IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No. HBC 225/2007

BETWEEN : **FOLLIES INTERNATIONAL LIMITED** a limited liability company having its registered office at c/o BDO Accountants, 8th Floor, Dominion House, Thompson St. Suva

Plaintiff

AND : **HONEYMOON ISLAND (FIJI) LIMITED** a limited liability company having its registered office c/o Young & Associates, Solicitors, 2 Saku Lane, Lautoka

First Defendant

AND : **OCEANIC SCHOONER COMPANY (FIJI) LIMITED** a limited liability company having its registered office at Cromptons, Solicitors, Office 10, Queensland Insurance, Victoria Parade, Suva

Second Defendant

AND : **iTAUKEI LAND TRUST BOARD** a body corporate established under the iTaukei Lands Trust Act 1940

Interested Party

CIVIL ACTION No. HBC 257/2007

BETWEEN : **HONEYMOON ISLAND (FIJI) LIMITED** (see above)

Plaintiff

AND : **iTAUKEI LAND TRUST BOARD** (see above)

Defendant

APPEARANCES:

Mr J Apted for the plaintiff in HBC 225/07 (Follies International Ltd)
Mr CB Young for the first and second defendants in HBC 225/07 and the plaintiff in HBC 257/07 (Honeymoon Island (Fiji) Ltd)
Ms E Raitamata for the interested party in HBC 225/07 and the defendant in HBC 257/07 (iTaukei Land Trust Board).

DATE OF HEARING : 21 &22 June, 3-5 December 2018, and 20 February 2020.

DATE OF JUDGMENT: 30 April 2020

DECISION

1. At first glance, looking at the various dates set out on the previous page, one could be excused for thinking that these proceedings had taken a mere 13 years to be resolved. That would be a mistake. In fact the issues that I would like to think will be finally resolved by this decision have their origins in events that occurred in 1999. This is simply one/the latest in a series of disputes and litigation around the same issue (Mociu Island) that reflect no credit on any of those involved (and I include the Court system in that), and that have taken far too long to reach this point. The delays that have occurred throughout the history of this litigation have meant that the remedies available to the parties have been changed irrevocably – as this decision shows - by interim events that have occurred that probably would not have happened as they did, or may not have had the same consequences, if the proceedings had progressed more quickly.

2. In the flurry of activity that has occurred over the last two years, the evidence has been heard, in hearings that took place in June and December 2018, numerous and lengthy written submissions have been filed, and final oral submissions and discussion took place on 20 February 2020. I am now faced with making sense of that evidence, and those submissions. That is complicated by the fact that the evidence was heard by Justice Mackie before he retired from the High Court bench, while I have heard only the submissions. Showing a level of common-sense and pragmatism that was not always apparent earlier in the proceedings, the parties have agreed that rather than start the hearing all over again (impracticable because at least one of the key witnesses – Mr Gock of Honeymoon Island - has since died), I should make a decision on the basis of the written transcripts of evidence (which I have duly read), and the parties' subsequent submissions. I am both delighted with their confidence in me, and dismayed by what I have to do. The labours of Hercules seem easy by comparison, although these proceedings have taken even longer than the twelve years he took to complete his tasks.

3. Mociu Island is a small – 1.7101ha - uninhabited island to the North of Malolo in the Mamanuca Group. This dispute is about access to and use of the island as a tourist destination. Follies International Limited and Honeymoon Island (Fiji) Limited (together with its associate company Oceanic Schooner Company (Fiji) Ltd) were at the time the court proceedings commenced, (it is not clear whether and to what extent they are all still involved in the business) competing operators of tour businesses, offering tourists the opportunity to visit and stay at islands off the West coast of Viti Levu. For convenience I will refer to them throughout this judgment as 'Follies' and 'Honeymoon Island' respectively (with the latter expression also

referring – unless I make it clear otherwise -to the second defendant in HBC 225/2007, Oceanic Schooner Company (Fiji) Ltd).

4. Also a party to the proceedings, as 'interested party' in the proceedings commenced by Follies (HBC 225/2007) and as defendant in the claim by Honeymoon Island (HBC 257/2007), is the iTaukei Land Trust Board (*ILTB*) which has title to and administers Mociu Island in its capacity as trustee under the (now) iTaukei Lands Trust Act 1940 on behalf of the land-owners, Mataqali Ketenamasi of Yaro Village on nearby Malolo.

Background

5. It would have been useful to have, somewhere in the evidence or submissions, a coherent, chronological statement of the history of interest by tourism operators in Mociu Island, to put into perspective the current proceedings. Unfortunately I have not been able to find such a history. This can happen when all the parties involved (including their advisers) have been immersed in the same issues for so long, and over such a range of proceedings, that they forget that new-comers to the dispute do not have their knowledge, and can struggle – as I have done – to put it all into sequence and perspective. What follows is my attempt (extracted from the documentary and oral evidence) at relating the history of the dispute, as a starting point to identifying and deciding the matters at issue.

6. Use of Mociu Island for tourism goes back at least to 1984, when the 2nd Defendant Oceanic Schooner Company (Fiji) Ltd was incorporated to build and operate a motor/sailing vessel (*Whales Tale*) to provide one day tours in the Mamanuca Group for tourists. One of the islands in this five island tour was Mociu, which was attractive because it was uninhabited, had all-tide beach access without having to cross the reef, and was pristine, undeveloped and photogenic. Oceanic Schooner brought visitors to the island (which it referred to in its marketing material as 'Honeymoon Island') for 90 minutes on each cruise, before moving on.

7. Oceanic Schooner Company (Fiji) Ltd was owned and managed by Mr Willam Gock and his business partner Paul Myers as shareholders and directors of the company. The company was not the only operator that used Mociu for tourism activities. The operators of nearby Plantation Island, Malolo Island (Musket Cove), Castaway Island and Mana Island tourist resorts also regularly took guests there for the snorkling and swimming. It is not clear, during this period from 1984 to the mid-1990s, what arrangements (if any) these operators had with the landowners of the island, the Mataqali Ketenamasi of Yaro village.

8. In the mid-1990s Messrs Gock and Myers of Oceanic Schooner decided to try to secure exclusive use of Mociu. The company Honeymoon Island was incorporated in

December 1995. It approached the landowners and, they say, obtained their blessing to the proposal. They then lodged an application with ILTB to obtain a lease for the island.

9. What happened in response to this application is set out (along with other things) in briefing paper prepared by ILTB for the Minister for Fijian Affairs sometime between June and August 2007. This paper is annexed to the affidavit of Mr Mesake Mara, a manager of the Tourism Department of ILTB, dated 13 August 2007 in HBC 225/2007. Not only does the briefing paper set out something of the history of the dispute for the benefit of the Minister, it also reveals ILTB's attitude towards the whole matter, which is relevant to my findings and decision in this judgment. I therefore set out the paper in full (I should note that what is reported in this paper has not been independently proved, and the decision I have come to is in no way dependent on the truth or otherwise of what is said here):

MOCIU ISLAND BRIEF

OVERVIEW

The Board received two interests for Mociu Island in 1998 and early 1999.

1. *The first party to show interest on the island was Honeymoon Island Ltd (HIL) of which Mr William Gock of WG Island Services Ltd held 50% shares and Ratu Jeremaia Matai held the other half in the interests of the Tokatokas of Yaro Village.*

2. *Mociu Island Ltd (MIL) which claimed to be the 'landowners company' headed by one Ratu Ponipate Ratuagone later showed interest on this island. The application was lodged by Messrs Hari Ram in early 1999 to the then General Manager of the Board, Mr Marika Qarikau. The company directors for MIL were Ratu Ponipate Ratuagone, Steve Marshall and Raijieli Bativunicagi.*

3. *Meeting with the landowners was convened at Yaro village on 23 February 1999 to determine as to which entity was to be offered the lease. Majority members endorsed lease to be issued to MIL.*

4. *Lease offered vide letter dated 3rd March 1999 with total sum of $31,727.20 payable and payments received on 26th April 1999.*

5. *De-reservation for 99 years from 1st January, 1999 approved by then General Manager on 15th April 1999 for ratification by the Board.*

6. *This lease was a subject of a court case HBC 135/1999 between HIL (plaintiff), NLTB (1st defendant)j and MIL (2nd defendant) which HIL agreed to withdraw if lease is issued to them upon surrender by MIL.*

7. *Lease was purportedly surrendered by MIL after failing to carry out its obligations however no documentary evidence available in file.*

HONEYMOON ISLAND LIMITED

1. *Lease was then offered to HIL vide offer letter dated 6th May 2003. Company directors were Ratu Jeremaia Matai (Tui Lawa), Paul Myers and William Gock.*

2. *There was no payment of premium demanded in the offer except for Board costs, 1st years rent, Stamp Duty and registration fees totalling $17,193.00.*

3. *No evidence in file of full payment of offer except for $12,000.00 which was paid on 12 October 2005 which had been unallocated in the system. There is no copy of any Agreement for Lease (AFL) or Registered Lease in file. Repeated requests to HIL to produce copy of lease to the Board unheeded.*

4. *One of the directors, William Gock, produced a copy of the AFL early this year after being advised that the landowners have consented to issue of lease to an overseas investor.*

5. *A payment of $24,000.00 was received at our Nadi office in June 2007, three and a half years from the first payment.*

BOARD STANCE ON HIL LEASE

Based on the opinion of our legal counsel the Board has therefore processed the application by Follies International Ltd on the following grounds:

- *Document provided by HIL is invalid as the front page as for a Registered lease without a Registrar of Titles box and signing clause is that of an Agreement to Lease and does not have the Boards seal.*
- *Payment of offer/rent/fees had not been accepted by the Board for two (2) years following the offer until 2005 in which $12,000 was receipted by our Nadi office. It was ascertained that such monies were not allocated to any account basically because there was no existing tenancy with HIL.*
- *The landowners are adamant HIL should not be entertained in any manner by the Board for the underhand tactics employed in their attempts at securing a legitimate title to Mociu Island without their consent.*
- *Lease issued to FIL has the majority consent and blessing of the land owning unit.*

CURRENT STATUS OF MOCIU ISLAND

- *Lease has been offered to Follies International Ltd (FIL) vide letter dated 29th May 2007 with total fees and premium payable amounting to $110,359.75 (VAT incl.)*
- *Stamp duty of $6400.00 has been paid and together with $150,000 goodwill which has been received by the landowners. AFL has been stamped and copy released to FIL.*
- *No evidence that other stipulated fees and premium has been paid to date however we have proceeded with the de-reservation which is yet to be approved.*
- *Recommend that the premium when paid be frozen until we are clear of any litigation action from HIL.*

WILLAM GLOCK & PAUL MYERS – DIRECTORS OF HONEY (sic) ISLAND LIMITED

- *From the various encounters with the above gentlemen, the officials of the Board has found them lacking in honesty and integrity and their tendency to manipulate landowners for their personal gain makes them questionable patriots in promoting active participation of landowners in the tourism industry.*
- *Malamala Island is an example where they have manipulated the Bete of the Vanua Nadi, Timoci Vuki, to operate a day cruise excursion without any lease/title and the paltry rental enjoyed only by himself instead of the Yavusa e Tolu for the past ten years or so.*
- *Mataqali Naboeka applied for a lease over Malamala and the mentioned gentlemen initiated legal proceedings against the Board which was overturned in the Board's favour through the court.*
- *The mentioned gentlemen also operate Oceanic Schooner, Malamala Cruises, Whales Tale and WG Island Services and their operations more or less promote 'squatter tourism' whereby shantily constructed bures on uninhabited islands are an eyesore in their quest to make big money at the detriment of landowners and their pristine environment.*

- *On a moral note Paul and William are known to be live-in partners and the result of this 'immoral' relationship more or less is reflected on the shady state of the businesses that they operate and the Board should not condone any dealings on Native Land from such characters.***

(** The memo, and any other evidential material quoted in this judgment, are reproduced with any errors or omissions exactly as they appeared in the evidence/copies produced to the Court)

Perhaps understandably, no-one put their name to this briefing paper.

10. As the Briefing Paper confirms, litigation over the use of Mociu Island goes back at least to 1999, when an interim injunction was sought by Honeymoon Island (in which half the shares were said to be held on behalf of the landowners) to stop ILTB from issuing a lease for the island to Mociu Island Limited, a company in which the landowners were also said to be represented. The injunction application was refused by the Court (Madraiwiwi J) because of a breach by Honeymoon Island of sections 7 and 8 of the (then) Native Land Trust Act cap 134 which prohibit any alienation and granting of licences other than in accordance with the provisions of the Act. Justice Madraiwiwi was satisfied that Honeymoon Island, with the consent and co-operation of some of the landowners, had made informal and illegal licence arrangements to pay a landing fee of $2500.00 per annum to some of the landowners.

11. Reading between the lines, and noting that both Honeymoon Island and Mociu Island Limited apparently included members of the mataqali in their shareholding, it may be that the 1999 dispute in part at least, reflected disagreement within the landowners about which business to support. In a letter to Honeymoon Island dated 17 February 1999, advising that a decision had been made to issue a lease to Mociu Island Ltd, not to Honeymoon Island, ILTB stated:

> *Please be informed that after checking our file records, we also had an application by Mociu Island Limited which was lodged with our General Manager at our Head Office in Suva on 10 February 1999. Unfortunately the landowners have also given their blessing to Mociu Island Limited to lease the island.*
>
> *We shall still convene the meeting scheduled for next Tuesday (23/02) to verify the consents and to really determine which of the two (2) aspiring applicants shall be given the new lease. I suppose you must be surprised at this resolution but to us this is something the NEW NLTB wants to achieve by having potential clients competing for Native Land Investments.*

12. An agreement to lease between Mociu Island Limited and ILTB was signed dated 28 October 1999. It provided for the tenant to pay rental of $6,000 per annum (an increase from the $2500 that Honeymoon Island had apparently agreed to pay – see paragraph 10 above). The agreement was for a term of 99 years commencing from 1 January 1999, and included the following clauses:

> *B The lessee hereby also agrees with the lessors as a condition of this agreement that*

1. *This agreement shall cease to have effect if the lessee fails within six (6) months from the date hereof to engage the services of a surveyor registered under the Surveyors Act to carry out a survey of the land agreed to be leased and to prepare a survey produce to the lessor satisfactory evidence that the services of such a surveyor have been so engaged by him.*

2. *If within three (3) months of being required to do so by notice in writing served on him by the lessor he fails or refuses to execute the lease which he has hereby agreed to take then, this agreement shall cease to have effect and in the event that this agreement shall cease to have effect then the provisions of Regulation 12(4) of the Native Land Trust (Leases and Licences) Regulation 1984 shall apply.*

13. Although the High Court had declined in 1999 (see paragraph 10 above) to issue an interim injunction to stop ILTB issuing a lease in favour of Mociu Island Ltd, the court proceedings between Honeymoon Island Ltd and the ILTB continued through to 2003. At that point it appears that some sort of accommodation was reached, whereby Mociu Island Ltd would surrender its agreement to lease the island, and the ILTB would issue a new lease agreement to Honeymoon Island Ltd, which would in turn discontinue its court proceedings against ILTB. This arrangement was recorded in a letter dated 17 February 2003 from ILTB to Honeymoon Island.

