarity or ambiguity in the express terms is such that the Court cannot determine what the parties meant by the particular term, will the Court conclude that the contract is void for uncertainty.

The 'memorandum of understanding' provides that;

> ***1.*** *THE Vendor will sell to the Purchaser who will purchase all that Native Lease and all the right to the title and interest of the Vendor in the said Lease over that piece of land described as native Land known as LD 4/10/7357 Naikabula showed in the subdivision plan No. SO 4655 as* ***Lot 2*** *having an area size of not less than 4000m2 at or for the price (NINETY THOUSAND DOLLARS $90,000.00) PLUS 15% Value Added Tax which shall be paid to the Vendor by the Purchaser in the following manner:-*
>
> *(a) The sum of (FOURTY THOUSAIND DOLLARS $40,000.00) to be paid by way of deposit and part payment upon execution of this document to be held by the Vendor pending completion of the transaction mentioned herein.*
>
> *(b) The balance sum of (FIFTY THOUSAND DOLLARS $50,000.00) shall be paid as mutually agreed until the whole*

amount is paid by instalments whereupon the Vendor shall provide a registered transfer of lease over the subject Lot free of all encumbrances upon completion of the said subdivision.

2. ***SETTLEMENT***

The Date of Settlement shall be upon completion of the subdivision within 6 months' time.

3. ***SALE AND PURCHASE AGREEMENT***

The Vendor agrees to enter into a sale and purchase agreement with all covenants and conditions pertinent to this memorandum of understanding after the receipt of a approved subdivision scheme plan.

Thus, major terms have been settled constituting a contract. I can find agreement on the price. The price is agreed. Seeing that there is an agreement on so fundamental a matter as the price, memorandum is a contract for sale. I do not see a deferral of an important term to be settled in the future. A concluded bargain had been reached.

The memorandum contains an express clause saying that;

> ***THE** Vendor will sell to the Purchaser who will purchase all that Native Lease and all the right to the title and interest of the Vendor in the said Lease over that piece of land described as native Land known as LD 4/10/7357 Naikabula showed in the subdivision plan No. SO 4655 as **Lot 2** having an area size of not less than 4000m2 at or for the price (**NINETY THOUSAND DOLLARS $90,000.00) PLUS 15% Value Added Tax** which shall be paid to the Vendor by the Purchaser in the following manner:-*
>
> *(a) The sum of (**FOURTY THOUSAIND DOLLARS $40,000.00)** to be paid by way of deposit and part payment upon execution of this document to be held by the Vendor pending completion of the transaction mentioned herein.*
>
> *(b) The balance sum of (**FIFTY THOUSAND DOLLARS $50,000.00)** shall be paid as mutually agreed until the whole amount is paid by instalments whereupon the Vendor shall*

provide a registered transfer of lease over the subject Lot free of all encumbrances upon completion of the said subdivision.

Normally, a vendor would want payment the moment there is an enforceable deal. Subsequent to the memorandum, the defendant has paid a deposit of $10,000.00 and $25,000.00 as part payment of purchase price. The defendant expended money and effort on the property and that necessarily mean that a concluded bargain had been reached.

Looking at the memorandum objectively, there was a settled deal. The parties had concluded an agreement for sale and purchase of a leasehold interest in native land and I find agreement on (i) the amount of purchase price that is to be paid (2) the amount of deposit that is to be paid (3) part payment (4) the date of settlement . There is no fundamental matter left undecided and to be the subject of negotiation. No terms were stated as not agreed. Nothing major was left to be agreed in the future.

Significantly, the memorandum **does not expressly state** that all covenants and conditions pertinent to the 'memorandum of understanding' are subject to a formal contract. There was no intention that the covenants and conditions pertinent to the 'memorandum of understanding 'should be subject to a formal contract. So I would hold that **a concluded contract for sale and purchase of leasehold interest in native land had come into existence under 'memorandum of understanding'.**

(13) According to the annexure AA-2 in the affidavit of Abbas Ali, the native lease **04/10/7357** was registered in the plaintiff's name on **05th September, 2016**.

