

BA PROVINCIAL HOLDINGS CO LTD and Anor v BA PROVINCIAL COUNCIL and Anor (Civil Action No 0237 of 2006)

HIGH COURT — CIVIL JURISDICTION

5 PHILLIP J

1, 8 September 2006

10 **Practice and procedure — pleadings — strike out — whether action instituted without proper authority — non compliance or breach of order — High Court Rules 1988 O 21 r 2(5), O 41 rr 9(2), 10(1), 11 (1).**

15 These were summons filed before the court for the following orders on behalf of the defendants (D1 and D2): (1) an order that the first Plaintiff, BA Provincial Holdings Co Ltd (P1) be struck out to be a party in the current action; (2) an order that the second named Plaintiff, Ratu Apisai Naevo (P2) be ceased to be a party in the current action; (3) an order that Ratu Josaia Daucia (P3), Ratu Tevita Lewaravu (P4), Sivaniolo Waqa Naulago (P5) and Semi Leiwere (P6) be struck out as plaintiffs; (4) that the expedited originating summons dated 9 August 2006 and amended expedited originating summons
20 dated 16 August 2006 be struck out for noncompliance and/or breach of the order dated 15 August 2006; and (5) an order that all the affidavits filed by and/or on behalf of the plaintiffs be struck out for noncompliance of O 41 of the High Court Rules 1988.

25 The defendants questioned the authority to sue in P1's name. They contended that P1, not having authorised the raising of the action and relying on a company resolution, was not properly constituted as the P1 and should be struck. In reply, the Plaintiffs relied on a flying minute resolution which authorised them to commence proceedings in the name of P1.

Counsel for the Defendants (Mr Krishna) likewise submitted that P1 need not be a party given that the issues were essentially between P2 and D1 and D2 (parties' issue).

30 **Held** — (1) On the issue of striking out P1, the court ruled to strike out P1 on the ground that the evidence of both sides showed that counsel for the plaintiffs (Mr Naivalu) failed to verify whether he had proper authority to start the proceedings in the name of P1 and was under an erroneous assumption as to the purported authority. The flying minute resolution purporting to constitute authority was endorsed by two persons who were not
35 directors. The court further held that on the parties' issue, it had adopted the principles referred in the *Vandervell* case which stated that "the only question is whether their presence before the Court is 'necessary' — that is, necessary to ensure that all matters in dispute in the cause or matter may be effectively and completely determined and adjudicated upon". In this light, there was no relief being sought by the company in these proceedings and the High Court having considered the respective submissions, concluded
40 that it was also not necessary for the company to be a plaintiff.

(2) The court said as to the order to strike out P2, that as there was dispute about the birth certificate related to P2, the court declined to grant relief on the ground that this would involve evidentiary matter that require further evidence.

45 (3) On orders to strike P3, P4, P5 and P6, the court held that P3, P4, P5 and P6 have already been struck out as plaintiffs as Mr Naivalu conceded that he was liable to pay costs for improperly instituting proceedings without their consent. The court likewise ordered payment of these costs. The court further struck out P7, P8 and P9 who were all named as the board of directors of P1. However, it turned out that they were not directors and never had been.

50 (4) The ruling of the court on the order that the expedited originating summons be struck out was that the court did not believe that defendants had been unduly prejudiced although Mr Naivalu acknowledged his failure to comply with O 41 r 9(2) and 11(1) of

the High Court Rules. The court granted leave to the second plaintiffs to use the affidavits in the form filed despite the failure by the counsel to comply with the mandatory rules relied on by Mr Krishna.

(5) As to the order that all the affidavits filed by or on behalf of the plaintiffs be struck out for noncompliance, the court held that 12 of the prayers for injunctive relief in the pending inter-parte motion were exactly the same as those the court had dealt with in the earlier civil action and dismissed. There were two additional orders sought in this action — prayer for the return of the keys of the company’s premises and for the return of the company seal. These additional orders were mere variations of other orders sought — they added nothing new and were inconsequential. The court noted that the notice of discontinuance issued in respect of Civil Action No 225 of 2006 was filed simultaneously with these proceedings and that the Second plaintiffs filed the notice in compliance with O 21 r 2(5) of the High Court Rules. New proceedings after a discontinuance are allowed on the same cause of action. The discontinuance terminated the earlier action but preserved the P2’s right to commence another action based on the same complaint.