14. In accordance with this agreement ILTB on 6 May 2003 sent a letter to Honeymoon Island stating:

RE: NATIVE LAND KNOWN AS MOCIU; DISTRICT OF MALOLO
APPLICATION FOR TOURISM LEASE

On behalf of the Board, I am pleased to offer you a lease over the above-mentioned land on the following terms and conditions: -

Lessee	:	*Honeymoon Island Limited*
Purpose	:	*Special Tourism (Purpose)*
Area	:	*3 acres*
Period	:	*95 years with effect from 1st January 2003*
Rent	:	*$12,000.00 per annum minimum rent for the first 3 years thence based on the following:*

(a) From the 4th to the 20th year shall be based on 7.40% of Gross Receipts or a minimum rental whichever is greater.
(b) From the 21st to the 30th year shall be based on 7.75% of Gross Receipts or a minimum rental whichever is greater.
(c) From the 31st to the 40th year shall be based on 8% of Gross Receipts or a minimum rental whichever is greater.
(d) From the 41st to the end of the lease shall be based on 8.25% of Gross Receipts or a minimum rental whichever is greater.

If you wish to accept this Offer please call at this Office to sign the documents at which time you must pay the following fees and rent;

DESCRIPTION	AMOUNT	VAT	TOTAL

Board costs	1,000.00	125.00	1,125.00
Rent (01/03-31/12/03)	12,000.00	225.00	12,225.00
Stamp Duty Fees	3,841.00	Nil	3,841.00
Registration Fees	2.50	0.31	2.81
TOTAL			$17,193.00

If you accept this offer please make full payment of the sum within six (6) weeks of the date of this letter which you should sign the lease documents.

If I do not receive payment within this period this offer will be deemed to have been withdrawn.

Should you wish to discuss the matter with a member of my staff the Estate Officer responsible for your area Mr Aisake Katonivere with direct telephone line No. 6734214 shall be willingly glad to see you by appointment and thoroughly explain it to you.

I look forward to your early payments and thank you for bearing with us.

Yours faithfully

.....
J. Dakuwaqa
MANAGER (SOUTH-WEST)

15. Honeymoon Island obviously wanted to take up this offer without delay. The required Notice of Discontinuance (referred to in the letter of 17 February) is dated 7 May 2003, and the surrender of the lease signed by Mociu Island Ltd and by ILTB is dated 9th May. Also dated 9th May 2003 is a document headed:

LEASE

For Class I: Special (Tourism –Daytrip & Accommodation) Purposes
Native Land Trust (Leases and Licences) Regulations 1984

The circumstances in which this document came into existence, and the form and contents of this document have been the focus of a great deal of attention in these proceedings. The evidence from Honeymoon Island (Mr Gock) is that this document was delivered to him on the day it was stamped (after stamp duty was paid by him to the Commissioner of Stamp Duties). The stamp duty stamp on the document shows that this happened on 26 May 2003. Mr Gock's recollection was that he received a telephone call from Mr Mataiasi Bolatagane who was an Estate Officer of the ILTB (at that time called the NLTB) based at Nadi, about the need to pay the stamp duty. Mr Gock says that he collected Mr Bolatagane from ILTB at Nadi and took him and the signed documents to the office of the Commissioner of Stamp Duties in Lautoka. There he (Mr Gock) paid the stamp duty of $3841.00, the signed document was stamped, and Mr Bolatagane handed him a copy of the stamped agreement. Mr Bolatagane recalls accompanying Mr Gock to Lautoka to pay stamp duty, but says it was for a different agreement at another time, and he did not accompany Mr Gock

in May 2003 for stamping the Mociu Island agreement/lease. Bearing in mind that this occurred 15 years before this evidence was given (before Mackie J in 2018), and that how the document came to be stamped is barely material, I do not think I need to resolve this difference. It is not in dispute that the signed document was stamped.

16. The document of 9 May 2003 (which for convenience I will refer to as the Honeymoon Island lease, without that necessarily meaning that I have decided or will decide that it is in fact a lease) is in a form that has similarities with, but also differences from, the forms of agreement to lease used by ILTB for leasing Mociu Island to Mociu Island Limited in 1999, and to Follies in 2007 (nor are these other agreements identical to each other). It is also different from the form of lease signed in 2009 in favour of Follies, which was subsequently registered. Some of these differences are explained by the differences in the underlying arrangements in each case, but others seem to be simply the result of using different forms. Of particular interest here are the following clauses from the Honeymoon Island lease:

4(a) If and whenever during the term of this lease:

i. any rent hereby reserved or made payable or any part thereof shall be in arrears and unpaid for one (1) month next after becoming payable (whether formally demanded or not):

ii. there shall be any breach, non-performance or non-observance of any of the covenants on the part of the lessee herein contained or implied by virtue of the Native Land Trust (Leases and Licences) Regulations 1984

iii. ...

iv. ...

v. ...

then, and in any such case, it shall be lawful for the lessor at any time thereafter , and notwithstanding the waiver by the lessor of any previous right of re-entry, to re-enter into and upon the land or any part thereof in the name of the whole and thereupon this demise shall absolutely cease and determine but without prejudice to any rights or remedies which may have accrued to the Lessor against the Lessee in respect of any antecedent breach of any of the covenants herein contained.

(b)-(m) ...

Notwithstanding the above if any action open to the lessor against the lessee by virtue of this agreement or any law or act is taken, the lessor will firstly give notice to the lessee in writing setting out the details of the breach or non-performance and will give the lessee reasonable notice to erect (sic – probably should be 'correct') such breach or non-performance, and such notice shall not be less than 21 days.

FOURTH SCHEDULE

(Regulation 13, Native Land Trust (Lease and Licence) Regulations 1984

B. The Lessee hereby also agrees with the lessor as a condition of this agreement that:

1. *This agreement shall cease to have effect if the lessee fails within six (6) months from the date hereof to engage the services of a surveyor registered under the Surveyors Act to carry out a survey of the land agreed to be leased and to prepare a survey produce to the lessor satisfactory evidence that the services of such surveyor have been so engaged by him.*

2. *If within three (3) months of being required to do so by notice in writing served on him by the lessor he fails or refuses to execute the lease which he has hereby agreed to take then, this agreement shall cease to have effect and that in the event that this agreement shall cease to have effect then the provisions of Regulation 12(4) of the Native Land Trust (Leases and Licences) Regulation shall apply.*

17. Following the signing of the agreement/lease with Honeymoon Island as described, ILTB issued a notice on its letterhead in the following terms:

> ***TO WHOM IT MAY CONCERN***
>
> ***Subject:* Lease of Mociu Island**
>
> *This letter will serve to confirm that Mociu Island has been leased to Honeymoon Island Limited for 99 years with effect from 1st January 2003.*
>
> *The former tenant "Mociu Islands Limited has surrendered its lease to us after failing to carry out its obligations and as such their interest on the island has ceased as well. The shareholders of the former Company have no authority to carry out any dealing related to Mociu Island. The Managing Director of 'Honeymoon Island Ltd" is William Gock and you are required to deal only with Mr Gock or anyone acting under the Managing Directors written authority.*
>
> *On behalf of the landowners I wish the new lessee Company the best in the proper use of Mociu Island for the benefit of everyone.*
>
> ***J Dakuwaqa***
> ***Manager (Southwest)***

Mr Gock says that this notice was given to him by ILTB so that he could let other operators that were using Mociu Island know that Honeymoon Island now had a 99 year lease. Mr Gock says he gave a copy of this notice to all the other users who were visiting Mociu Island. Mr Dakuwaqa, who signed the notice, had also signed the agreement/lease of 9 May 2003 on behalf of ILTB.

18. It seems that although Honeymoon Island paid the stamp duty, probably in the manner explained by Mr Gock, it did not pay any of the other amounts due in terms of the letter dated 6 May 2003, at least not at the time. It is not in dispute that a payment of $12,000 (not $12,225 as the letter stipulates) was made by Honeymoon Island to the ILTB in October 2005 (two and a half years after it was due), and a further payment of $24,000 was made in June 2007 (after Honeymoon Island became aware of Follies' interest in the island).

19. It also now seems clear that ILTB had no copy of the agreement with Honeymoon Island, and had not set up the arrangement with Honeymoon Island for leasing Mociu in its systems. It is suggested by ILTB (an argument adopted by Follies) that the absence of the document, and the failure to set up the arrangement in its systems, is in some way evidence that there was no such agreement, and no such arrangement. Faced with the signed and stamped document dated 9 May 2003 between ILTB and Honeymoon Island, and the preceding and subsequent documentary evidence that there was indeed such an arrangement, I am not prepared to accept that argument. ILTB does acknowledge that it had a draft of the 9 May document on its files. In my view, in the absence of any evidence from ILTB of some other explanation (in particular the failure to produce the draft leads inevitably to the assumption that there was no significant difference between the draft and the final version), a far more probably explanation for the loss of the document and the failure to set up the lease arrangement, or follow up on payment of the amounts due under it, is a system failure within ILTB. It was not the fault of Honeymoon Island (although of course the failure of Honeymoon Island to pay the amounts due is not excuseable either, and will have consequences for it, as will be seen as this decision progresses).

20. Whatever the reasons for it, the fact that ILTB did not have a copy of the lease, and had not set up the lease arrangement in its systems, meant that the landowners may not have been told of the arrangement, and certainly did not receive any money from it. It is clear that while Honeymoon Island was in serious default in its payments of rent, even the rent that it did pay in October 2005 was not distributed to the landowners (it appears that ILTB did nothing with it until 2007, and made no attempt to ascertain why it had been paid). The landowners can therefore be excused if they became disenchanted with Honeymoon Island, and so were responsive to other expressions of interest in leasing Mociu Island.

21. Whether this is what happened is not clear from the evidence. What is apparent is that in March 2007 Follies, having held discussions with Mataqali Ketenamasi about getting access to Mociu Island, lodged with ILTB an Application to Lease the island, and paid the requisite fee of $562.50. The application notes that the rent being offered by Follies was *as per letter 5/12/06 entitled "Nuka lai lai"*. A copy of that letter has not been put in evidence.

22. It also seems that at about the same time someone at ILTB became aware that there might already be an arrangement with Honeymoon Island for access to Mociu Island. How this realisation arose is not clear. What is clear is that at around that time Mr Glock, in response he says to a request from ILTB, sent to ILTB a copy of the lease document he had. This is the document referred to in paragraphs 15 and 16 above. The appearance of this document seems to have caused consternation at ILTB, at

Follies and with the Mataqali Ketenemasi. There was a flurry of correspondence, internally at ILTB and between the mataqali and Follies. A legal opinion was produced by one of ILTB's in-house solicitors. The focus of all this was to establish that whatever the arrangement was with Honeymoon Island, it was no longer in force, leaving ILTB free to make a new arrangement with Follies for access to Mociu Island.

23. Of particular interest was the position taken by the mataqali. A letter was written by the late Ratu Jeremaia Naitauniyalo, Turaga Tui Lawa, Turaga ni Yavusa Lawa (Yaro) and Turaga ni Mataqali Ketenamasi dated 10 April 2007 to ILTB. It will be recalled that Ratu Jeremaia (also known as Ratu Jeremaia Matai) was a director and shareholder (according to ILTB's Briefing Paper referred to in paragraph 9 above) of Honeymoon Island (Fiji) Limited. When he gave his evidence in mid-2018 Mr Gock also confirmed Ratu Jeremaia's directorship. The letter from the Tui Lawa objected in unequivocal terms to the idea that Honeymoon Island had a lease to Mociu, and asked some questions about the origins and authenticity of the 'purported' lease arrangement with Honeymoon Island, and about the role of ILTB and its staff in relation to the arrangement (including what had happened to any money that had been paid to ILTB). The letter made it clear that the mataqali was very keen to conclude the arrangement with Follies. The letter suggests very clearly that Ratu Jeremaia did not know anything at all about the arrangement with Honeymoon Island, didn't believe there was any such arrangement, and would be extremely concerned if there was (at least in part because of concerns about Honeymoon Island's conduct in its use of the island). It appears that Ratu Jeremaia had passed away before the trial of these proceedings, and he did not have the opportunity to give evidence that may have shed more light on his involvement with the matter. It is possible that his stated ignorance of the arrangements that Honeymoon Island claimed to have reflect the fact that no-one at ILTB had told the mataqali about the Honeymoon Island lease.

24. Also sent at around this time were a series of internal and external emails at ILTB, including the following:

i. an email dated 4 April 2007 from Kasimiro Taukeinikoro in ILTB to Koila Kabu (in-house solicitor at ILTB) and copied to a number of others, including John Heeley, a director of Follies, referring to 'Mociu Is' and stating:

> *Referring to our last discussion, these are the next course of action to take:*
>
> *1) You will study the Mociu case in the weekend and forward your opinion accordingly on Tuesday*
> *2) Torika to check the copy of the AFL and verify whether it is a legal lease or not*
> *3) Torika to check if the rental payments are made if there is a lease*
> *4) Can the Board revoke the Lease if there had been no rental payments*

5) *Torika to check with the Registrar of Titles to find out if there is a lease on Tuesday.*
6) *Torika to also find out if the company has been registered on Tuesday.*

I will be away for two weeks and please update Mesake on your findings so we can brief the applicant on the current and real status of Mociu Is.

ii. An opinion dated 10 April 2007 by the in-house solicitor at ILTB Koila Kabu which advised (I will set it out in full as its contents are important for what follows):

PRELIMINARIES

SEO/Tourism requested an opinion regarding the legality of Honeymoon Island Limited's lease over Mociu Island.

ISSUES

To ascertain whether:

i. Honeymoon Island Limited has a pending legal case against NLTB
ii. Honeymoon Island Limited has a legal lease over Mociu Island
iii. Follies International Limited stance.

Litigation History of Honeymoon Island against NLTB

A High Court case was instituted by Honeymoon Island Limited (hereinafter referred to as HIL) in 1999, claiming general and exemplary damage, compensation and costs. The plaintiff attempted to place an injunction against the Board in dealing with Mociu Island. This was rejected by the High Court.

The following day a Judgment in Default was filed and sealed by the plaintiff, as we had not filed any Statement of Defence. This was contested by the Board and we filed such accordingly.

In April 1999 the plaintiff Director requested their lawyer to abstain from any present and/or future litigation cases against the Board, because he was in the process of positive talks with the LOUs concerned.
Based on the above, the court cases against the Board seemed to cease immediately.

Lease granted to Mociu Island Limited

A lease was supposedly given to Mociu Island Limited. Based on an application for exclusion from native reserve signed in 1999, Mociu Island Limited was supposed to have received such. The application indicates that 54 of the adult members of the LOU had consented to such. However there are no consent signatures nor any verification from NLFC to confirm such numbers.

Lease granted to HIL

On May 6 2003 the Board made an offer to HIL for a tourism lease over Mociu Island. Also in file is a document which resembles that of a Lease Document, albeit a

draft. There is no verification from NLFC let alone a form indicating the LOU's consent.

Lease application by Follies International Limited

An application for a Tourism Lease was submitted in late March 2007. It had majority consent from the LOU, with verification from NLFC. The consent to dereserve and to lease such land has been signed.