(14) Therefore, the plaintiff has no registered title to rely upon as prima facie evidence of its interest in the native land Ref; 04/10/7357 **before 05th September 2016**.

(15) Then how did the plaintiff contract for the sale to the defendant of the leasehold interest in the native land Ref; 04/10/7357 by way of a memorandum of understanding in May 2011? The plaintiff did not have title to the land in May 2011. It is indicative of the plaintiff's claim generally.

This casts doubt upon the plaintiff's truthfulness and reliability. The plaintiff is lacking in credibility to the extent that I would not accept its affidavit evidence on any material aspect unless it is supported by some persuasive

evidence from an independent source. This seems an instance that there ought for some other reason to be a trial.

MEMORANDUM OF UNDERSTANDING OR PAROLE CONTRACT ?

(16) The plaintiff says that the native land that is in question in the instant case had been the subject of 'memorandum of understanding' for sale and purchase of the leasehold interest in the native land at $90,000.00. A sum of $35,000.00 was paid by the defendant as the deposit. The plaintiff's claim is that the defendant failed to pay the full deposit amount of $40,000.00. The plaintiff alleges that the defendant failed to pay the requisite deposit and part payment and thereby breached the memorandum. The plaintiff resisted the defendant's claim for specific performance.

(17) **Abbas Ali** in paragraph (5) of the affidavit in support of the application for summary judgment asserted that:

> 5. *On or about 6th May, 2011 I had been engaged negotiations with Mr John Sofianopoulos who is a director of the Defendant Company. The discussion led to a draft of a Memorandum of Agreement (MOU) being prepared. This was not executed by the parties. However, the Defendant did pay the total sum of $35,000.00 on various occasions until 25th May 2011. I now produce copies of the draft Memorandum of Understanding and the receipts for the payments marked "AA-3", "AA-4", "AA-5", "AA-6" and "AA-7" evidencing the payments.*

In paragraph (6) of the affidavit he asserted that;

> 6. *The Defendant failed to pay the full deposit amount of $40,000.00 The subdivision was not undertaken or completed within 6 months. The parties did not enter into a Sale and Purchase Agreement as envisaged. The land in question is marked as Lot 2 in yellow on the plan now produced by me marked "AA-8".*
>
> (Emphasis added)

(18) On the other hand, the defendant in its affidavit in opposition denied that any such memorandum of understanding to sell the land had been reached at all and denied the plaintiff's claim in *toto*. The defendant says that no memorandum of understanding subsisted between the plaintiff and itself. The defendant says that the agreement was parole by which the plaintiff agreed to sell to it, the defendant, the plaintiff's leasehold interest in native land for the sum of $90,000.00.

The defendant had paid a deposit of $10,000.00 and $25,000.00 in part payment of the purchase price. The parole contract was partly performed by the plaintiff permitting the defendant to enter on the native land for ; (i) construction of a 15,000 litres sewer tank; (ii) construction of borehole and power generated pumping system; (iii) construction of water and sewer line system; (iv) laying of power cables. This work represented the money and time defendant had expended on the native land. The defendant has spent; it is alleged, approximated, $2,000,000.00 for a building project on the land. The defendant alleged that the plaintiff had failed to complete the sale and the plaintiff was aware of the necessity for the iTLTB's approval and was in breach of an implied undertaking to obtain the consent of the iTLTB and ask for 'specific performance'. **Mr John Sofianopoulos** in his affidavit in opposition asserted;

5.1 *That I was approached by Abbas Ali the Plaintiff's Managing Director sometimes in the first week of May, 2011 and asked whether my company was interested in a piece of undeveloped native land next to Fantasia Resort and offered it to me for $90,000.00 (Ninety Thousand Dollars).*

5.2 *At the time Abbas made the offer he also showed me a one page copy of an AGREEMENT FOR LEASE for the same piece of undeveloped native land he was selling which I recognised in its locality diagram as next to my crown lease.*

5.3 *I recognised and identified a copy of the same one page Agreement for Lease that was shown to me by Abbas Ali as annexure "AA-11" in the Affidavit.*