Determination made.

Cases referred to

Danish Mercantile Co Ltd v Beaumont [1951] Ch 680; [1951] 1 All ER 925;
Vandervell Trustee Ltd v White [1971] AC 912; [1970] 3 All ER 16, considered.

Messrs Law Naivalu for the Plaintiffs

Messrs Krishna & Co for the Defendants

[1] **Phillip J.** The summons which is before me asks for the following orders on behalf of the Defendants:

- (i) an order that the first Plaintiff (P1) be dismissed and/or struck out and/or ceased to be a party in the current action;
- (ii) an order that the 2nd named second Plaintiff (P2), Ratu Apisai Naevo be ceased to be a party in the current action and/or be dismissed and/or struck out;
- (iii) an order that the 5th named P2, Ratu Josaia Daucia be ceased to be a party in the current action and/or be dismissed and/or struck out;
- (iv) an order that the 6th named P2, Ratu Tevita Lewaravu be ceased to be a party in the current action and/or be dismissed and/or struck out;
- (v) an order that the 9th named P2, Sivaniolo Waqa Naulago be ceased to be a party in the current action and/or be dismissed and/or struck out;
- (vi) an order that the 11th named P2, Semi Leiwere be ceased to be a party in the current action and/or be dismissed and/or struck out;
- (vii) that the expedited originating summons dated 9 August 2006 and amended expedited originating summons dated 16 August 2006 be struck out and/or dismissed for non compliance and/or breach of the order dated 15 August 2006;
- (viii) an order that all the affidavits filed by the Plaintiffs and/or affidavits filed on behalf of the Plaintiffs be struck out and/or dismissed for non compliance and/or breach of O 41 of the High Court Rules 1988;
- (ix) that the expedited originating summons and ex-parte notice of motion both dated 9 August 2006 and amended expedited originating summons dated 16 August 2006 be struck-out and dismissed for duplicity of actions.

An order that the P1 be dismissed and/or struck out and/or ceased to be a party in the current action

[2] The Defendants question the authority to sue in the P1's name. They contend that the P1, Ba Provincial Holdings Company Ltd (the company) not
5 having authorised the raising of the action, is not properly constituted as the P1 and should be struck out as such. The Defendants rely on a company resolution dated 18 August 2006, (exhibit D in the affidavit of Ratu Tevita Momoedonu dated 29 August 2006) resolving that the company withdraw as P1 having not
10 given instructions to be a party in these proceedings.

[3] In reply the 2nd named Plaintiffs rely on a copy of a "Flying Minute resolution" (flying minute) annexed in the affidavit of Ratu Apisai Naevo dated 9 August 2006, which they claim authorises them to commence proceedings in the name of the company as well.

[4] The evidence before me shows that the flying minute is also signed by Ratu Viliame Ratuvou and Sikeli Mulase who were not directors of the company. Suffice it to say that there has been no proper ratification of the purported resolution.

[5] Mr Krishna also submitted that the company need not be a party given that the issues in this case are essentially between the P2s and the first and second Defendants (D1 and D2). He relies on the principles expressed in the case of *Vandervell Trustee Ltd v White* [1971] AC 912; [1970] 3 All ER 16 (*Vandervell*).

[6] I uphold the Defendants on both grounds.