A. Legal Case against NLTB

According to the litigation file, plus the tourism file references, the last court date activity was in 1999. There has been no development in the court front since then. Subject to a search by LCNW in the court registry in Lautoka, it would be safe to presume that HIL has stopped litigation against the Board.

B. Legal Lease over Mociu Island by HIL

The only document signifying a lease by HIL is a draft. A copy of the said original was faxed over by HIL, albeit an illegible one, and has the signatures of NLTB staff and the duty stamp.

There is inconclusive evidence on file to ascertain that HIL was indeed given a tourism lease over Mociu Island.

C. Follies International Limited

The company has prepared and submitted the documents needed for such a lease. It is currently being put on hold due to the history of this Island. It is advised that we pause the processing of such an application.

Dilemma

1. *Mociu Island Limted has got the blessings of the Board for dereservation of native reserve (refer to 4/11/6284- W/9906112), however this was not gazetted so as to confirm the dereservation.*

2. *HIL has been given the lease, however the original lease document is not on the file, that cannot be determined. Further, there is no mention of completion of the dereservation process to fully comply with the legality of such a lease.*
   A discussion [tele-con dated 10 April 07) with A Toia highlights that HIL has paid a sum of $12,000 in 12 October 2005, and that this amount is in the unallocated section. This could imply that this is payment for the said lease (I stand to be corrected on this point).

3. *Follies International Limited*

Refer to C above.

Advice

Having perused the mentioned files and from discussions with staff, it is my opinion that no person, company or entity one has got any legal hold on Mociu Island, so far. Evidentiary documents need to be obtained and clarified in order to fully ascertain whether a lease has indeed been given at any time to a tenant, whether it be HIL or Mociu Is Limited.

Humbly submitted
Koila Kabu.

iii. an email dated 17 April 2007 sent by Leona Heeley (a director of Follies and wife of John Heeley – see paragraph 22(i) above) to ILTB. The court documents include only the first page of this email, which refers to a recent meeting between Follies ('investors'), Landowners Mataqali Ketenamasi and the Acting General Manager of ILTB *regarding the sudden appearance of what can only be described as a 'bogus lease' to Honeymoon Island (Fiji) Limited.* The email refers to some of the same issues and has a similar use of language to that in the letter signed by Ratu Jeremaia.

Many of these exchanges were copied to John Heeley, one of the directors of Follies, and it is clear that Follies was kept well informed of progress with ILTB's position regarding Honeymoon Island and its lease arrangements.

25. By the end of May 2007 ILTB had made a decision about what to do with Honeymoon Island. On 29 May 2007 ILTB sent by letter a lease offer to Follies which was promptly accepted by the company. The letter presumably reflected what had already been discussed between the parties, including the landowners. It is easy to see why the Mataqali Ketanamasi was so eager to conclude an arrangement with Follies. While the term of the lease (99 years), and minimum rent ($12,000 per annum) were the same or similar to the lease arrangement offered to Honeymoon Island four years previously (see paragraph 14 above), the arrangement now included a Premium of $80,000 payable by Follies at the commencement of the lease, plus a goodwill payment of $150,000 directly to the landowners. Also attractive to the landowners was the requirement (not included in the lease offer, but provided for in the Agreement to Lease signed shortly afterwards) that Follies would by 1st January 2009 (i.e. within 18 months from the commencement of the agreement) begin construction of a tourist resort:

> *... to be constructed of substantial materials on the land comprising of tourism, hospitality, entering [entertaining?], offices, shops and accommodations unit together with central facilities, staff quarters and other building ancillary to the Resort.*

For the landowners the attraction of this commitment/obligation was that it held the promise of increased rental (based on a percentage of the gross receipts from the resort, once completed). In this respect the agreement to lease was similar in its provisions to the agreement with Mociu Island Ltd in 1999, which included an almost identical commitment to develop a resort. The 2003 document between Honeymoon Island Ltd and ILTB did not have any similar commitments by the lessee, and did not include any premium or payment to the landowners. The evidence shows that this development obligation was not met by Mociu Island Ltd, and has still not been met by Follies.

26. Curiously, in view of the history, the offer letter from ILTB to Follies included the following comment in relation to payment of the total amount stipulated ($261,319.75):

> *Due to the number of interested investors we are giving a 'first come first serve' basis in terms of payment. This offer expires on 30 June or whenever any party pays the initial payment.*

There is no evidence before the court of any 'interested' parties, other than Follies and Honeymoon Island, and it is clear that the offer made to Follies was not extended to Honeymoon Island. The most generous explanation I can think of for this comment is that it arose from some muddled thinking within ILTB about its role, and how best to meet its responsibilities.

27. Whatever the thinking was behind this comment, it clearly prompted Follies to accept the offer without delay, and payment of an initial amount of $105,207.25 was made by Follies to ILTB on 7 June 2007, on the same day that an Agreement to Lease was signed by Follies and ILTB.

28. The day before, on 6 June 2007, ILTB wrote to Honeymoon Island making clear its position regarding Honeymoon Island's claim to have a lease. A draft letter to Honeymoon Island was prepared by ILTB's in-house solicitor, who by email of the same date advised ILTB:

> *Attached is the draft letter you requested.*
>
> *I have checked the files again, and rest assured that HIL does not have a legal title over the land due to the following:*
>
> *i. The stamped AFL you were referring to has not been registered thus, finalisation not complete.*
> *ii. The same document has a registered lease front page without a Register of Titles Box.*
> *iii. The signing clause is that of an Agreement for Lease (unregistered lease), does not have the Board's seal; Further, 2 Directors are supposed to sign instead of the one signatory on the document.*
> *iv. The offer made in May 2003 lasted for 6 weeks, and despite us not writing to withdraw offer, their non-payment for another two years may deem that a waiver. Our acceptance of the $12,000 will be refunded as stated in opinion dated 10 April 2007.*
>
> *The above are our reasons for holding that there is no legal lease. I have not mentioned in the draft letter, for legal reasons. If the above could be kept close.*
>
> *NB. We should proceed with the removal of HIL, if they are still on the said land. Since they have never been given the right to be on the land in the first place, the Landowners can do this. However, if the diplomatic channel is to be followed then a notice of "as soon as" should be served to their registered office in Suva or Nadi. Considering that an offer has been made*

to Follies, vacation of the property should be immediate. Improvements, if any, should not be removed because they had no right in the first place, as stated above.

I will have more to say later about the correctness of this advice, but it seems contrary to an internal email sent two days before (on 4 June 2007) by the same solicitor, who said then:

> *We have already offered a lease to Follies however we have not served an appropriate notice to Mociu Island informing them of the cancellation/revocation of the stamped AFL (Agreement for Lease) issued in 2003.*

Since there was only one lease issued in 2003, to Honeymoon Island, the reference to Mociu Island in this email should presumably be to Honeymoon Island.

29. The letter then sent by ILTB to Honeymoon Island (on the same date) was brief and to the point (breathtakingly so, in all the circumstances). It advised;

> *This serves to inform you that Honeymoon Island Limited, after careful perusal of our files, does not have any legal relationship with NLTB. According to our records you do not have any legal title over the said piece of land.*
>
> *The $12,000.00 (receipt # 14000365) paid by your firm on 12 October 2005 and the recent payment made at our Nadi office will be refunded immediately, reason being that the offer had expired in June 2003. As such we appreciate you taking the necessary arrangements to vacate Mociu Island.*

30. Not surprisingly Honeymoon Island did not accept this position. Correspondence and discussions then followed between Honeymoon Island and its solicitors and ILTB. Included in this correspondence is a letter from Honeymoon Island (Mr Gock) to ILTB dated 21 June 2007 in which Honeymoon Island clearly rejects the position taken by ILTB and affirms its determination to continue with the Honeymoon Island lease. By letter of 28 June 2007 to the solicitors, ILTB expanded on the reasons for its conclusion that Honeymoon Island did not have a lease, as follows:

> I. *NLTB acts on the intentions and wishes of the land owning unit(s). This has to be respected and adhered to by the Board. During various consultations with them, they remain adamant that your client should not be entertained in any way by the Board. This includes not consenting to, issuing of, renewal etc of any dealings with your client.*
>
> II. *The offer made to your client was dated 6 May 2003. In that letter, it clearly stated that acceptance of such was to be made within 6 weeks. This had not been done by your client. Thus the offer is deemed withdrawn.*
>
> III. *Payment of offer/rent/fees etc has not been accepted by NLTB for two (2) years following the offer, until late 2005 in which $12,000 was paid to our Nadi office. Upon clarification with the Legal department, it was ascertained that such monies*

were not allocated to any account basically because there was no existing tenancy with your client.

As such, after legal scrutiny of the documents contained within our files, it was determined that there is no legal relationship between NLTB and your client.

IV *Further, the evidence we have on file points out that the lease document is not a valid one.*

31. In July 2007 Follies issued these proceedings (HBC 225/2007) seeking an injunction to restrain Honeymoon Island from interfering with its occupation of Mociu Island. An ex parte application for injunction was made, and on 19 July 2007 the High Court at Lautoka made orders restraining Honeymoon Island from 'trespassing or landing on Mociu Island'. These orders were stayed by a subsequent order made on 27 July by a different judge, and instead Follies was restrained from approaching or landing at Mociu. Eventually it seems that all the interim orders were vacated by the Court of Appeal in 2008, leaving the parties to pursue the substantive proceedings.

32. In separate proceedings commenced in the High Court at Lautoka in August 2007 (HBC 257/2007) Honeymoon Island claimed against the ILTB seeking a declaration that the May 2003 is valid and binding, an order for specific performance of that agreement, an injunction restraining ILTB from dealing with Mociu in any manner inconsistent with that agreement, and damages.

33. At some point between then and now orders for consolidation were made whereby the two sets of proceedings were to be heard together. Unfortunately that order did not require the parties to tidy up the pleadings into a coherent whole.

34. Following the Agreement to Lease dated June 2007, Follies proceeded to carry out a survey of the island, and in due course, in April 2009, the de-reservation of the island was approved and gazetted. While this was happening consideration was given to ILTB's and Follies' positions regarding registration of the lease. Follies, and – it seemed – the landowners were keen to see registration completed. Initially ILTB took a cautious approach, and after some internal consultation, on 30 October 2008 sent a letter to Follies (apparently in response to some prompting by Follies to proceed with registration) advising:

> *Your letter dated 15 October 2008 is acknowledged and we apologise for the belated reply.*
>
> *We wish to advise that the registration of the lease plus any dealings shall be on hold awaiting the outcome of the pending court case.*

There is no evidence that Honeymoon Island or its solicitors was aware of this stance by ILTB at this time. Nor is there any evidence of what was said by Follies in its letter of 15 October 2008 referred to in the above ILTB response. In light of what had

occurred previously (internal discussion at ILTB and what was said), and subsequently (see below), it seems likely that Follies was pressing ILTB to register the lease without further delay.

35. Obviously Follies did not accept this position by ILTB. It wrote to the Attorney General/Minister for Tourism (again that correspondence was not put before the Court). Apparently as a result of that, a meeting was held on 13 March 2009 between the ILTB General Manager (Alipate Qetaki) and some members of his staff, Mr John Heeley of Follies and three trustees of Mataqali Ketenamasi. The minutes of this meeting are in the evidence produced to the Court. These minutes include the following extracts:

> *2.0 ISSUES FOR MOCIU ISLAND*
>
> *2.1 GM confirmed that the lessee Follies had written to the Attorney General/Minister for Tourism. We have received a letter from the Attorney General and which we (NLTB) have replied.*
>
> *2.2 There were two issues raised:*
>
> - *Registration of the lease*
> - *Extension of the development period*
>
> *3.0 EXTENSION OF DEVELOPMENT PERIOD*
>
> *3.1 Mr Heeley had initially sought extension because of the initial time frame which seemed to be out of date so to speak.*
>
> *3.2 The lessee requests the dates to be rescheduled for the reason above as well as the requirements from the Westpac Bank. The bank will not provide the finance until they see a copy of the registered lease and therefore Mr Heeley stated they cannot commence construction accordingly.*
>
> *3.3 Mr Heeley requested for extension for another year to 2011 in order to give Follies International Limited time to comply with the lease.*
>
> *4.0 UPDATE ON THE COURT CASE*
>
> *GM requested for an update on the court cases and which Mr Heeley confirmed on the following:*
>
> *4.1 Hearing date is on the 21st of March 2009 and hopes that a trial date is confirmed within 2 months.*
>
> *4.2 There are two (2) court cases:*
> - *Follies v Honeymoon*
> - *Honeymoon v NLTB*

4.3 Honeymoon (Mr Young) is defending the case vigorously. ...

4.4 GM commented that he is not happy with the current legal position.

6.0 REGISTRATION OF LEASE

6.1 John Heeley confirmed that they are still interested and fully support the project. Their business partner (a long-time friend for 20 years) needs something concrete i.e. the registered lease in order to secure financing. The with-holding of registration of the lease could cause some setbacks/issues. Follies International Limited has a good chance of completing the development.

6.2 Mr Gock is not a straight person and has a bogus agreement with the landowners. Mr Gock had written to Follies International Limited to pay $420,000 and they will walk away from the case.

6.3 GM confirmed that there are some allegations of corruption internally against our senior staff and he will investigate the case. Mr Heeley confirmed that he did not state in his letter that there is corruption, but on how the document came about for FIL is something he was very concerned with

7.0 TRUSTEES FOR MATAQALI KETENAMASI/MEETING WITH LOU

7.1 ...

7.2 On behalf of the landowners, Mr Tuidekei requested NLTB to give the registered lease and to assist FIL so that development can be completed and the landowners will receive the maximum benefits. The lease was issued in 2007 and it will bring about maximum economic benefits to the landowners.

7.3 Vilimoni confirmed he was present in the meeting held on the 11th at the village. Rara Cava was present in the meeting also and he seemed to have a personal agenda. He made an agreement/arrangement with Mr Gock. He did not sign for John Heeley's lease.

7.4 GM informed Mr Heeley that the tourism department (NLTB) held a meeting with the landowners to discuss the status of the island and the outstanding issues. Only few of the landowners attended the meeting. Dereservation is yet to be approved by the Board and still not gazetted and therefore a registered lease cannot be issued.

7.5 Landowners have been informed to write to the Board with their support/consent in order for the dereservation to be formalised.

8.0 WAY FORWARD

8.1 *GM will need to submit paper to the Board together with the letter from the landowners in support of the project. GM will be making a recommendation to the Board for the approval of dereservation on the 26th of March 2009.*

8.2 *Approval of De-reservation to be gazetted which will take 1 to 2 weeks to be completed.*

8.3 *We can then move forward after de-reservation has been gazetted. Mr Heeley should hear from NLTB after 3 weeks.*

36. The evidence before the court shows that following this meeting things moved more quickly. The de-reservation of the island was gazetted on 24 April 2009, and the lease of the island to Follies International Limited was signed on 13 July, and registered on 28 July 2009 (under registered number 29018). Not much has changed since then. At some point after 2009 and before 2017 the original shareholders of Follies (John Heeley and his wife Leona) sold their shares in the company, and the shareholding changed again in 2017. The current shareholders are associated with the Witton family which controls the Rosie Travel Group, and operates resorts on Malolo Island (Malolo Island Resort and Likuliku Lagoon Resort). Mr AJ Witton, who gave evidence before Mackie J in December 2018 had never met the Heeleys, and knew very little of the history of Follies' acquisition of the Mociu Island lease. However those currently in control of Follies are eager to maintain its lease of the island, which is close to the Likuliku Lagoon and Malolo Island resorts, and the right to visit Mociu is obviously an added attraction that they can offer their guests.