5.4 *The undeveloped native land under Agreement for Lease has a land area totalling 1.5866 hectares and borders my crown lease on the Nadi Bay direction.*

5.5 *I asked Abbas Ali what the Agreement for Lease was for and he said that it was for tourism and I advised him that a tourism lease will not serve my purpose unless the lease is a commercial lease.*

5.6 *Abbas Ali assured me that the process of transferring the Agreement for Lease to a commercial lease was already under way and if I want to buy the undeveloped land he undertook to have the transfer finalised in six (6) months.*

5.7 *Premised upon Abbas Ali's verbal promise and undertaking to transfer the tourism lease to a commercial lease, I accepted the offer to purchase the undeveloped land for $90,000.00 plus VAT.*

5.8 *The agreement to purchase the undeveloped land was made verbal and include the following conditions:*

h) the purchase price for the land as $90,000.00 plus vat;

i) a ten percent (10%) deposit of $10,000.00 (Ten Thousand Dollars) to be paid on by 6th May, 2011.

j) the date of settlement to be in six months from 6th May, 2011.

k) The Plaintiff as vendor to formalize the agreement in writing by way of a sale and purchase agreement as soon as possible after 6th May 2011;

l) The Plaintiff as vendor to finalise the process of obtaining a commercial lease under the Defendant's name on the settlement date;

m) The Plaintiff to deliver to the Defendant a registered commercial lease and the Defendant to pay the Plaintiff the full balance of the purchase price on the date of settlement; and

n) The Plaintiff to include all the above in the written sale and purchase agreement.

5.9 *In the morning of 6th May, 2011 I, on behalf of the Defendant paid Abbas Ali, on behalf of the Plaintiff, by cheque the sum of $10,000.00 (Ten Thousand Dollars) being the 10% deposit of the purchase price of $90,000.00 pursuant to the verbal contract made.*

5.10 *I demanded a receipt for the deposit sum paid and Abbas Ali gave the receipt referred to and marked as annexure "AA-4" in the affidavit.*

5.11 *To my understanding, the verbal contract made between me and Abbas Ali, for and on behalf of our respective companies was confirmed by the 10% deposit amounting to $10,000.00 paid on 6th May, 2011.*

5.12 *On receipt of the $10,000.00 deposit, Abbas Ali reassured me that he will work on the written sale and purchase agreement as soon as possible since I have paid the deposit as agreed.*

5.13 *In the afternoon of 6th May, 2011 Abbas Ali brought a written Memorandum of understanding (herein referred to as the "MOU) and referred to as annexure "AA-3" in the affidavit. Upon reading*

the MOU I became very disappointed with Abbas Ali and rejected the MOU outright. ***I rejected the MOU because:***

(f) A verbal agreement on the sale of the undeveloped native land and its transfer was made between the Plaintiff and Defendant as evidenced by the deposit paid earlier that morning.

(g) An MOU was never the subject of discussion and agreement between the parties from the time Abbas Ali first approached me and made the offer to sell the undeveloped land for $90,000.00 till the deposit of the purchase price amounting to $10,000.00 was paid.

(h) The MOU requires a $40,000.00 deposit was contrary to the deposit earlier agreed and paid by me that morning.

(i) I suspected that the status of the MOU was fraudulent because of the reference to subdivisions as this would subject the Defendant to long delays in its investment plans and Abbas made no reference to the subject whatsoever.

(j) That on the above grounds I refused to sign the MOU.