[7] In regard the submission that the action has been instituted without proper authority, I adopt the principle applied in *Danish Mercantile Co Ltd v Beaumont* [1951] Ch 680; [1951] 1 All ER 925 at 930 where Jenkins LJ expressed the principle to the applied as follows:

30 I think the true position is simply that a solicitor who starts proceedings in the name of a company without verifying whether he has proper authority to do so, or under an erroneous assumption as to the authority, does so at his own peril, and, so long as the matter rests there, the action is not properly constituted. In that sense it is a nullity and can be stayed at any time, providing the aggrieved defendant does not unduly delay his
35 application, but it is open at any time to any purported plaintiff to ratify the act of the solicitor who started the action, to adopt the proceedings, and to say: "I approve of all that has been done in the past and I instruct you to continue the action." When that has been done, then, in accordance with the ordinary law of principal and agent and the ordinary doctrine of ratification the defect in the proceedings as originally constituted is cured, and it is no longer open to the defendant to object on the ground that the
40 proceedings thus ratified and adopted were in the first instance brought without proper authority.

[8] In this case the affidavit evidence of both sides has led me to conclude that counsel for the Plaintiffs, Mr Naivalu, has both failed to verify whether he had
45 proper authority to start these proceedings in the name of the company and is under an erroneous assumption as to the purported authority. The flying minute purporting to constitute authority is endorsed by two persons who are not and were not directors. Moreover he has not disclosed evidence of ratification.

[9] On the "parties" issue I adopt the principles Mr Krishna referred me to in the *Vandervell* case as expressed by His Lordship Lord Morris of Bourth-Y-Gest at 19:

the only question is whether their presence before the Court is “necessary” — ie necessary to ensure that all matters in dispute in the cause or matter may be effectively and completely determined and adjudicated upon;

and by His Lordship Lord Diplock at 31, that:

5 ... a party to an action must be a person who claims in that action some relief against another party to the action or against whom some relief is claimed by another party to the action.

10 [10] There is no relief being sought by the company in these proceedings and having considered the respective submissions I have concluded that it is also not necessary for the company to be a Plaintiff.

[11] The company is struck out as P1.

An order that the 2nd named P2, Ratu Apisai Naevo be ceased to be a party in the current action and/or be dismissed and/or struck out

15 [12] There is dispute about whether the birth certificate relied on by the Defendants is in fact that of Ratu Apisai Naevo. The birth certificate contains the details of one Avisai Dere. Mr Naivalu submitted that his instructions were that the birth certificate is not that of Ratu Apisai Naevo. There being a dispute about
20 Ratu Naevo’s age and whether the birth certificate relates to him is an evidenciary matter that requires further evidence and as such I decline this relief.

Orders that Ratu Josaia Daucia, Ratu Tevita Lewaravu, Sivaniolo Waqa Naulago and Semi Leiwere be struck out as Plaintiffs

25 [13] Mr Naivalu has conceded that he failed to obtain instructions from Ratu Lewaravu, Mr Naulago and Mr Leiwere. Ratu Daucia is deceased. They have already been struck out as Plaintiffs. Mr Naivalu has accepted that he is liable to pay costs for improperly instituting proceedings on their behalf without their consent. I find the estimated costs payable submitted by Mr Krishna to be excessive and fix costs payable to Ratu Lewaravu, Mr Naulago and Mr Leiwere
30 in the sum of \$250 each. These costs are to be paid by Mr Naivalu within 7 days. The costs ordered are in respect of these proceedings only.

[14] There is a further issue. It transpired in the course of the hearing that Mr Isimeli Bose, Ratu Viliame Ratuvou and Isikeli Mulase who are all named as
35 the Board of Directors of the company are not directors of the company and never have been. Their names are also struck out as P2s. Mr Naivalu conceded at the hearing that Mr Bose has never been a director of the company. He stated that Mr Bose was included as a P2 in his capacity as Chief Executive Officer of the company. If Mr Bose has never been a director of the company, Mr Naivalu has
40 incorrectly described and included him as a Plaintiff in a purported capacity of director of the company. Mr Bose cannot sue as a director in these proceedings if he has never been one. Earlier proceedings involving the same parties and the same dispute, namely civil action 225/06, brought by Mr Bose as the dismissed CEO separately from the other Plaintiffs who were also parties, have been
45 terminated. In the earlier case, I had concluded, on an ex-parte application argued by Mr Naivalu that Mr Bose had a cause of action and there were serious issues to be tried in respect of the cause of action pleaded. Mr Naivalu’s carelessness, bordering on incompetence, in instituting these proceedings on behalf also of Mr Bose in a capacity Mr Bose is not entitled to sue, potentially deprives his client a cause of action, as the pleadings in this case stand. Mr Naivalu rested on
50 his admission that Mr Bose has never been a director of the company and made no attempt to correct the error made.