37. In October 2015 Honeymoon Island registered a caveat (No. 819720) against the registered lease held by Follies preventing registration of any further dealings with the lease. For reasons that are not clear, this caveat did not prevent registration in April 2016 of a variation of Lease 29018. This variation amended the development clause in the lease to extend to 1st December 2016 and 1st June 2018 respectively the times to submit plans for approval and to commence construction of a resort on the island. However a subsequently agreed variation in November 2017, removing altogether the time limit for submission of plans and completion of construction, could not be registered because of the caveat, and remains unregistered. Follies, in this proceeding, therefore seeks the removal of the Honeymoon Island caveat.

38. Mociu Island remains undeveloped to this day. Mr Witton's evidence suggests that it is now accepted by all parties (including the landowners) that development of a resort on the island is not practicable – it is too small. The current 'vision' for Mociu is for it to be a nature reserve to which Follies can bring small groups of visitors for snorkelling and picnicking, but there is no longer any plan to build any major infrastructure, or make any major alteration to the landscape. There is no evidence

of what impact this change of 'vision' has on the returns that the landowners currently receive, and can expect to receive, from the lessees for their use of the island, or on whether the landowners have been compensated for the abandonment of the development plans.

Current proceedings

39. In its claim filed in July 2007 in HBC 225/2007 Follies pleaded the existence of the Agreement to Lease dated 7 June 2007 (taking effect from 1 July 2007) and sought:

    i. an injunction restraining Honeymoon Island and its directors (the 3rd and 4th defendants) from trespassing on Mociu Island or otherwise interfering with Follies right of occupation.

    ii. damages and costs.

40. Follies amended its statement of claim on 9 February 2017 to plead the registration of the lease in July 2009 (the original statement of claim did not mention registration, because of course the lease had not been registered at the time the proceedings were commenced in 2007). The relevant paragraph of the amended statement of claim reads (paragraph 6 is new, paragraph 7 is unchanged):

> *6. By a lease made on or about the 13th July 2009, the Plaintiff became the registered owner of Native Lease No 29018 which comprises of all that piece or parcel of land described as:*
>
> | *Name of Land* | *Tikina* | *Province* | *Area* |
> |---|---|---|---|
> | *Mociu Island Lot 1 on SO 5850* | *Malolo* | *Nadroga/Navosa* | *1.7101* |
>
> *7. The Defendants do not have a lease over or any interest in Mociu Island. They have no legal right or interest in reversion in any shape or form that can adversely affect or militate against the Plaintiff's proprietary rights as lessee of Mociu Island.*

41. In the course of the hearing in December 2018 the director of Follies, Mr Witton, confirmed that the plaintiff is no longer seeking damages against Honeymoon Island (there was no evidence led of any damage or on-going interference with any right of occupation that Follies has), but is still seeking an injunction and costs. No evidence was led of any activity by or interest of Honeymoon Island (or its directors, one of whom has died) attempting to land at Mociu except for an incident that occurred in July 2007 when someone from Honeymoon Island brought a group of tourists to the island. There is nothing that persuades me that an injunction is still necessary to

protect whatever interest Follies is found to have in the island, and the Court will not issue an injunction that is not necessary.

42. On 13 June 2017 Honeymoon Island filed a statement of defence and counterclaim to Follies Amended Statement of Claim. In the statement of defence Honeymoon Island denies the existence of the Follies 2007 Agreement to Lease, and asserts the existence of its own 2003 lease of the island. In response to paragraph 6 of the Amended Statement of Claim the defence states:

> *4. The 1st and 2nd Defendants deny paragraph 6 and further say that at all material time the Plaintiff was aware of the existence of the 1st Defendants lease pursuant to a lease dated 9 May 2003.*

There is no response by Honeymoon Island to paragraph 7 of the Amended Statement of Claim, and there is no reference in the statement of defence to fraud or an express challenge to the indefeasibility of the Follies' lease.

43. Honeymoon Island's counterclaim (paragraphs 15 and 16) alleges:

> *15. The Plaintiff conspired with an officer or officers of the iTaukei Land Trust Board and/or other parties with the intent to causing loss or damage to the 1st Defendant and/or to the 2nd Defendant by preventing the 1st Defendant and/or the 2nd Defendant from entering and using Mociu Island pursuant to its Lease Agreement dated 9th May 2003 by inducing iTaukei Land Trust Board to unlawfully cancel or terminate the 1st Defendant's said lease.*
>
> *16. At all material times, the Plaintiff well knew of the 1st Defendant's Lease (dated 9th May 2003) over Mociu Island but wrongly induced and procured the iTaukei Land Trust Board to take unlawful steps to cancel or terminate the 1st Defendant's said lease.*
>
> *17. By reason of the Plaintiff's action as set out in paragraphs 15 and 16 the iTaukei Land Trust Board purported to cancel or terminate the 1st Defendant's said lease and the 1st and 2nd Defendants suffered loss and damages including consequential loss.*

44. Accordingly Honeymoon Island's counterclaim seeks the following remedies:

> (i) *That the Plaintiff's claim be dismissed as (sic) costs.*
>
> (ii) *That there be judgment for 1st and 2nd Defendants for damages (including consequential loss) on its Counter-Claim in terms of paragraphs 15, 16 and 17.*
>
> (iii) *That there be judgment for the 1st and 2nd Defendants for damages on its Counterclaim including consequential loss suffered on account of the injunction obtained by the Plaintiff on 19 July 2007 and further consequential loss after the injunction was dissolved.*
>
> (iv) *For a declaratory order that the 1st Defendant's Lease dated 9th May 2003 is still valid and enforceable.*

(v) *For a declaratory order that the 1st Defendant's Lease dated 9th May 2003 confers upon the 1st Defendant's rights that is superior to the rights conferred upon the Plaintiff's Lease dated 7th June 2007 and Native Lease No 29018.*

(vi) *For an order directing the Registrar of Titles to cancel Native Lease No. 29018 or alternatively, to transfer Native Lease No. 29018 to the 1st Defendant.*

(vii) *For an order that the Plaintiff whether by itself, its servants or agents or employees be restrained howsoever from:*

(a) remaining on Mociu Island or approaching within 100 meters of Mociu Island

(b) from interfering howsoever with the 1st and 2nd Defendants and/or its guests access to and use of Mociu Island.

(viii) *Such further or other relief as this Honourable Court may deem just.*

(ix) *The Plaintiff do pay the 1st and 2nd Defendants costs of this action on an indemnity basis.*

45. In its reply and statement of defence to the counterclaim Follies generally denied the allegations made. It also complained about the lack of particularity in the claims against it, and suggested that these were such as to be prejudicial to a fair trial. Similar complaints have been made by Honeymoon Island about Follies' pleadings. I agree that there is plenty of room for improvement in the pleadings. Nevertheless, no request for or application for further and better particulars was made by either party, and they were obviously willing to proceed to trial on the basis of the pleadings as they stood. Nor has anyone claimed to be taken by surprise by any particular basis for claim or defence, or sought to introduce new evidence to respond to some unexpected and unpleaded argument. I am not therefore particularly sympathetic to complaints now made by both parties in submissions that the pleadings are deficient, and don't permit a party to maintain a particular claim or defence. In pre-trial conference minutes agreed to by the parties in 2014 there is no mention either of registration of the lease, or the indefeasibility that usually results from registration. It may be that the parties simply did not realise the significance of this. But it must have been evident ever since Honeymoon Island registered a caveat against the lease in 2015, prompting Follies to amend its statement of claim in 2017 to assert registration of the lease, that Honeymoon Island's position has included a challenge to the registration of the lease and the rights conferred thereby. The counterclaim by Honeymoon Island in response to the amended statement of claim included allegations against Follies of conspiracy and unlawful inducement to unlawfully terminate the Honeymoon Island lease, and Follies was clearly aware of these issues and has responded to them in its evidence and submissions. It has not identified any way in which it will be prejudiced by me now deciding this issue. I see no basis for denying Honeymoon Island the opportunity to argue the point simply because its pleadings could have been clearer. If necessary I would allow the application by Honeymoon Island – in its submissions in reply in October 2019 – to amend its statement of defence dated 13th June 2017 to the amended counterclaim by substituting the following for paragraph 3:

The 1st Defendant denies that the Plaintiff's registered Native Lease No. 29018 is indefeasible against Honeymoon's Agreement to Lease dated 7 May 2003 because the Plaintiff was guilty of fraud.

Particulars of fraud

(i) The 1st Defendant repeats paragraphs 15 and 16 hereinbefore.

(ii) At the material time the Plaintiff was aware of the current court proceedings and, also that of Civil Action No. 257 of 2007 and the remedies and order sought by Honeymoon Island (Fiji) Limited in the respective proceedings and that iTLTB had not denied the allegation made by Honeymoon Island (Fiji) Limited in its letter of 30 July 2007 to iTLTB as it was disclosed to Follies International Limited in Honeymoon Island (Fiji) Limited's Affidavit Verifying List of Documents filed on 20 November 2008.

(iii) Plaintiff had conspired and/or co-operated with iTLTB to defeat the 1st Defendant's rights under its Agreement to Lease dated 7 May 2003 by having its lease registered on 28 July 2009."

46. By the same reasoning, I accept that if the challenge to the Follies lease and its registration is unsuccessful, Follies is entitled to an order for removal of the Honeymoon Island's caveat, even though Follies has not included that request in any claim or counterclaim.

47. In its claim in HBC 257/2007 against ILTB (in which the pleadings are as they were in 2007) Honeymoon Island pleads three causes of action against ILTB. They are:

i. Breach of clause 3 of the lease document dated 9 May 2003, (which although not expressly pleaded, states:

3. THE LESSOR HEREBY COVENANTS WITH THE LESSEE that the lessee paying the rent hereby reserved and performing and observing the covenants on the lessee's part herein contained the lessee may peaceably hold and enjoy the land during the said term without any interruption by the lessor or any person lawfully claiming through or under or in trust for the lessor except as otherwise provided herein).

or repudiating the agreement (which repudiation was not accepted by Honeymoon Island), as a result of which Honeymoon Island suffered unspecified loss and damage.

ii. Misleading and deceptive conduct in breach of section 54 of the Fair Trading Decree 1992 (now the Fijian Competition and Consumer Commission Act 2010) by:

- refusing to acknowledge and/or recognise the Plaintiff's rights under the lease document
- agreeing to settle Civil Action HBC 135/1999 in exchange for issuing an agreement for lease of Mociu Island and subsequently producing an agreement in respect of Mociu Island to the plaintiff for signing.
- signing the document of 9 May 2003
- issuing a circular to be distributed to other operators using Mociu Island advising them of the agreement reached with Honeymoon Island
- receiving payments of rental in October 2005 and June 2007, thus conveying to Honeymoon Island that the lease arrangement for Mociu Island was ongoing
- dealing and corresponding with and making a lease offer to Follies in May 2007 for lease of Mociu Island
- issuing the notice to Honeymoon Island in June 2007 (see paragraph 25 above)
- signing the agreement to lease of 7 June 2007 with Follies.

Again, unspecified loss and damage is said to have been incurred by Honeymoon Island as a result of this misconduct by ILTB.

ii. Estoppel of ILTB arising from the following conduct:

- agreeing to settle Civil Action HBC 135/1999 in exchange for issuing an agreement for lease of Mociu Island and subsequently producing an agreement in respect of Mociu Island to the Plaintiff for signing
- signing the agreement referred to (9th May 2003)
- issuing a circular to be distributed to other operators using Mociu Island advising them of the agreement reached with Honeymoon Island
- receiving payments of rental in October 2005 and June 2007, thus conveying to Honeymoon Island that the lease arrangement for Mociu Island was ongoing.

48. On the basis of these allegations Honeymoon Island seeks the following remedies against ILTB:

(1) Damages including consequential loss.
(2) Compensation and/or other remedial orders under the Fair Trading Decree 1990 as this Honourable Court may deem just.
(3) An order restraining ILTB from further dealing with Mociu Island.

(4) A declaration that the agreement dated 9 May 2003 between Honeymoon Island and ILTB is valid and binding on ILTB.

(5) An order for specific performance of the 9 May 2003 agreement.

(6) Such further or other relief as this Honourable Court deems just.

49. After initially failing to file a statement of defence, as a result of which judgment by default was entered against it, ILTB was eventually given leave to do so in August 2008. The statement of defence takes the following positions in response to Honeymoon Island claim (this is my summary of what I understand are the essential elements of the defence, since I don't think quoting it will add clarity):

i. while the payments by Honeymoon island of $12,000 in October 2005 and $24,000 in June 2007 are admitted, ILTB denies that its receipt of these amounts has the significance alleged by Honeymoon Island, and cannot be treated as the payment of 'rent' because the ILTB's 'IT and Finance system' did not recognise Honeymoon Island as a legal tenant.

ii. ILTB denies breaching clause 3 of the lease document dated 9 May 2003, nor has it repudiated that agreement, because the agreement does not exist, Honeymoon Island having failed to accept the offer of 6 May 2003 within six weeks as the letter required.

iii. Alternatively to (ii), the 'tenancy agreement' dated 9 May 2003 was breached by Honeymoon Island in the following manner:

- It failed to pay rent 'in the manner [required]'
- It failed to initiate a survey of the island within six months of the commencement date as required by clause B(1) of the Fourth Schedule.

NB. It is not asserted by ILTB that it terminated the Honeymoon Island lease in reliance on these breaches.

iv. Any loss or damage claimed by Honeymoon Island is denied because:

- Honeymoon Island had no right to use Mociu Island, therefore could not have suffered loss or damage when that use was ended by ILTB.
- Any loss or damage was of Honeymoon Island's own making because it did not respect the landowners' rights and intentions by not making the appropriate acceptance of the ILTB's offer, and not paying consideration.

- Honeymoon Island used and enjoyed the subject land for five years without any monetary returns to any of the landowning units. This 'Squatter Tourism' is not accepted by the ILTB.

v. Honeymoon Island is not entitled to succeed in its estoppel claim because it had breached certain clauses in the 'Tenancy Agreement', which warranted the termination of the agreement, and therefore justified the ILTB not recognising the agreement.

50. ILTB also made a counterclaim for:

i. Damages for non-acceptance, non-payment of consideration for the offer made on 6 May 2003.

ii. In the alternative, loss and damages both to the landowners and the ILTB arising out of Honeymoon Island's breach of the Tenancy Agreement.

iii. A declaratory order that the Follies' lease is the legal lease.

iv. An order restraining Honeymoon Island from using, enjoying or occupying Mociu Island.

Evidence

51. As I have mentioned, evidence was given before Mackie J in June 2018, when Mr Gock gave the only evidence for Honeymoon Island (he was terminally ill at the time and died not long afterwards), and December of the same year when all the other witnesses (all being witnesses of Follies or ILTB) gave their evidence.