5.14 *That I asked Abbas Ali as to why he made an MOU and not a written sale and purchase agreement as verbally agreed? I also queried as to why a deposit of $40,000.00 was in the MOU as opposed to the agreed and paid up deposit of $10,000.00?*

5.15 *Abbas Ali said that he was in financial difficulties to pay his staffs' wages and made the MOU to reflect a higher deposit of $40,000.00 to offset the wages.*

5.16 *That I very disappointed with Abbas Ali as he was untruthful and started playing little dirty tricks on me. I therefore demanded the full refund of the $10,000.00 deposit paid that day forthwith.*

5.17 *That Abbas Ali then begged me not to withdraw the deposit paid and promised that the verbal agreement made would still remain. He then negotiated the possibility of further payments on the purchase price to assist his pressing financial difficulties.*

5.18 *After discussions with my wife I agreed not to withdraw the deposit made and to make further payments to the Plaintiff to alleviate his financial difficulties at the time. For the further payments to be*

made, it was agreed between me and Abbas Ali that these would to be deducted from the purchase price of $90,000.00

5.19 *The further payments made to the Plaintiff are those reflected in receipts marked as annexures "AA-5", "AA-6" and "AA-7" respectively in the Affidavit and amounted to $25,000.00 (Twenty Five Thousand Dollars). This amount, in addition to the deposit paid, totalled $35,000.00 (Thirty Five Thousand Dollars).*

5.20 *The amount of $35,000.00 paid by the Defendant to the Plaintiff was paid in the month of May, 2011 to meet the pressing financial difficulties encountered by the Plaintiff as requested.*

5.21 *The amount of $35,000.00 paid by the Defendant in May 2011 was never intended or in contemplation whatsoever by me or the Defendant to be part of the deposit reflected in the MOU as contended by the Plaintiff.*

(Emphasis added)

It comes, therefore to this. There is a dispute whether 'memorandum of understanding' has or has not been made. There is a dispute whether a parole contract has or has not been entered into. More significantly, the alleged oral terms are in flat contradiction to the terms of the memorandum of understanding.

There is a conflict of evidence. Such a conflict ought not to be disposed of on affidavit evidence only. It is not appropriate for a judge to attempt to resolve conflict of evidence on affidavit. I am satisfied that the statements contained in the affidavits that I relied upon as raising a conflict of evidence (See para 16 and 17 above) upon a very material fact have sufficient prima facie plausibility to merit further investigation as to their truth. I need to hear further evidence beyond the affidavits. The judicial experience shows that in adjudicating upon the rival claims brought before the court it is not always easy to decide where the truth lies. The first thing that the plaintiff has to do is go into the witness box and prove what the memorandum of understanding was in respect of which it was suing. It is open to the defendant to cross-examine the plaintiff to show that the real bargain between the parties was different from that contained in the memorandum which plaintiff produced. Thereafter, the defendant should go into the witness box and prove the accuracy of what was being put to the plaintiff in cross-examination. The defendant should go into the witness box and try to persuade the court that, in fact, the oral agreement

between the parties was different from that recorded in the memorandum of understanding.

FRAUD

(19) Mr. John Sofianopoulos in paragraph 5.30 in his affidavit asserted that;

> *5.30 That the trail of documents and transactions referred to at sub-paragraph 5.30 hereinabove, when pieced together, clearly showed that Abbas Ali and the Plaintiff had committed fraud against me and the Defendant as follows:*
>
> *(a) Offering for sale an undeveloped native land with a one page copy of an Agreement for Lease as per annexure "AA-11" of the Affidavit with the full knowledge that the Agreement for Lease as of the first week of May, 2011 was under the Trustees for Mataqali Vunatawa of Saunaka village, Nadi.*
>
> *(b) By deceptively presenting the Plaintiff as the proprietor of Agreement for Lease as per annexure "AA-11" of the Affidavit.*
>
> *(c) When making the offer for sale of land the subject of Agreement for Lease marked as annexure "AA-11" of the Affidavit, Abbas Ali and the Plaintiff deceptively made a material non-disclosure to me and the Defendant of the conveyancing documents and transaction referred to at sub-paragraph 5.30 (i), (ii) and (iii) respectively hereinabove.*
>
> *(d) Accepting $35,000.00 (Thirty Five Thousand Dollars) in May, 2011 as part payments of the purchase price without disclosing the true status of the land on the Agreement for Lease.*
>
> *(e) Approval and acquiescence to the development works carried out by the Defendant without disclosing the true status of the land under Agreement for Lease.*
>
> *(f) Failure to inform and/or advise me or the Defendant that the tourism lease was non-transferable directly to a commercial lease.*
>
> *(g) Creating deceit and lies on many occasions to the Defendant and me as to the real status of the formal sale and purchase agreement and transfer of tourism lease to a commercial lease.*

(h) Failing to advise me and the Defendant of the process and transaction carried out as per sub-paragraph 5.29 (iv), (v) and (ix) hereinabove with regard to status of the land in question.