That the expedited originating summons dated 9 August 2006 and amended expedited originating summons dated 16 August 2006 be struck out and/or dismissed for non compliance and/or breach of the order dated 15 August 2006

5 [15] Mr Naivalu conceded that he breached my orders of 15 August 2006. Not only did he fail to serve the Defendants as I had specifically ordered, he failed to apply for leave as ordered and filed instead the amended expedited originating summons dated 16 August 2006. I have granted leave notwithstanding counsels non compliance. The prejudicial impact, if any, of the non compliance can be
10 remedied by an appropriate order for costs at the conclusion of this case.

An order that all the affidavits filed by the Plaintiffs and/or affidavits filed on behalf of the Plaintiffs be struck out and/or dismissed for non compliance and/or breach of order 41 of the High Court Rules 1988

15 [16] Mr Naivalu has acknowledged failure to comply with O 41 rr 9(2) and 11(1) of the High Court Rules. All the affidavits filed by the Plaintiffs are defective. However again, I do not believe that the Defendants have been unduly prejudiced. I have granted leave to the P2s to use the affidavits in the form filed despite the failure by counsel to comply with the mandatory rules relied on by
20 Mr Krishna. Leave was sought, on my suggestion in the course of the hearing that the defects were capable of being cured. I caution Mr Naivalu that any further non compliance may prove fatal. The delay and wastage of resources caused by the continuing series of errors on his part is unsatisfactory and inconvenient for all concerned including the court. His misguided submission that I ought to give
25 priority to this case notwithstanding that the continuing delay is caused by his failure to comply with the High Court Rules and orders, because in effect that the case concerned a company and parties who are indigenous Fijians is both discourteous to those involved in the dispute and contrary to Constitutional provisions he is bound to uphold and which he said he had not considered.

30 [17] Notwithstanding and largely to avoid further delay leave is granted to use the defective affidavits in these proceedings pursuant to O 41 r 10(1). What weight I give to the affidavits filed by Mr Bose is a matter to be determined at a later date.

That the expedited originating summons and ex-parte notice of motion both dated 9 August 2006 and amended expedited originating summons dated 16 August 2006 be struck out and dismissed for duplicity of actions

35 [18] Mr Naivalu submitted that there is no duplicity between the earlier proceedings in civil action no 225 of 2006 and this case. I note that the notice of discontinuance issued in respect of civil action no 225 of 2006 was filed
40 simultaneously with these proceedings. I am satisfied that the P2s filed the notice in compliance with O 21 r 2(5) of the High Court Rules. New proceedings after a discontinuance are allowed on the same cause of action. The discontinuance terminated the earlier action but preserved the P2s right to commence another action based on the same complaint.

45 [19] However in the earlier action I heard the Plaintiffs application for injunctive relief, albeit ex-parte and gave judgment declining injunctive relief before the notice of discontinuance was filed. That creates an estoppel as to new and similar applications for virtually the same relief. My earlier judgment was based on the pleadings and my assessment of uncontested facts. Mr Naivalu
50 maintains that the injunctive relief sought in these proceedings are different. That is not so.

[20] He submitted that the parties in both actions are different. Again that is not so. The parties are the same, the only difference being that the names of the directors whose appointments as such came to an end on 31 July 2006 are specifically named in this action. In the earlier case they were collectively the P2
5 described as the board of directors. In the earlier case, Mr Bose sued as third Plaintiff (P3) in his capacity as the dismissed Chief Executive Officer. In this case, Mr Bose was included as P2 in a purported capacity of director.