52. Very little of the evidence is contested (although of course the significance of it is very much an issue). The only evidence where there is direct disagreement is that of Mr Gock and Mr Bolatagane (the only witnesses who had direct personal experience of what happened in 2003 and earlier) about the circumstances in which the document of 9 May 2003 came to be stamped. Although much has been said about the original and continuing validity of this document, and its effect in law, there is no suggestion by ILTB (Honeymoon Island is certainly not going to challenge it) that the document itself is forged, or is in some other way inauthentic. Nor is there any suggestion that it is not stamped, and therefore admissible for what it is. For these reasons I do not think anything turns on how it came to be stamped, and whether Mr Bolatagane or some other person from ILTB was involved in its stamping.

53. Mr Gock also gave evidence about the damage that he said was caused to Honeymoon Island by being 'locked out' from using Mociu Island in its tours. He said that in the immediately preceding period August to December (in 2006) Honeymoon Island had taken 3700 tourists on its island tour. They each paid $169.00 for the trip. However after the injunction was issued to Follies in August 2007 800 fewer trips were sold over the same five month period in 2007 (an average reduction of 160 passengers per month). Even after the injunctions were set aside by the Court of Appeal in 2008 Honeymoon Island was not able to resume tours to the island because of the risk of hostile intervention by the landowners. Hence – Mr Gock said – the losses continued up to the date of the hearing (143 months then, now 152 months to April 2020) at 160 x $169 per month, a total of $4,109,924.00. In cross-examination Mr Gock acknowledged that the military coup that occurred in Fiji in late 2006 had an impact on the number of tourists, but he did not offer any figures on the extent of this impact. Mr Witton in his evidence in December 2018 was asked about the impact of the coup on visitor numbers, but nothing he said had been put to Mr Gock (who had passed away by the time Mr Witton gave his evidence). Nor did Mr Gock offer (and he was not questioned about) any documentary evidence (records of sales, overheads incurred in running the tours, financial accounts, evidence that Honeymoon Island was still in business in 2018) showing the impact of this loss of business on Honeymoon Island's bottom line.

54. In December 2018 evidence was given on behalf of Follies by:

i. the Registrar of Titles (Ms Treta Sharma) whose evidence related to the process of registration and the use of forms and the non-registration (or registerability) of the 2003 document as a lease, the registration of the 2009 lease to Follies, and the presence and effect of Honeymoon Island's caveat.,

ii. Mr Anthony Witton, now a director of Follies but not involved in any way with any of the parties in 1999, 2003 or 2007,

iii. Mr Peni Qalo, now Manager Tourism with ILTB but a very junior officer of ILTB in 2003, and not directly involved in anything that is relevant to these proceedings. Mr Qalo's evidence was more about the ILTB systems and documentary records than his personal recollection of anything involving these parties. In cross-examination Mr Qalo was asked a series of questions about ILTB's record-keeping and computer programmes, apparently directed at showing that any lack of records by ILTB about the Honeymoon Island arrangements from 2003 was as a result of human error.

55. Mr Bolatagane was called by ILTB. In 1999 – 2003 he was based in the Western Division (Lautoka and Nadi offices of ILTB), but is now working in Labasa as an Estate Officer. He was questioned (by way of examination-in-chief) by counsel for Follies and ILTB, and cross examined by counsel for Honeymoon Island. Apart from his

evidence about events relating to the 1999 agreement with Mociu Island Limited, the 2003 offer to Honeymoon Island, and the stamping of the 2003 document, Mr Bolatagane was asked in cross-examination about practices adopted by ILTB for the maintenance of confidentiality, and the sharing of information. In particular he confirmed that much of the internal correspondence at ILTB relating to the validity of the Honeymoon Island lease/agreement to lease, was copied to Follies in the period from March 2007 to when the Follies lease was registered in 2009.

Conclusions from the Evidence

A - Did Honeymoon Island have a lease or agreement to lease Mociu Island?

56. In spite of the attempts by Follies and ILTB to argue otherwise I am satisfied that the document of 9 May 2003 is genuine, and was enforceable as an agreement to lease. I have no reason to doubt Mr Gock's evidence that shortly after Honeymoon Island received the lease offer dated 6 May 2003 he took steps to obtain the agreement to lease referred to in that offer. The evidence shows that the notice of discontinuance of the existing High Court proceedings was dated 7 May 2003, and the surrender of the existing agreement to lease with Mociu Island Limited is dated 9 May 2003, the same date as the new 'lease' document between Honeymoon Island and ILTB; it seems likely that both were signed at the same time.

57. Also issued at around the same time was a notice to other interested parties that an arrangement had been entered into between ILTB and Honeymoon Island for lease and occupation of Mociu Island. It is, with respect, nonsense to suggest that this document was not issued by ILTB for the purpose of distribution by Honeymoon Island to inform anyone who might have been using the island that they could no longer do so, at least without first getting agreement from Honeymoon Island. The issue of this notice is consistent with what the ILTB had done in 1999 when reaching agreement with Mociu Island Limited, and would do in 2007 when it entered into the agreement to lease with Follies. To suggest, as ILTB has done, that the purpose of the notice in 2003 was any different from those other occasions, and that it was issued merely for the information of Honeymoon Island, is disingenuous.

58. What the notice and the other documents generated by or signed by ILTB at around the same time show, along with the evidence of what led to them, is that the 2003 arrangement reached between ILTB and Honeymoon Island was not – at the time it was entered into - an aberration, or irregular or ineffective, any more than were the arrangements made by ILTB with Mociu Island Limited in 1999, and with Follies in 2007. There is no evidence that suggests that ILTB's intentions in 2003 were any different from what they were previously and subsequently when it entered into contractual relations for use and occupation of Mociu Island, i.e. it was the first step

in what it hoped/expected would be a long-term arrangement for the benefit of both the lessee and the landowners. ILTB argues that the absence of a copy of the lease, or of records showing that the lease arrangement was properly recorded in its systems (an absence which meant that there was no follow-up or enforcement undertaken by ILTB), shows that the arrangement was irregular or illegitimate, or indeed that there was no such arrangement at all, and that this was - in some unspecified way - the fault of Honeymoon Island. Again I don't accept this argument. Without evidence to explain the failure in other terms (e.g. evidence perhaps of corruption involving a deliberate failure to log the details of the Honeymoon Island arrangement in its records, and some explanation of why someone at ILTB might want to behave in that way) it seems to be far more likely/probable that the absence of the arrangement from ILTB's systems arose through error or inadvertence within ILTB. There obviously was a file, and on the file there was (as ILTB's internal solicitor noted in advising ILTB on the status of the Honeymoon Island lease – see paragraph 24(ii) above) at least a draft of the 'lease' – although no copy of that draft has been produced. But someone obviously failed to keep a copy of the signed document, and failed to complete the process of entering the details of the arrangement in the ILTB systems.

59. Similarly, inadvertence, or lack of attention is likely to be the explanation for ILTB's failure, when Honeymoon Island eventually in 2005 decided to pay some rent, to identify what and who the payment was for. Instead ILTB kept the money unallocated for nearly two years, and apparently made no attempt to resolve the issue. These failures on the part of ILTB do not excuse or justify Honeymoon Islands own failure to pay the rent on time, or comply with the other terms of the agreement (about which I will have more to say), but they meant that ILTB did not meet its obligations to its landowners to manage the arrangement, and that the payments (late and underpaid as they were) by Honeymoon Island did not reach the landowners. This in turn no doubt contributed to the attitude of the landowners in 2007, that they wanted nothing more to do with Honeymoon Island, and embraced the much more generous proposals made by Follies.

60. With regard to Honeymoon Island's own conduct, the only evidence that was presented for it was that of Mr Gock. It seems that the focus of both Follies and ILTB at the time of his evidence was to establish that the 'lease' to Honeymoon Island was a sham, or in some other way void ab initio. The explanation for this may lie in the position taken by ILTB and Follies in 2007, which was that the Honeymoon Island arrangement for the occupation and use of Mociu was 'bogus', there was therefore no need for ILTB to go through a process of terminating that arrangement, and there was no impediment to ILTB immediately entering into an agreement to lease with Follies. Because of this focus, cross-examination of Mr Gock centred around the

circumstances in which the 'lease' agreement came to be signed and stamped, apparently in an attempt to show that this was in some way irregular. Very little attention was paid either in evidence-in-chief or cross-examination to the non-compliance by Honeymoon Island with the terms of the lease agreement, including the non-payment of rent, and its failure to commence a survey of the island (the first step in removing the reserve status of the island so that it could be leased).

61. What seems clear is that Honeymoon Island and its directors wanted to do and pay as little as they could get away while still maintaining Honeymoon Islands 'right' to occupy and use Mociu. The only payments made by Honeymoon Island (out of the payments listed in the offer letter of 6 May 2003 -see paragraph 14 above) were the stamp duty paid directly to the Commissioner of Stamp Duties in 2003, the payment of $12,000 in October 2005 (the timing of which was not explained by Mr Gock), and the payment of a further $24,000 in June 2007 after Mr Gock learned of the discussions under way with Follies. Had Honeymoon Island paid the stamp duty to ILTB (rather than directly to the Commissioner of Stamp Duties), the costs, or the rent in advance on the 1st January and the 1st July ($6,000 plus VAT) each year as required, and had it made arrangements for the survey of the island, and pursued the de-reservation and registration of the lease as determinedly as Follies did after 2007, there was a good chance that ILTB would have become aware of and addressed the failures in its own systems. Furthermore, this should have ensured that the landowners received the rent money they were entitled to, and may have meant that they were less receptive to Follies' overtures in 2007. So while Honeymoon Island's conduct does not excuse ILTB's own failures, it can at least be said that it was very much the author of its own misfortune.

B - Proof of damage suffered by Honeymoon Island

62. On the issue of damages, it seems that only Honeymoon Island is now claiming anything; Mr Witton acknowledged during his evidence that Follies is now seeking only an injunction, and ILTB has provided no evidence of damages incurred by it or the landowners arising from Honeymoon Island's breach of the 'tenancy agreement', and has not claimed payment of rent (how could it, given it was denying there was any tenancy?). In closing submissions counsel for Honeymoon Island argues that because there was little cross-examination of Mr Gock on his evidence of the losses suffered by Honeymoon Island from being stopped from using Mociu Island in its tours, and such cross-examination as there was did not put any alternative scenario to Mr Gock, the court is obliged to accept Honeymoon Island's calculation of (now) over $4m (see paragraph 53 above). I do not accept that this is the law. While it is true that the court must do its best, even in the absence of evidence, to arrive at an assessment of damages in a situation where loss is proven - see the decision of the

Fiji Court of Appeal in **Attorney General of Fiji v Broadbridge** [2005] FJSC 4; (CBV 0005 of 2003S (8 April 2005) in the context of a claim for personal injury:

> *Once the court accepts that the plaintiff has suffered a loss for which the defendant is liable, it will not allow difficulties in assessing the value of the loss to deprive the plaintiff of an award of damages*

that does not mean that the court must uncritically accept claims of loss simply because they are unchallenged. It is still the case that the party claiming the loss has the onus of proving both the fact of, and the extent of damage, on the balance of probabilities. While in a personal injury claim where damage is proved the courts may be willing to make reasonable assumptions, in the absence of evidence, to assess compensation, and while a failure to adduce evidence may lead to certain presumptions against a party who could have done so, those situations don't apply here. A plaintiff seeking damages for economic loss in a commercial claim does not receive the same indulgence. In the present claim, all the information relevant to loss is in the control of Honeymoon Island. It is not entitled to the benefit of any doubt if it fails to produce that evidence. Here there is simply no evidence, other than the bare comparison of figures between August and December 2006 and those in the same months of 2007, to show that the reduction in customer numbers that Honeymoon Island experienced for its island tours was attributable to Mociu Island being dropped from the list of islands visited. For that to be the case requires evidence that a certain proportion of Honeymoon Island's clientele chose not to buy a tour because it did not include Mociu Island, when they would have done so had Mociu Island still been included in the itinerary. That seems unlikely, and is certainly not demonstrated by evidence. Furthermore, even if the loss of numbers was shown to be attributable to the dropping of Mociu Island (as opposed to, say, the 2006 coup, or the 2007 Global Financial Crisis (GFC)), Honeymoon Island's loss does not necessarily equate to the gross ticket price that those tourists would have paid had they booked for the tour. Offset against that loss of revenue must be the costs that Honeymoon Island has not incurred because of those reduced numbers, including the cost of transport, catering, agents' commissions, etc. In other words, Honeymoon Island's loss is not represented by the loss of ticket sales, but by the loss of profit that it would have derived from those sales. There is no evidence of that loss.

63. A further complication for Honeymoon Island's claim for damages is the fact that there are two parties involved, Honeymoon Island (Fiji) Limited, and Oceanic Schooner Company (Fiji) Limited. It is not clear from the evidence how these two entities arranged their affairs inter se. It appears that Oceanic Schooner owned the vessel 'Whales Tale'used for the cruises/tours, , but did Oceanic Cruises run the tours and pay Honeymoon Island for access to the island, or did Honeymoon Island sell the

tours and pay Oceanic Cruises for transport? The evidence does not disclose this, but how these things were arranged makes a significant difference to which party suffered the losses (bearing in mind that Oceanic Schooners did not have any right to use Mociu Island except through Honeymoon Island, and had no contractual relationship with ILTB), and how those losses are calculated.

64. Finally on this issue is the period for which any loss can be claimed. I am not prepared to assume, in the absence of evidence, that Honeymoon Island (again using that expression to apply to both entities) is today, nearly 14 years since it stopped taking tours to the island, still suffering in the same way and at the same level as it did in 2007 from the loss of Mociu Island from its itinerary. Again, I make the point that all the evidence on this issue was in the control of Honeymoon Island, but was not produced in Court. The only evidence of reduction in the number of tourists who paid for the Whale's Tale cruise is that relating to the difference between the months of August to December 2007 compared to the same period the previous year. There is no evidence of what happened in subsequent years, and I am not prepared to guess.

C – Follies entitlement to an injunction

65. With regard to the injunctions sought by Follies and ILTB (paras 41 and 49 above) there is no evidence that Honeymoon Island has at any time since 2007 sought to use Mociu Island for its tours, or indeed is even still in the business of running tours as it did. Honeymoon Island stopped using the island, even after the discharge of the injunction preventing it from doing so, because the hostile reception it received from the landowners and from Follies when it last attempted to do so meant that it could not provide a safe and enjoyable experience for its customers. I have no doubt that that would be the situation still, were Honeymoon Island to attempt to resume its use of the island. The law provides ample remedies for the landowners and others with rights to use the island to deal with trespassers and unwanted visitors without the court making orders that are not justified on the evidence.

D – Knowledge of Follies of Honeymoon Islands lease.