(i) Retention of a MOU in the pretext of showing that its contents reflects the contemplation of the parties on 6th May, 2011 when the MOU was not executed by the Defendant and rejected by me for reasons referred to at sub-paragraph 5.13 hereinabove.

(20) In the present case, I think there is a prima facie case of fraud shown on the defendant's affidavit. The mere statement in the plaintiff's affidavit that ***"I deny the contents of paragraph 5.30"*** is not sufficient to decide that issue in their favour.

In my opinion when a defendant presents a prima facie case of fraud in the plaintiff, the court ought to act on that and give him leave to defend. The court ought to have the opportunity of seeing what is the truth of the matter and it is proper for the court to try the issue between the parties.

SECTION 59 OF THE INDEMNITY GURANTEE AND BAILMENT ACT

(21) As I said in the preceding paragraphs, the defendant says that the agreement made was a **parole agreement** for the sale to the defendant a plot of land. The defendant says that it was orally agreed between the defendant and the plaintiff that the plaintiff would sell and the defendant would buy the plaintiff's leasehold interest in iTaukei lease No. 32908. Moreover, the defendant says that the real bargain between the parties was different from that contained in the 'memorandum of understanding'. Mr John Sofianopoulos, in paragraph 5.8 of his affidavit in opposition states;

5.8 The agreement to purchase the undeveloped land was made verbal and include the following conditions:

o) the purchase price for the land as $90,000.00 plus vat;

p) a ten percent (10%) deposit of $10,000.00 (Ten Thousand Dollars) to be paid on by 6th May, 2011.

q) the date of settlement to be in six months from 6th May, 2011.

r) The Plaintiff as vendor to formalize the agreement in writing by way of a sale and purchase agreement as soon as possible after 6th May 2011;

s) *The Plaintiff as vendor to finalise the process of obtaining a commercial lease under the Defendant's name on the settlement date;*

t) *The Plaintiff to deliver to the Defendant a registered commercial lease and the Defendant to pay the Plaintiff the full balance of the purchase price on the date of settlement; and*

u) *The Plaintiff to include all the above in the written sale and purchase agreement.*

(22) On the other hand, the plaintiff argues that if there was an oral agreement to give away the native land it would be unenforceable anyway since it fails to comply with section 59 of the **Indemnity, Guarantee and Bailment Act, Cap 232.**

(23) Counsel for the plaintiff elaborated on this point on page (6) and (7) of the written submissions filed on 08th November, 2018 as follows:-

5.8 *The Defendant is then left with his oral contract that he alleges between the parties. If this is the basis of the dealing then the Defendant faces another obstacle under Section 59 of the Indemnity Guarantee and Bailment Act. This provision requires that any agreement for the sale or other disposition of land stated in the section is unenforceable against the party to be charged unless there is a note or memorandum in writing. The oral agreement alleged by the Defendant would be unenforceable in law.*

5.9 *The Defendant would then have to rely on some note or memorandum signed by the Plaintiff or acts of part performance. Arguably the receipts from the Plaintiff would partially satisfy this requirement. However, the receipts do not help as it makes no reference to the parties or the description of the land. Alternatively or additionally the Defendant may have to rely on acts of part performance which continues to apply despite the legislative provision. We would submit that in view of the inconsistencies in the Defendant's own contention that the dealing had to be completed and other steps taken before settlement that the acts of part performance it would hope to rely on would not be referrable to the contract it alleges.*

5.10 *The acts of part performance the Defendant of necessity would have to rely on would be the payment of part of the purchase price, the developments it carried out and its continued occupation by use of the land and exercising proprietary rights over it to the exclusion of the Plaintiff.*

(24) It is, first, necessary to observe what the statute says. Section 59 of the **Indemnity, Guarantee and Bailment Act, Cap 232** is in these terms so far as relevant;

Section 59 relevantly provides:

"59. No action shall be brought .....