[21] Mr Naivalu submitted that the injunctive reliefs sought are different. That
10 is clearly not the case. For his benefit, a comparison of the injunctive relief sought in the pending motion herein and those which I dealt with in the earlier case are set out hereunder.

A] **Civil Action No 237 of 2006 [Notice of Motion — 9th August]**

15 iii] An injunction that the defendants be restrained from performing any duties for and on behalf of the 1st plaintiff company forthwith.

Civil Action No 225 of 2006 [Ex parte notice of motion — 1st August]

iii] The 2nd and 3rd defendants be restrained from performing any duties for and on behalf of the 1st plaintiff company.

20 B] **Civil Action No 237 of 2006 [Notice of Motion — 9th August]**

iv] An injunction that the defendants either by themselves and/or their servants and/or their agents be restrained from entering into the business premises of the 1st plaintiff company situated at Rogorogoivuda House, Tavewa Avenue, Lautoka and further be restrained from interfering with the operation of the 1st plaintiff
25 company business interests including any negotiations, dealings and transactions in any manner whatsoever forthwith.

Civil Action No 225 of 2006 [Ex parte notice of motion — 1st August]

iv] That the 2nd and 3rd defendants either by themselves and/or their servants and/or their agents be restrained from entering into the business premises of the 1st plaintiff company situated at Rogorogoivuda House, Tavewa Avenue, Lautoka and further be
30 restrained from interfering with the operation of the 1st plaintiff company business interests in any matter whatsoever.

C] **Civil Action No 237 of 2006 [Notice of Motion — 9th August]**

35 vii] An injunction that the defendants either by themselves and/or their servants and/or their agents be restrained from interfering with and obstructing the 2nd plaintiffs in any manner howsoever from performing their duties and obligations as the Board of Directors of the 1st plaintiff company forthwith.

Civil Action No 225 of 2006 [Ex parte notice of motion — 1st August]

40 vii] That the defendants either by themselves and/or their servants and/or their agents be restrained from interfering with and obstructing the 2nd plaintiff in any manner howsoever from performing their duties and obligations as the Board of Directors of the 1st plaintiff company.

45 D] **Civil Action No 237 of 2006 [Notice of Motion — 9th August]**

viii] An injunction that the defendants either by themselves and/or their servants and/or their agents be restrained from interfering with and obstructing Mr Isimeli Bose in any manner howsoever from performing their duties and obligations as the Chief Executive Officer of the 1st plaintiff company forthwith.

50 **Civil Action No 225 of 2006 [Ex parte notice of motion — 1st August]**

viii] That the defendants either by themselves and/or their servants and/or their agents be restrained from interfering with and obstructing the 3rd

plaintiff in any manner howsoever from performing his duties and obligations as the Chief Executive Officer of the 1st plaintiff company.

E] **Civil Action No 237 of 2006 [Notice of Motion — 9th August]**

ix] An injunction that the defendants, their servants and/or agents be restrained from implementing all resolutions passed at the meeting of the Defendant held on 31st July 2006 until further Order.

Civil Action No 225 of 2006 [Ex parte notice of motion — 1st August]

xvii] That the defendant, its servants or agents be restrained from implementing all resolutions passed at the meeting of the defendant held on 31st July 2006 until further Order.

E] **Civil Action No 237 of 2006 [Notice of Motion — 9th August]**

x] An injunction that the defendants, their servants and/or agents be restrained from interfering with or removing or disrupting the contract of service and/or the employment of any of the 2nd plaintiffs with the 1st plaintiff or any of the current employees with the 1st plaintiff pending further Order forthwith.

Civil Action No 225 of 2006 [Ex parte notice of motion — 1st August]

xiii] The defendant, its servants and agents be restrained from interfering with or removing or disrupting the contract of service and the employment of the plaintiff with the defendant pending further Order.