66. The final aspect of evidence that I need to comment on is the knowledge and involvement of Follies in the decisions made and actions taken by ILTB in relation to Honeymoon Island and its access to and use of Mociu Island. On this issue the court has no evidence apart from what is apparent from the documentary evidence that has been produced. In particular those in control of Follies in 2007, Mr John Heeley and his wife Lenora, did not give evidence. Nor was there any evidence from ILTB about its dealings with the Heeleys, apart from what is documented. The evidence shows that from late 2006 Follies was active in pursuing an arrangement for the use of Mociu Island. This activity involved consultations with the landowners, the

mataqali Ketenemasi and at least preliminary agreement by December 2006 about the terms (including the terms of payment) on which Follies would have access. The evidence suggests that Follies and ILTB (at least those people in ILTB dealing with Follies and the mataqali) only became aware of Honeymoon Island's lease in March 2007. Although this is somewhat surprising, bearing in mind Ratu Jeremaia's involvement as a director and possibly shareholder of Honeymoon Island, and the fact that Mr Bolatagane (who had been involved in 2003) was still employed by ILTB, I have already canvassed the systemic failures at ILTB that meant it did not have a copy of the lease, and it seems that Mr Bolatagane was no longer in the West, and may not have become aware of what was happening until it was reasonably advanced. Furthermore, Honeymoon Island's own failings (including its failure to pay rent) may have meant that there was no-one in the mataqali who realised – if they ever knew - that the Honeymoon Island lease was still in existence.

67. Once they did become aware of the Honeymoon Island lease it is clear that ILTB kept the Heeleys well informed about what it was doing, and the position it was taking. For example by mid-April 2007 Follies had taken part in discussions between ILTB and the mataqali about what is referred to as Honeymoon Island's 'Bogus' lease (see paragraph 24(iii) above). This close liaison continued right through to the meeting in March 2009 between Follies, ILTB and the mataqali which included discussion about the registration of Follies lease. Although it is not clear whether Follies had seen a copy of the internal ILTB opinion about the status of the Honeymoon Island lease, it does seem apparent that Follies knew that ILTB regarded the lease as ineffective or void.

68. By July 2009 when Follies' lease was registered both Follies and ILTB knew much more about Honeymoon Island's claimed interest than they probably knew in March/April 2007. By that time the current court actions had been commenced, and both Follies and Honeymoon Island had sought injunctions against the other, in which (in the case of Honeymoon Island's claim) the history of Honeymoon Island's involvement with Mociu Island, and how its lease came into existence, would have been set out in affidavits and discussed in submissions before the High Court and the Court of Appeal. From the minutes of the meeting that took place in March 2009 (see paragraph 35 above) it is also clear that Follies was pressing for registration of the lease, and knew that registration would better secure Follies' position vis a vis Honeymoon Island. In the minutes this is referred to in the context of Follies securing further investment, but it is implicit that registration is desirable because it will give Follies greater security (it is reported in the minutes that Follies' banker requires the lease to be registered before it will lend on any proposed development on the island), and the only party that was challenging the security of its position was Honeymoon Island. Follies also knew that ILTB had taken the position that

registration of the lease should await the outcome of the court proceedings (see paragraph 34 above), and Follies was pressing ILTB to abandon this position and agree to registration. The only reason for this can have been Follies' awareness that registration would improve Follies' position against Honeymoon Island, and would likely frustrate any attempt by Honeymoon Island to challenge Follies' lease.

The Law

69. Since Fiji was first ceded to the Queen of England in 1879 the government has sought to establish and maintain extraordinary measures to protect indigenous land from alienation. The ITaukei Land Trust Act 1940 is the vehicle by which this protection is mainly implemented. The Act (section 3) establishes the ITaukei Land Trust Board (the Board), and its provisions include:

> *3(6) The Board shall be a body corporate with perpetual succession and a common seal and may, in such name, sue and be sued, borrow money and enter into contracts, and may acquire, purchase, take, hold and enjoy real and personal property of every description and may convey, assign, surrender and yield up, charge, mortgage, transfer or otherwise dispose of or deal with or in real or personal property vested in the Board on such terms as the Board thinks fit.*
>
> *4(1) The control of all iTaukei land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the iTaukei owners or for the benefit of the iTaukei.*
>
> *7 Subject to the provisions of the State Acquisition of Lands Act 1940, the Forest Act 1992, the Petroleum (Exploration and Exploitation) Act 1978 and the Mining Act 1965, no iTaukei land shall be sold, leased or otherwise disposed of and no licence in respect of iTaukei land shall be granted save under and in accordance with the provisions of this Act.*
>
> *8(1) Subject to the provisions of section 9, it shall be lawful for the Board to grant leases or licences of portions of iTaukei land not included in an iTaukei reserve for such purpose and subject to such terms and conditions as to renewals or otherwise as may be prescribed.*
>
> *(2) Any lease of or licence in respect of land under the provisions of this Act shall be made out from and in the name of the Board and such lease or licence shall be executed under the seal of the Board.*
>
> *10(1) All leases of iTaukei land shall be in such form and subject to such conditions and covenants as may be prescribed, ...*

70. Regulation 5 of the iTaukei Land Trust (Leases and Licences) Regulations 1984 directs that all leases are to be in the form prescribed in Schedule 2 of the Regulations. There is no prescribed form for Agreements to lease or licences, however Regulation 12 states:

(1) Where the Board has approved that grant of a lease of iTaukei land to any person subject to this regulation, the Board shall cause to be served on that person for execution by him or her an agreement for the lease of that land in duplicate, together with a notice in writing stating that the Board has approved the grant of the lease subject to this regulation and requiring that person, before the date specified in the notice in that behalf:-

(a) To execute both copies of the agreement and to return one copy thereof to the Board, duly executed; and

(b) To pay to the Board all monies due and payable by that person on or before that date under and in respect of the agreement, whether by way of premium, rent, fees, stamp duty or otherwise.

(2) No tenancy of iTaukei land shall be taken to subsist by virtue of any notice served in pursuance of subregulation (1) unless and until all the requirements of the notice as are mentioned in paragraphs (a) and (b) of that subregulation have been complied with, notwithstanding that any person has entered into possession of that land, with or without the consent of the Board, and notwithstanding that any rent shall have been received by the Board in respect of that land.

(3) An agreement for a lease of iTaukei land served on any person in pursuance of subregulation (1) shall set out in full the terms, conditions and covenants subject to which the land is to be demised and shall contain –

(a) A description of the land, whether by reference to a plan or otherwise

(b) A condition to the effect that if the person shall not, within 3 months of being required to do so by notice in writing served on him or her by the Board –

i. Engage the services of a surveyor registered under the Surveyors Act 1969 to carry out a survey of that land and to prepare a survey plan in accordance with the regulations made under that Act; and

ii. Produce to the Board evidence satisfactory to the Board that the services of such surveyor have been so engaged by him or her;

the agreement shall cease to have effect.

71. Where a lease has been registered under the Land Transfer Act 1971 that Act applies to the lease (to the extent that it is not inconsistent with the iTaukei Land Trust Act). In particular section 39 of the Act provides:

Estate of registered proprietor paramount, and his or her title guaranteed

(1) Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the State or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall , except in the case of fraud, hold the same ... absolutely free from all other encumbrances whatsoever ...

'Proprietor' means '*the registered proprietor of land, or of any estate or interest therein*', hence in the absence of fraud, the lessee of a registered lease has an indefeasible title to that interest, subject only to the continued existence and terms of its lease.

72 The concept of indefeasibility was explained by the Privy Council in **Frazer v Walker** [1967] 1 All ER 649 (referring to the New Zealand Land Transfer Act 1952) in the following terms:

> *It is these sections which, together with those next referred to, confer on the registered proprietor what has come to be called "indefeasibility of title". The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration.*

73. While registration is a pre-requisite for a legal lease, that does not mean that only registered leases are enforceable. The iTaukei Land Trust Act itself (see paragraph 68 above) recognises the need to often, if not invariably, have an agreement to lease precede the preparation and signing of a registerable lease. This may arise because there are conditions to be satisfied before the formal lease can be signed. Exactly this situation arose with the agreement to lease between ILTB and Follies, which was subject to conditions requiring a survey to be carried out, and the reservation status of the island to be removed. The Privy Council in **Chandrika Prasad v Gulzara Singh** on appeal from Fiji (Privy Council Appeal No. 10 of 1979) had this to say on the distinction between a lease and an agreement to lease:

> *On 16th October 1967 NLTB granted provisional approval (under file No. 4/9/1135) of an application by the appellant to lease a piece of agricultural land ("the land" of some 11 acres for 30 years from 1st July 1965. This was not the grant of a lease in law. This it could not be until registration of a lease: it was an agreement to grant a lease conditional upon certain payments and the land required survey before a registrable lease could be granted. It was the view of the courts below that this constituted an equitable lease in favour of the appellant, and their Lordships accept that view.*

This distinction has been part of the law of Fiji for at least as long as the current iTaukei Land Trust Act has been in force, and probably before. It is recognised in the Property Law Act 1971, which in section 2 defines 'lease' as including a sublease and agreement for a lease. It is a necessary distinction to allow arrangements that are not yet 'leases' to be entered into and enforced. Without this distinction being recognised arrangements for the use and occupation of land in Fiji would be cumbersome, and impracticable, to the detriment of both landowners and lessees, and commerce generally. Recognising this distinction does not threaten the primary objective of the iTaukei Land regime, which – as stated by Sir Robin Cooke in the Privy Council in **Maharaj v Jai Chand** [1986] 3 All ER 107 at p.110b is:

> *... directed against alienating or dealing with "**the land**" without the consent of the board. Manifestly the section is intended to ensure that the board's power of control and the*

beneficial interests of the Fijian owners are not to be prejudiced by unauthorised transactions.

74 However, an equitable lease is enforceable only where, and to the extent that, a court will order it to be specifically enforced, and is therefore subject to all the principles that might affect that outcome. Included in those principles is the issue of whether, on forfeiture of the lease following default by the lessee, a court would grant relief against forfeiture, allowing the lease to continue in effect. If a court would not do so, the agreement to lease is for all practical purposes, unenforceable as a lease (i.e. conferring an interest in land), although it might still retain some validity, and therefore value, as a mere contract conferring a right to damages for breach.

75. The protections and implied covenants in the Property Law Act 1971 apply to both leases and agreements to lease. Section 105 provides:

> *(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition, express or implied, in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice:*
>
> *(a) specifying the particular breach complained of; and*
>
> *(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and*
>
> *(c) In any case, requiring the lessee to make compensation in money for the breach,*
>
> *and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.*
>
> *(2) Where a lessor is proceeding, by action or otherwise, to enforce a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself or herself, apply to the court for relief and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all other circumstances, thinks fit and in case of relief may grant it on such term, if any, as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in future, as the court, in the circumstances of each case, thinks fit.*
>
> *(09) This section shall not, save as otherwise mentioned, affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.*
>
> *(10) This section shall have effect notwithstanding any stipulation to the contrary.*

76 Halsbury's Laws of England (5th ed., 2014) Vol 47 Equitable Jurisdiction (at para 223) lists the three conditions that must be satisfied for there to be jurisdiction to grant relief:

- The primary object of the provision under which the lessor seeks to terminate/forfeit the lease must be to secure a stated result
- That result must be one that can still effectively be attained when the matter comes before the Court
- It must be possible to say of the forfeiture provision that it was added by way of security for the production of that result.

The High Court of New Zealand in **Greenshell New Zealand Ltd (in Receivership) v Tikapa Moana Enterprises Limited** [2014] NZHC 1474 (Cooper J) declined an application for equitable (as opposed to statutory – under the Property Law Act 2007, which confers broader powers on the Court to allow relief) relief against forfeiture where the lessor's right to forfeit the lease had arisen because the lessee went into receivership. In those circumstances the Court was satisfied that granting relief against forfeiture would not effectively put the lessor in the same situation it would have been in had the receivership not occurred. In other words, granting relief would not secure the outcome for the lessor that the original provision (conferring the right to cancel on the insolvency of the lessee) was intended to secure.

76 In **New Zealand Mint Limited v Greys Avenue Investment Limited** [2015] NZHC 2051 the court accepted the following as a list of the criteria that should be applied in deciding an application for relief where the tenant had made changes to the premises without first obtaining the lessor's consent (it should be noted that insofar as this passage from the judgment refers to forfeiture for non-payment of rent, it reflects provisions under the New Zealand Property Law Act 2007 that are different from the provisions of the Fiji Act – where forfeiture and relief in cases of non-payment of rent is still governed by the common law, as reflected by s105(9) of the Act - but in general the approach is still valid):

i. *The Court exercises a broad discretion. There has been a reluctance in the authorities to place any restrictions on the factors it may consider. See* ***Hyman v Rose*** *[1912] 2 KB 234 (at pp 241-2)*

ii. *The leading decisions in New Zealand are* ***McIvor v Donald*** *[1984] 2 NZLR 487 (CA) and* ***Studio X Ltd v Mobil Oil New Zealand Ltd*** *[1996] 2 NZLR 697*

iii. *As part of the application for relief, the Court is entitled to determine whether there has, in fact, been a breach of the lease. If there has been no breach, relief will be granted because the lessor is not entitled to cancel;*

iv. *However, the Court does not have to determine whether the lessee is in breach, before it can grant relief. This arises because of the provisions of s255 Property Law Act 2007 (NZ).*

v. *Where the breach has been remedied, or is capable of being remedied, then the Court will as, already indicated, invariably grant relief. If the breach has not been remedied by the time of the hearing, the Court may choose to require it to be remedied as a term of the relief granted. See* ***McIvor v Donald*** *(see above).*

vi. *The requirement to remedy the breach does not have to be immediate, or indeed close in time to the ordering of the relief. For example, in the leading authority of* ***McIvor v Donald****, the Court endorsed the development of a program for remediation, which would have seen the breach remedied by the end of the lease.*

vii. *Alterations to premises are a breach that is capable of remedy. The English Court of Appeal in* ***Savva v Houssein*** *[1996] 2 EGLR 65 (at p66) stated the principle as follows:*

> *When something has been done without consent, it is not possible to restore the matter wholly to the situation which it was in before the breach. The moving finger writes and cannot be recalled. That is not to my mind what is meant by a remedy, it is a remedy if the mischief caused by the breach can be removed. In the case of a covenant not to make alterations without consent or not to display signs without consent, if there is a breach of that, the mischief can be removed by removing the signs or restoring the property to the state it was in before the alterations.*

viii. *The conduct of the parties is a relevant consideration:* ***Hyman v Rose****.*

ix. *The ultimate inquiry is one of proportionality, and whether the breach committed requires the response of cancellation. The approach was summarised by Williams J in* ***Pike River Coal Ltd (in rec) v O'Malley Farming Ltd*** *in the following terms:*

> *A distinction has been historically drawn in relief cases between rent and non-rent covenants. The Courts have been ready to grant relief to a lessee in default of a rent covenant where the arrears is [sic] paid up fully, including any costs, by the time the matter comes to Court, as long as the lessee is not hopelessly insolvent. ... In non-rent cases the Courts have traditionally taken a broad approach in which the essential justice of the case is transparently assessed in a proportionality exercise. The question asked is whether in all the circumstances, determination of the Lease is a proportionate response to the lessee's breach.*

The underlining is mine.

77 Fraud for the purposes of negating indefeasibility under the Land Transfer Act means something more than mere knowledge of an adverse interest. It means dishonesty of some sort by the registered proprietor or his agent (i.e. the person whose title is challenged). In this case this means Follies, whose right to indefeasibility of its interest as lessee is impugned. What *dishonesty* might mean in practice has been considered by the Fiji Court of Appeal in a number of cases, in which the court has consistently followed decisions of the Privy Council on appeal from New Zealand in decisions such as **Assets Company Limited v Mere Roihi and Ors** [1905] A.C. 176 and **Waimiha Sawmilling Company Limited v Waione Timber Company Limited** [1926] AC 101.