(d) upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; or

.....

unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged there or some other person thereunto by him lawfully authorised."

(25) All that the plaintiff has done is to plead the statute generally as an answer to the parole agreement which the defendant pleads. The defendant says that the agreement made was a parole agreement for the sale. Is the defendant in a position to prove an enforceable bargain having regard to the terms of section 59 of the Indemnity, Guarantee and Bailment Act, Cap 232? The defendant must establish that there is a note or memorandum of the parole agreement within the terms of section 59.

(26) The defendant's affidavit in opposition contained the following evidence.

5.9 In the morning of 6th May, 2011, on behalf of the Defendant paid Abbas Ali, on behalf of the plaintiff, by cheque the sum of $10,000.00 (Ten Thousand Dollars) being the 10% deposit of the purchase price if $90,000.00 pursuant to the verbal contract made.

*5.10 I demanded a receipt for the deposit sum paid and Abbas Ali gave the receipt referred to and marked as annexure **"AA-4"** in the Affidavit.*

*5.19 The further payments made to the plaintiff are those reflected in receipts marked as annexures **"AA-5", "AA-6" and "AA-7"** respectively in the Affidavit and amounted to $25,000.00 (Twenty Five Thousand Dollars). This amount, in addition to the deposit paid, totalled **$35,000.00** (Thirty Five Thousand Dollars).*

(27) The question is whether some document, such as a receipt for the sale sufficiently satisfied the statute.

The annexure marked AA-4, AA-5, AA-6, AA-7 and produced in evidence bear the plaintiff's signature. The documents AA-4, AA-5 and AA-6 are in these terms respectively.

06-05-2011

JUXTA BEACH (FIJI) LIMITED 58
Extreme Sport Fishing (Fiji) Ltd
Ten Thousand Dollars Only
Selling of Lot 2 – Native Lease

$10,000.00 RR

...-05-2011

JUXTA BEACH (FIJI) LIMITED 59
Extreme Sport Fishing (Fiji) Ltd
Fifteen Thousand Dollars Only
Selling of Lot 2 – Native Lease

$15,000.00 RR

-05-2011

JUXTA BEACH (FIJI) LIMITED 60
Extreme Sport Fishing (Fiji) Ltd
Five Thousand Dollars Only
Selling of Lot 2 – Native Lease

$5,000.00 RR

The document AA-7 is in these terms.

Date : 26/05/2011 62

JUXTA BEACH (FIJI) LIMITED

Received from M Extreme Sport Fishing (Fiji) Ltd by Cash Cheque
the sum of Five Thousand Dollars Only dollars
and ..... cents
being for Selling of Lot 2 – Native Lease
.....
With Thanks

$5,000.00 Per : R Reddy

(28) Those documents are in the form of a receipt and they contain all the necessary ingredients of a receipt. Those documents show the sum paid, who paid it, who received it and identified the property in respect of which it is paid. Those are matters which are properly to be included in a receipt. Those documents are signed by one party only, ie, by the recipient of the money, the plaintiff. They presuppose on the face of it as antecedent agreement pursuant to which the sum acknowledged is paid. Annexure AA-4 is expressed to be a receipt for the sum of $10,000.00. The document goes on to state what was the transaction in respect of which $10,000.00 was received. The document states that the sum of $10,000.00 being for sale of Lot 2 - Native Lease. Therefore, I say that those documents (viz, AA-4, AA-5, AA-6 and AA-7) are something more than a receipt and as a matter of construction of these documents I say that they are intended by the parties to have a greater operation than that of a receipt.

(29) There is no doubt, to my mind, that the parties did intend that there should be a sale of the leasehold interest of the plaintiff in the land concerned to the defendant. The receipts in question make reference to show what was the transaction which the payment related without purporting to state all the terms of the parole contract. It is not necessary that every term of the parole agreement should be evidenced. These receipts in question may sometimes

constitute note or memorandum in writing of the parole contract to satisfy section 59 of the Indemnity Guarantee & Bailment Act. I say may sometimes, because I do not want to lay down any final conclusion as regards the question whether the receipts in question does satisfy the requirements of the Indemnity Guarantee & Bailment Act. The receipts in question are open to the construction and the court needs to consider what weight should be attached to them. The fact that those documents, ie, AA-4, AA-5, AA-6 and AA-7, bear one signature does afford some ground for saying that it is only intended as a receipt. That it is a receipt does not mean that it might not be also be a memorandum or note of a parole contract. The fact that the land in question is identified by means of a description in the receipt, perhaps, suggests that the document is something more than a receipt. Wherever a document is of an informal character, it cannot be intended by the parties to embody all the terms of the agreement recorded by them. This point the defendant is entitled to have tried in open Court and I am not authorised to allow judgment to be signed against the defendant on an affidavit. So without travelling further into the details, I should confine myself to saying that the determination of the question involves an examination of a great number of judicial decisions on the subject of the sufficiency or insufficiency of the memorandum or note.

ILLEGALITY UNDER SECTION 12

(30) A further contention put forward by counsel for the plaintiff is that *"No consent was obtained from TLTB prior to the purported sale and purchase of TL 32908."* (See paragraph 6.1 of the plaintiff's written submission filed on 08th November 2018)

"The purported agreement between the parties is illegal, null and void under section 12 of the TLT Act as no consent prior to such 'dealing 'was obtained prior to performance". (See paragraph 7.16 of the plaintiff's written submissions)

The argument for the plaintiff is based on the following decisions;

- **Jai Kissun Singh v Simintra**
  (1970) 16 FLR 165.

- **Chalmers v Parode**
  (1963) 3 ALL.ER 552

- **Phalad v Sukh Raj**
  Civil Appeal No:- 43 of 1978

❖ **D.B. Waite (Overseas) Ltd v Sydney Leslie Wallath**
(1972) 18 FLR 141 P.

(31) The instant case is a claim for possession of iTaukei Lease No:- 32908. On 24th August, 2017, the solicitors for the plaintiff wrote to the solicitors for the defendant in this term;

24th August, 2017 *BY EMAIL, FASCIMILE & POST*

Our ref: J160/17/AKN (301-173) (Please reply to Ba Office)

Aman Ravindra Singh Lawyers
Barristers & Solicitors
P O Box 732
LAUTOKA

PROPOSED PURCHASE OF LOT 2 SO 4655
LD/4/7357 NAIKABULA
MEMORANDUM OF UNDERSTANDING
EXTREME SPORTS FISHING (FIJI) LIMITED
JUXTA BEACH FIJI LIMITED

1. *We are acting for Juxta Beach Fiji Limited and acknowledge receipt of your letter dated 2nd August 2017.*

2. *The memorandum of Understanding was merely an agreement to agree in the future. It contemplated a Sale and Purchase Agreement to be entered between the parties. Your client failed to pay the requisite deposit and part payment. There was a breach by your client. No Sale and Purchase Agreement was executed by the parties. The Memorandum of Understanding has in any event been discharged.*

3. *Your client has carried out developments on part of our client's lands including the construction of a concrete driveway and has been utilizing the land despite protests by our client. Your client's actions are unlawful and no doubt was carried out on an erroneous assumption that the Memorandum of Agreement gave an entitlement to take possession.*

4. *The unilateral assumption of rights of ownership under the discharged the Memorandum of Understanding by your client is unlawful and in breach of section 12 of the iTaukei Lands Trust Act.*

5. *Our client had returned the part payment as it anticipated your client may seek a refund. In view of the rejection our client will resist any future claim in respect of this.*

6. *Your client is now required to forthwith remove the improvements carried out on the land which includes the concrete driveway.*