78 In **Steiner v Steiner** [2017] FJCA 102 under the heading *The Degree and Nature of fraud required to be proved to impeach registered title* the Court of Appeal said:

*The Privy Council in **Assets Company Limited v Mere Roihi and Others** [1905] A.C.176 cited with approval **Fels v Knowles** (supra) in regard to the degree of fraud required to impeach registered title obtained bone fide. In that case, the provisions of the Land Transfer Acts of 1870 and 1885, of New Zealand, which are similar to the Land Transfer Act of Fiji, were considered. In respect of the allegation of fraud for the purposes of impeaching registered title, Lord Lindley delivering judgement, held as follows: -*

> *....the fraud which must be proved in order to invalidate title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Lands Act, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out if he had been more vigilant and had he made further inquiries which he omitted to make, does not of itself, prove fraud on his part...*
>
> *Thus, if the designed object of transfer is to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered, and thus fraudulently keeping the register clear. It is not however necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances. The act must be dishonest and the dishonesty must not be assumed solely by reason of knowledge of an unregistered interest.*

79 In **Prasad v Wati** [2001] 1 FLR 430 the Fiji Court had this to say (at 436-7):

*... Perhaps the best-known statement of what will, and what will not amount to fraud is to be found in the judgment of Salmond J., a member of the New Zealand Court of Appeal, which determined the case of **Waimiha Sawmilling Co. Ltd. v Waione Timber Co. Ltd.** [1923] NZLR 1137. In the course of his judgment Salmond J. said (at 1174-5):*

> *Where a purchaser actually knows for certain of the existence of an adverse right which will be destroyed by his purchase he is, as already indicated, guilty of fraud. Where, on the contrary, he has no knowledge that such a right exists or is even claimed he is a purchaser in good faith. In between these two extremes there lie those intermediate cases in which, although there is no certain knowledge of the existence of an adverse right, there is knowledge of a claim and of the possibility of that claim being well founded. The purchaser does not actually know that the right exists, but he knows that it may exist, or fears or suspects that it exists, or doubts whether it exists or not. If in such circumstances and in such a state of mind he acquires the property intending to hold it for an unencumbered title and to destroy the right in question if it does exist, is the case one of fraud or one of bona fides within the meaning of the Act? An extreme view, which cannot be supported, would place all cases of this kind within the sphere of fraud. According to this view, knowledge of the existence of an adverse claim, coupled with an intent to defeat*

that claim by a purchase of the property, is always inconsistent with good faith, even though the claim is not known or believed to be well founded. This view, however, is not in conformity either with the spirit and purpose of the Land Transfer Act or with any reasonable standard of good faith and honest dealing. One of the main objects of the Land Transfer Act is to facilitate the alienation of land by eliminating the encumbering influence of unregistered interests, and by relieving purchasers from the necessity of inquiring into the existence and validity of adverse equitable claims and interests. Moreover, a proper standard of honesty and good faith regards the interests of the owner no less than those of the adverse claimants. An owner of land is not necessarily bound to abstain from alienating his property because of the existence of some adverse claim which he does not know or believe to be well founded, and because he knows that the effect of such alienation under the Land Transfer Act will be to destroy that claim. Nor is a purchaser necessarily bound to abstain from acquiring the property for the same reason. Good faith requires that due consideration be given to the conflicting interests both of the owner and of the claimant in such a case, and not that exclusive consideration be given to the interests of one of them only. Knowledge, therefore, that an adverse claim exists, that it may possibly be well founded, and that it will be destroyed by an alienation of the property, is not in itself sufficient to stamp the transaction as fraudulent within the meaning of the Land Transfer Act."

79. Salmond J's words from **Waimiha** were also echoed by Kitto J. of the Australian High Court in **Mills v Stockman** [1967] HCA 15 where he said (at p78) that merely to take a transfer with notice or even knowledge that its registration will defeat an existing unregistered interest is not fraud. On the other hand Kitto J also said, in ***Latec Investments Ltd. V. Hotel Terrigal Pty. Ltd.*** (1965) 113 C.L.R. 265 at 273:

> *...we were invited to hold that nothing is fraud in the sense which is relevant under the Real Property Act unless it includes a fraudulent misrepresentation. The whole course of authority on this branch of the law is to the contrary. Moral turpitude there must be; but a designed cheating of a registered proprietor out of his rights by means of a collusive and colourable sale by a mortgagee company to a subsidiary is as clearly a fraud, as clearly a defrauding of the mortgagor, as a cheating by any other means;*

80. When applying these principles it is useful to look at the facts of the cases where fraud has been found to exist, and those where it has not. In its decision in **Sharma v Singh** [2004] FJCA 12 a court consisting of Justices of Appeal Sheppard, Gallen and Ellis upheld the High Court finding of fraud (where a son had acquired title from his father) in the following terms:

> *We think it was open to the Judge to conclude that in the light of quite unsatisfactory and contradictory explanations being given for the transfer, co-incidental with the transfer taking place at a time when proceedings were contemplated by the parties, that the transfer was no more than a sham designed to deprive the second respondent of any possibility of retaining the land, which he then occupied and a sham to which Dinesh Chandra Sharma was party since it was from him that the contradictory explanations were put forward.*

81. In **Prasad v Wati** (see above) another very experienced bench of the Court of Appeal upheld the High Court decision that no fraud was involved when the only fact relied on by the party challenging the registered proprietors' title was the proprietors' knowledge of the claimant's occupation and cultivation of part of the land. It was not alleged that the proprietors knew of the basis for the defendant's claim to an interest in the land. Quoting the decision of the High Court of Australia in **Bahr v Nicolay (No. 2)** (1988) 164 CLR 604 the court referred to the need to find *actual fraud, personal dishonesty or moral turpitude.* Mere knowledge was not sufficient foundation for a challenge to the title of a registered proprietor.

82 In **Steiner** it was alleged that the current registered proprietor had falsely claimed to have witnessed his grandfather's will made 45 years previously, and that the will was therefore invalid. The Court of Appeal was satisfied on the evidence (overruling the decision of the High Court) that the will had been properly signed and witnessed, and there was therefore no element of fraud or dishonesty involved in the registered proprietor's acquisition of title. The decision is significant in so far as it provides an example (in that case the false witnessing of a will) of what might, if it had been proven, have amounted to fraud, dishonesty or moral turpitude.

Analysis – Honeymoon Island lease

83 Applying the law to the facts, my findings on this issue are as follows:

(a) The lease document entered into between ILTB and Honeymoon Island on 9 May 2003 was, at the time it was executed a valid and enforceable agreement to lease. Although ILTB and Follies devoted time and energy at the trial and in submissions to their argument that the lease proposal contained in the letter of 6 May 2003 (paragraph 14 above) had not been accepted and had expired, that argument is simply not sustainable in light of the signing of the lease document by the parties on 9 May. Nor am I persuaded that the fact that ILTB apparently did not have a copy of the lease agreement means that the agreement was void or invalid from its inception, or was in some way unauthorised. The lease document has been produced in evidence, and no-one has suggested that it has not been properly signed by ILTB as an agreement to lease. Although there is a suggestion that the affixing of the common seal of Honeymoon Island was defective at the time it was signed (witnessed by only one director rather than two), that only means that the document may not be a deed. But whether or not it is a deed, it is nevertheless a written contract that records the terms of the parties' agreement (section 36(1)(a) Companies Act (Cap 247) and ss 53 & 54 Companies Act 2015 regarding assumptions anyone dealing with a company is entitled to make, and prohibiting a company from contesting those

assumptions). It is immaterial to the enforceability of the document as an agreement to lease that it was labelled a 'lease' and had in some respects (although not all) the appearance of a lease that was intended to be registered. It was not registered, and so was not a registered lease, but that does not mean that it was unenforceable as an agreement to lease. Had there been evidence of confusion, uncertainty or ambiguity in the interpretation of the document because of its appearance or description as a lease, it would have been necessary for the court to rule on the significance of those factors to its meaning. But that is not the situation here; no-one has claimed to be confused about what the document says or means.

(b) Having signed the lease document on 9 May 2003 ILTB must be taken to have waived the performance of those aspects of the letter of 6 May that it specified needed to be completed/paid before the agreement to lease would be granted. The offer that would have lapsed if not accepted, and payment made within 6 weeks, was subsumed by acceptance and the signing of the lease document. By doing so without insisting on payment, ILTB waived any rights to withdraw the offer that it otherwise may have had for non-payment (ILTB was still entitled to require payment of costs etc., it was simply the lapsing of the offer that was no longer arguable).

(c) Once the lease agreement was entered into, the parties were entitled to the rights, and subject to the obligations set out in the agreement. ILTB was entitled to insist on performance by Honeymoon Island of its obligations under the agreement, including the obligation to pay rent, and to commence the process of surveying the island. If those obligations were not performed by Honeymoon Island, the remedies available to ILTB were those provided for in the agreement, and by the law (including the Property Law Act 1971), including termination following notice of default. The fact that ILTB apparently lost its copy of the agreement, and failed to enter the arrangement into its internal records or management programme, does not mean that the document is invalid.

(d) The position taken by ILTB in its internal legal opinion, and its letters to Honeymoon Island's solicitors (see paragraphs 28 and 30 above) are completely untenable. It is, with respect to those involved, unsustainable to argue that the agreement to lease was void and *there was no legal relationship between ILTB and Honeymoon Island* because of any of the factors listed in the opinion and letter.

(e) Because of the misconceived position that it took as to the validity of the agreement to lease, ILTB failed to take any of the steps that it may have been

entitled to take to terminate the agreement with Honeymoon Island. Both in terms of section 105 Property Law Act (see paragraph 75 above) and of the lease document itself (see the proviso to clause 4 provided as follows:

> *Notwithstanding the above if any action open to the lessor against the lessee by virtue of this agreement or any law or act is taken, the lessor will firstly give notice to the lessee in writing setting out the details of the breach or non-performance and will give the lessee reasonable notice to erect (sic – probably should be 'correct') such breach or non-performance, and such notice shall not be less than 21 days.)*

Honeymoon Island was entitled to be given at least 21 days notice of default before the agreement could be terminated for breach. Without the express contractual agreement to provide notice (as per clause 4 quoted above), s105(9) Property Law Act 1971 would have meant that notice was not necessary before re-entry where ILTB was relying only on non-payment of rent. Under the common law, notice of default is not required in that situation. But in the contract/agreement itself ILTB had agreed, notwithstanding s105(9), that it would first give notice of any default before exercising its right of forfeiture, and Honeymoon Island was therefore contractually entitled to that notice, even if the Act did not require it. That notice – as clause 4 states - would need to specify the breaches complained of, and require Honeymoon Island to remedy those breaches (if they were capable of remedy), and/or pay compensation within not less than 28 days. Because of ILTB's regrettable position that the agreement was void, no such notice was issued, and Honeymoon Island was not given the opportunity to rectify its defaults. Given that the requirement for notice is expressly set out in the agreement and in the Property Law Act, the wording of clause B(1) of the lease agreement (see para 16 above) must be taken to be subject to the giving of notice, and does not mean that the agreement automatically terminated on the expiry of 6 months when no survey was obtained (that this is the case is apparent from the position taken by ILTB in relation to the agreement to lease with Mociu Island Limited in 1999. Although that agreement also provided for avoidance after 6 months if no survey was done, ILTB nevertheless required that agreement to be surrendered by Mociu Island Limited in 2003 before ILTB entered into the new agreement to lease with Honeymoon Island – see terms of letter dated 17 February 2003 referred to in paragraph 13 above).

(f) The evidence suggests that at least in terms of the payment of rent and costs, Honeymoon Island would have been able to rectify the default, had it received notice. In June 2007 Honeymoon Island made a payment of $24,000 to ILTB, supposedly in payment of rent arrears. Probably this was insufficient

to bring rent up to date ($12,000 per year plus VAT from 1 January 2003), but the fact that it was paid, coupled with the steps taken by Honeymoon Island to preserve its position (e.g. issue of the court proceedings in August 2007) indicates that Honeymoon Island was in a position to, and would have paid the full amount specified in any default notice, and so would have rectified any default based on non-payment of rent. In that event Honeymoon Island would have been entitled to relief against any attempt at forfeiture of the lease on that basis (the right to forfeiture for non-payment of rent is merely security for payment, and on payment of arrears in full the lessee is normally entitled to relief).

(g) Whether Honeymoon Island could so easily have satisfied a default based on failure to obtain a survey is a more difficult issue. At one level it would have been easy enough for Honeymoon Island to arrange, in response to a default notice issued in 2007, for the survey of the island as the first step in the de-reservation process. But bearing in mind that the survey was supposed to be arranged within 6 months of the commencement of the lease, and that any lease of the land while it was still a reserve was prohibited, it was open to ILTB and the landowners to argue that starting the survey process in July 2007 would not put them in the same position as they would have been had the process been commenced promptly. Unlike a delay in payment of money, the delays in obtaining the survey could not be retrieved, and ILTB could not – in 2007 – be put back into the same position as it was in 2003. I think that in any contest about whether Honeymoon Island should be given relief against forfeiture a court, looking at all the circumstances, including the substantially better financial package offered by Follies to the mataqali and the complaints raised by the mataqali about Honeymoon Island's conduct (see the letter referred to in paragraph 23 above), would have decided that Honeymoon Island was not entitled to relief from its apparently cynical defaults. It would have been hard for Honeymoon Island to argue that it was seeking the Court's intervention with 'clean hands'.

(h) However, because ILTB took no steps to terminate it, the Honeymoon Island lease was still in existence when ILTB signed the Follies lease in June 2007. Accordingly, ILTB was in breach of its obligations under the Honeymoon Island lease when it agreed to lease Mociu Island to Follies, and its letter of 6 June 2007 to Honeymoon Island (paragraphs 28 and 29 above) was a repudiation of that agreement, which was not accepted by Honeymoon Island. Hence, the point about whether relief would have been granted (assuming that the failure to obtain a survey was an issue relied on in any hypothetical default notice) is relevant only to the assessment of damages.

Analysis – Follies lease

84. What then about Follies lease? Unless there is a finding of fraud against Follies, the fact that its lease is registered means that that its lease of Mociu Island cannot now be challenged. I am satisfied, by a fine margin, that Follies' knowledge of and support for the ILTB's position vis a vis the Honeymoon Island lease does not amount to fraud.

85. In coming to this conclusion I have taken into account the fact that from late 2006 when Follies first agreed with the landowners on the terms upon which it could have access to and use Mociu Island, until July 2009 when the lease was registered, Follies was in close contact with ILTB, and seemingly was well aware of ILTB's stance on the status of the Honeymoon Island lease. More than this, Follies participated in meetings with ILTB and the landowners where the lease to Honeymoon Island was discussed, pressed ILTB to advance the registration of the Follies lease, and it seems recruited the mataqali to support it in that request, on the basis that until that happened, the proposed development of a resort on the island (a development which has not in fact progressed, and arguably was never practicable, but which – if it did proceed – promised the landowners greater returns) could not proceed until the lease was registered.