7. *In the event of non-compliance within 7 days of the date hereof our client will proceed to remove all offending improvements on the subject land and will seek to recover the costs from your client. For the avoidance of any doubt your client is put on notice not to enter our client's land save to remove the improvements within the stipulated time. Thereafter, any entry on the subject land will be a trespass and those responsible will be dealt with accordingly.*

8. *In the above regard your client is put on further notice that after the expiry of 7 days of the date hereof your client/its officers, servants, agents, workmen, contractors, tenants or guests will not be permitted to enter the subject land and the access to the driveway will be prohibited.*

Yours faithfully
AK LAWYERS

Per: (Signed)
AKN/sn

cc: The Managing Director
Juxta Beach Fiji Ltd
NADI

(32) The crucial paragraphs in the correspondence are paragraph (2), (3) and (4);

2. *The memorandum of Understanding was merely an agreement to agree in the future. It contemplated a Sale and Purchase Agreement to be entered between the parties. Your client failed to pay the requisite deposit and part payment. There was a breach by your client. No Sale and Purchase Agreement was executed by the parties. The Memorandum of Understanding has in any event been discharged.*

3. *Your client has carried out developments on part of our client's lands including the construction of a concrete driveway and has been utilizing the land despite protests by our client.* ***Your client's***

actions are unlawful and no doubt was carried out on an erroneous assumption that the Memorandum of Agreement gave an entitlement to take possession.

4. ***The unilateral assumption of rights of ownership under the discharged the Memorandum of Understanding by your client is unlawful and in breach of section 12 of the iTaukei Lands Trust Act.***

(Emphasis added)

(33) In his affidavit in support "Abbas Ali" states;

10. *The both solicitors then entered into correspondences with each other.* ***The Defendant who had entered the subject land in or around August 2017 has remained in occupation of the land to date and has been utilising it for its own benefit.*** *I now produce copies of the correspondences exchanged marked "AA-15" and "AA-16".*

11. *The Defendant erected a concrete drive through the subject land leading to its property and had other structures such as a sewer pump. I now produce copies of a photograph marked "AA-17" showing the concrete drive/road way and "AA-18" showing a sewer pump structure.*

(Emphasis added)

(34) So the position of the plaintiff is this: (I quote from the correspondence and the affidavit)

"The Defendant who had entered the subject land in or around August 2017 has remained in occupation of the land to date and has been utilising it for its own benefit. Your client's actions are unlawful and no doubt was carried out on an erroneous assumption that the Memorandum of Agreement gave an entitlement to take possession. The unilateral assumption of rights of ownership under the discharged the Memorandum of Understanding by your client is unlawful and in breach of section 12 of the iTaukei Lands Trust Act".

The arrangement contained in the memorandum is dated 06th May 2011 (See annexure AA.3). **The memorandum did not contain a provision enabling the defendant to take possession.**

If I put out of my mind for a moment the question whether plaintiff had a sufficient legal interest in the native land in 2011 to enter into a contract for sale, **I cannot think that the defendant took possession of the subject property in August 2017** (paragraph 10 of Abbas Ali's affidavit in support) **pursuant to the 'memorandum of understanding' which came into existence on 06th May 2011.**

Can anyone suppose for a moment that the defendant entered on the land in August 2017 by virtue of the 'memorandum of understanding' which came into existence on **06th May, 2011**? I cannot conceive it for a moment. I spent considerable time trying to understand what led the defendant to move on to the possession of the land **in August 2017**. I have found nothing in the material before me. Certainly, the May 2011 memorandum of understanding cannot give away possession in August 2017. Then how could it constitute an alienation or dealing with the native land? **The whole case is fraught with mystery.** I need to hear further evidence beyond affidavits.

(E) ORDERS

(i) The plaintiff's application for summary judgment and trial of a preliminary point is dismissed.

(ii) The defendant is granted unconditional leave to defend the plaintiff's claim and pursue the counter - claim.

(iii) The plaintiff to pay costs of $1500.00 (summarily assessed) to the defendant within 14 days from the date of this ruling.

HIGH COURT OF FIJI LAUTOKA

.....29/03/2019.....

Jude Nanayakkara
Judge

At Lautoka,
Friday, 29th March 2019