86. Follie's conduct certainly exploits to the full its commercial advantage and knowledge, and its relationship with ILTB and the mataqali (Follies had after all paid a considerable sum to secure the rights it sought), but the issue here is whether its conduct amounts to *actual fraud, personal dishonesty or moral turpitude* such that Follies is not entitled to the protection that registration would normally confer. In coming to the conclusion that Follies was not fraudulent, dishonest or wicked in obtaining its registered interest under the lease, I have taken into account the words of Salmond J in the **Waimiha** case quoted above in paragraph 79. Follies had played no part in creating the situation whereby the Honeymoon Island lease had come into question. There was no evidence of misconduct on its part, and while it took full advantage of what I have found is the wrong decision of ILTB about the status of the Honeymoon Island lease, there is no evidence that it had any input into that decision, in the sense that it knowingly encouraged ILTB in its error, or that it knew that ILTB's position was untenable. While it is clear that Follies came to know that ILTB took the view that Honeymoon Island had no lease, the evidence does not show that Follies knew the basis upon which ILTB had reached that view (there is no evidence showing conclusively that Follies was given a copy of the ILTB internal opinion), or suspected that the view was unsustainable. The closest that Follies came – on the evidence presented - to influencing ILTB in reaching this conclusion is

perhaps its description of the Honeymoon Island lease as 'bogus' in the email from Leona Heeley to ILTB dated 18 April 2007 (see paragraph 24(iii) above). But by this time ILTB already had its in-house opinion of 10 April that the 'lease' held by Honeymoon Island was invalid, and the email referred to may merely have been reflecting the language used by ILTB, as opposed to influencing ILTB in reaching that conclusion.

87. In all the circumstances, for Follies to refuse to accept registration of the lease it was being offered would, to apply the words of Salmond J from the following passage from **Waimiha**:

> *Good faith requires that due consideration be given to the conflicting interests both of the owner and of the claimant in such a case, and not that exclusive consideration be given to the interests of one of them only. Knowledge, therefore, that an adverse claim exists, that it may possibly be well founded, and that it will be destroyed by an alienation of the property, is not in itself sufficient to stamp the transaction as fraudulent ...*

have amounted to giving more weight to the interests of Honeymoon Island than to those of ILTB and the landowners, and to its own situation. Furthermore, Honeymoon Island always had the option of registering a caveat to prevent registration, which it eventually did. The fact that it did so too late to prevent registration of the lease was not Follies' fault, nor did it arise from any trick, deception or misconduct on the part of Follies directed either towards ILTB or to Honeymoon Island. Although there is no evidence that this was its analysis, Follies would have been entitled to take the view that if Honeymoon Island really believed in the validity of its lease it would have registered a caveat, and the fact that it had not done so meant that there was no impediment to registration of the lease. The whole point of the Torrens system of title by registration is to provide to those dealing with the registered proprietor the assurance that, in the absence of fraud, they will get good title, in this case a valid lease. The benefits of this assurance in terms of money saved, and avoidance of wasted time and commercial uncertainty involved in investigating title, and litigating over disputed interests, are immense. Those benefits would be lost and uncertainty reintroduced into the land title system if the courts were to insist on such high standards of commercial and personal behaviour that mere knowledge of an adverse interest is equated with fraud.

88. As I have said, I have reached this conclusion by a fine margin. Follies was entitled to approach the mataqali and ILTB in the first instance to explore the possibility of getting access to Mociu Island, and – even if at that early stage it knew of Honeymoon Island's activities at the island – there was nothing dishonest or unfair about looking into what was possible. But thereafter, Follies' obvious knowledge of and close involvement in the whole process was such that if there was any evidence

of Follies' having input into the ILTB's misconceived decision about the validity of its agreement with Honeymoon Island, or of any influence by Follies in the dissatisfaction of ILTB and the mataqali with the arrangements that Honeymoon Island had with regard to the island, my decision would likely have been different. It is perhaps fortunate for Follies that those who were involved on its behalf in the events of 2007-2009 were apparently not available to give evidence, and so were not cross-examined on the extent of their knowledge and involvement.

89. But had I concluded that Follies registered lease was impeachable for fraud, and so came to consider which of Honeymoon Island's and Follies' leases should take priority, I would still have decided – as indicated previously (see paragraph 83(g) & (h)) - that Follies lease of June 2007 should be given effect in priority to Honeymoon Island's 2003 lease.

90. I have given some thought to whether this issue should be referred for further hearing, since the focus of the court proceedings up to now has not been the relative precedence each lease agreement should be given by a court in equity. However taking into account the passage of time, and the death or unavailability of witnesses whose evidence on the issues (persistent default by Honeymoon Island, and knowledge by Follies) would be crucial, there is no point in prolonging the proceedings for this purpose.

91. While obviously the Honeymoon Island's lease was first in time, and would therefore normally – all other things being equal - be given precedence in equity over the later lease to Follies, in the present case the Honeymoon Island defaults were such, and of such a character, that I would not have been prepared to order relief against forfeiture and specific performance of the Honeymoon Island lease, particularly against the wishes of the landowners. The object of the iTaukei Land Trust Act 1940 is for the ILTB to administer and preserve the iTaukei land for the benefit of its iTaukei owners. Given the circumstances in which the Honeymoon Island lease was issued in 2003 without the views of the mataqali Ketenemasi being canvassed (the landowners had supported the lease to Mociu Island Ltd in 1999 in preference to Honeymoon Island and were not given a second chance to vote on the issue), Honeymoon Island's subsequent behaviour, and the opposition of the mataqali to Honeymoon Island's claims in 2007, I would not be exercising the Court's jurisdiction in equity to make orders reinstating or enforcing the Honeymoon Island's lease. Equity requires a party seeking the court's intervention come with 'clean hands'. Disregarding entirely ILTB's prudish objection to Mr Gock and his partners' lifestyle, Honeymoon Island's hands were far from clean. In reaching this view I have not taken into account the argument that an order for specific performance could not be made in favour of Honeymoon Island because the island was still a reserve, and

needed to be 'de-reserved' before it could be let. But this objection was true also of the agreement to lease to Follies, and Follies has not conceded that its agreement to lease was also unenforceable. Furthermore, the de-reservation of Mociu has now taken effect, and – regardless of how it was achieved – that issue is no longer an impediment to granting specific performance, should the court otherwise decide to do so.

92. It follows from these findings that Honeymoon Island's counterclaim (in HBC 225/2007) seeking against Follies (see paragraph 44 above):

i. an order declaring the Honeymoon Island lease still valid and enforceable, and that it confers rights in respect of Mociu Island that are superior to those held by Follies under its registered lease,
ii. an order cancelling or transferring to Honeymoon Island the Follies registered lease
iii. an injunction restraining Follies from remaining on or approaching Mociu Island or interfering with Honeymoon Island's use of the island

cannot succeed. Follies has a registered lease of the island, and its title and right to use the island cannot be impeached for the reasons discussed. For much the same reasons (i.e. lack of fraud on the part of Follies) the claim by Honeymoon Island against Follies for damages for conspiracy, inducement of breach of contract etc. also fails. There is no evidence of conspiracy on the part of Follies and ILTB to harm Honeymoon Island; the belief of the parties, misconceived though it was, was that Honeymoon Island had no rights in respect of Mociu Island, so there was no interest to harm, and no contract to breach. Awareness of the true rights of the Honeymoon Island, and a common intention to harm or interfere with those rights are essential elements of the torts alleged against Follies in Honeymoon Island's counterclaim. That awareness and common intention has not been proved against Follies in this case; Follies' objective was to benefit itself, not to harm Honeymoon Island

93. A further difficulty for Honeymoon Island in its claim for damages against Follies is the issue of proof of loss. For the reasons discussed in paragraphs 62-64 above I am not satisfied that Honeymoon Island has sufficiently proved what losses it has suffered as a result of any tort committed by Follies. In the absence of evidence showing that this was the reason for the reduction in visitor numbers, I regard it as unlikely that many (if any) customers of Honeymoon Island's five-island, one day cruise would be so familiar with and eager to visit Mociu that they would choose not to take the cruise when they could no longer do so. I would also add that even if I thought otherwise, I would offset against any award of damages the unpaid rent and other costs (plus interest) that Honeymoon Island failed to pay under the 2003 lease,

for the whole of the period from 2003 to the date to which compensation was awarded. One of the expenses that Honeymoon Island was obliged to – but did not – pay for its use and enjoyment of Mociu Island was the $12,000 per annum (plus VAT) rent. It cannot be entitled to any loss of earnings without meeting the costs it would have had to pay to generate that income.

94. Because Follies leasehold estate is unimpeachable by Honeymoon Island for the reasons set out, I order the caveat registered by Honeymoon Island (Fiji) Limited (No. 819720) to be removed. I am not willing to make an order restraining Honeymoon Island from visiting the island. There has been no such order in place since 2008, when the Court of Appeal discharged the injunctions granted in 2007. In submissions on this issue counsel for Follies argued that Follies is 'entitled' to an injunction if its lease is held to be valid. It is trite law, he submitted, that an injunction may be granted in all cases in which it appears to the court to be "just or convenient" to do so. He referred to the decision in **Pride of Derby, etc. Ltd v British Celanese Ltd** [1953] 1 Ch 149, in which Lord Evershed MR said at 181:

> *if A proves that his proprietary rights are being wrongfully interfered with by B, and that B intends to continue his wrong, then A is prima facie entitled to an injunction, and he will be deprived of that only if special circumstances exist.*

I accept of course that this passage correctly states the law. But the key words – for present purposes at least– are those I have underlined. No evidence has been led to show that whatever rights Follies has 'are being' wrongfully interfered with, or that this decision is likely to change that, largely for the entirely pragmatic reasons I have referred to in paragraph 65. Follies has managed without one for 12 years, and nothing has been said in evidence or submissions that persuades me that an injunction is now necessary.

95. This brings me to the claim by Honeymoon Island against ILTB in HBC 257/2007. In this claim (see details in paragraph 47 above) Honeymoon Island alleges breach of the covenant for quiet enjoyment in the lease, breach of section 54 of the Fair Trading Decree 1992, or estoppel. I am not sure what the Fair Trading and estoppel claims add to the matter. If, as I have found was the case, there was a lease between Honeymoon Island and ILTB, the other claims add nothing to Honeymoon Island's contractual rights under the lease (these claims are alternatives, in case the court were to find that there was no lease). But even if there is no lease, I struggle to see how ILTB's conduct (bearing in mind that ILTB's position is that it knew nothing about the lease) has misled Honeymoon Island, or that ILTB has by its conduct allowed circumstances to arise whereby it is estopped from denying the lease. It is equally hard to see how Honeymoon Island has relied on any misleading representation, or conduct giving rise to an estoppel, to its disadvantage or in a way

that makes it unfair for ILTB to now deny the existence of the lease. Put at its crudest, Honeymoon Island did not perform its part of any bargain encapsulated by the lease, and took advantage of the arrangement without paying anything except the stamp duty, and a single payment of part of the rent in 2005 (over 2 years late). The money paid by Honeymoon Island to ILTB was repaid to it in full in July 2007, so its four and a half years of use of Mociu Island has cost Honeymoon Island nothing, and provided no benefit whatsoever for the landowners. This was less a reliance by Honeymoon Island to its detriment, than an exploitation of its position without paying for it.

96. However, as I have found, there was an agreement to lease, and the law and the contract meant that Honeymoon Island was entitled to notice of default before that lease could be determined for any breach on its part. That notice was not given, the lease agreement was not terminated, and so ILTB was in breach of its lease agreement with Honeymoon Island when it denied the existence of the lease, and agreed in June 2007 to give a new lease to Follies.

97. Normally such a breach would entitle Honeymoon Island to damages for any loss caused. I have no doubt that Honeymoon Island did incur some damage. But I have commented earlier in this judgment on the adequacy of Honeymoon Island's proof of the damage it suffered, and for the reasons given I do not accept that its losses can be measured in the simplistic way that it proposes, with the reduction in passenger numbers between 2006 and 2007 attributed entirely to the loss of Mociu Island from the tour itinerary. Nor do I accept that those losses have continued at the same level, or indeed at all, from 2007 to now. As I have also observed, Honeymoon Island is not entitled to claim its losses, without giving credit for the costs it would have incurred in generating the income that it claims to have lost. On the basis that anything paid by Honeymoon Island towards rent was repaid by ILTB in 2007 any losses that it was able to prove would have been off-set, at least in part, by the approximately $60,000 plus interest payable to ILTB for rent for the period from 2003 to 2007.

98. Taking all these factors into account I am not satisfied that Honeymoon Island is entitled to any further compensation for losses that might have arisen from ILTB's breach of the lease agreement, other than to be relieved of the obligation under the agreement to pay rent and any other outgoings.

99. However Honeymoon Island and Follies are entitled to costs against ILTB in recognition of the quite inexcuseable and incomprehensible conduct of ILTB in taking the position it did in 2007 in connection with Honeymoon Island's lease agreement. Although Honeymoon Island's behaviour has undoubtedly contributed to the

situation it now finds itself in, the main fault lies at the door of ILTB. Had it approached the situation in 2007 professionally and sensibly, it would likely – although not inevitably - have achieved the same outcome then as we have now, with the lease agreement with Honeymoon Island terminated, and the lease to Follies granted and (eventually) registered. Instead its decision to deny the existence of, rather than deal with, the lease agreement with Honeymoon Island has led to 13 years of litigation, and the enormous expense and wasted time that these proceedings have taken up, to no discernible advantage for anyone. In case it is necessary I would make the point that I expect these costs to be paid by ILTB out of its own resources. The costs should not be charged to the landowners' account – it is not their fault that this situation has arisen.

100. I thank all counsel for their helpful and comprehensive submissions, which have been enormously helpful.

101. I therefore make the following orders:

i. The caveat registered by Honeymoon Island (Fiji) Limited against the title to Mociu Island (No. 819720) is to be discharged.

ii. The claims by Follies International Limited in HBC 225/2007 against Honeymoon Island (Fiji) Limited and Oceanic Schooner Company (Fiji) Limited, and the counterclaims by Honeymoon Island (Fiji) Limited and Oceanic Schooner Company (Fiji) Limited against Follies International Limited are otherwise dismissed.

iii. The claims by Honeymoon Island (Fiji) Limited in HBC 257/2007 against the iTaukei Land Trust Board (ILTB), and any counterclaims by the ILTB against Honeymoon Island (Fiji) Limited are dismissed.

iv. ILTB is to pay costs in the cause to Follies International Limited, and Honeymoon Island (Fiji) Limited. For obvious reasons I do not make a separate costs award in favour of Oceanic Schooner Company (Fiji) Limited.

HIGH COURT OF FIJI
LAUTOKA

A.G. Stuart
Judge

At Lautoka this 30th day of April 2020

SOLICITORS:

Munro Leys of Suva, for Follies International Limited (plaintiff in HBC 225/2007)

Young & Associates of Lautoka, for Honeymoon Island (Fiji) Limited (Plaintiff in HBC 257/2007 and First Defendant in HBC 225/2007) and Oceanic Schooner Company (Fiji) Limited (Second Defendant in HBC 257/2007)

iTaukei Land Trust Board for ILTB (interested party in HBC 225/2007 and defendant in HBC 257/2007)