G] **Civil Action No 237 of 2006 [Notice of Motion — 9th August]**

xi] An injunction that the defendants, their servants and/or agents be restrained from removing from the premises of the 1st plaintiff at its registered office at Level 3, Rogorogovuda House, Tavewa Avenue, Lautoka any equipment, computer programs and records or items being the property of the 1st plaintiff forthwith.

Civil Action No 225 of 2006 [Ex parte notice of motion — 1st August]

xiv] That the defendant, its servants and agents be restrained from removing from the premises of the Defendant at its registered office at Level 3, Rogorogovuda House, Tavewa Avenue, Lautoka any equipment, computer programs and records or items being the property of the 1st plaintiff.

H] **Civil Action No 237 of 2006 [Notice of Motion — 9th August]**

xii] An injunction that the defendants, their servants and/or agents be restricted from interfering with all the 1st plaintiff's bank accounts and financial facilities until further Order.

Civil Action No 225 of 2006 [Ex parte notice of motion — 1st August]

xv] That the defendant, its servants and agents be restricted from interfering with the 1st plaintiff's bank accounts and financial facilities until further Order.

I] **Civil Action No 237 of 2006 [Notice of Motion — 9th August]**

xiii] An injunction that the defendants, their servants and/or agents be restrained from notifying orally by whatever means or in writing by whatever means or by facsimile transmission to the news media or through any dissemination to a or any third party as to the purported suspension of any of the 2nd plaintiffs in the circumstances including the re-structuring of the 1st plaintiff and current negotiations, dealings and transactions forthwith including any information by whatever means retrieved from the plaintiffs business premises since 1st August, 2006.

Civil Action No 225 of 2006 [Ex parte notice of motion — 1st August]

xvi] That the defendant, its servants and agents be restrained from notifying orally by whatever means or in writing by whatever means or by facsimile transmission to the news media or through any dissemination

to a or any third party as to the purported suspension of the 1st and 2nd plaintiff in the circumstances including the re-structuring of the 1st plaintiff, if any.

J] **Civil Action No 237 of 2006 [Notice of Motion — 9th August]**

xiv] An injunction that the defendants do forthwith at all times maintain a 250 meter radius distance from the Chief Executive Officer, Isimeli Bose and from the business place of the 1st plaintiff company situated at Rogorogoivuda House, Tavewa Avenue, Lautoka.

Civil Action No 225 of 2006 [Ex parte notice of motion — 1st August]

ix] The defendants do forthwith at all times maintain a 200 meter radius distance from the 3rd plaintiff and from the business place of the 1st plaintiff company situated at Rogorogoivuda House, Tavewa Avenue, Lautoka.

K] **Civil Action No 237 of 2006 [Notice of Motion — 9th August]**

xvii] An order that the officers of Fiji Police Force to assist in the enforcement of the Orders, if necessary.

Civil Action No 225 of 2006 [Ex parte notice of motion — 1st August]

x] That the officers of the Fiji Police Force to assist in the enforcement of the Orders, if necessary.

L] **Civil Action No 237 of 2006 [Notice of Motion — 9th August]**

xviii] Any further and/or other relief that this Honourable Court deems just and expedient in the circumstances.

Civil Action No 225 of 2006 [Ex parte notice of motion — 1st August]

xviii] Any further and/or other relief that this Honourable Court deems just and expedient in the circumstances.

[22] *Twelve* of the prayers for injunctive relief in the pending inter-parte motion are exactly the same as those I had dealt with in the earlier civil action and dismissed. There are two additional orders sought in this action — prayer [xv] for the return of the keys of the company's premises and [xvi] for the return of the company seal. These additional orders are mere variations of other orders sought — they add nothing new and are inconsequential.

[23] Mr Naivalu submitted that the facts relied on in this action are different. These so called new facts stem from media reports of statements attributed to Ratu Tevita Momoedonu. I do not consider the facts relied on by the Plaintiffs to be materially different to the facts relied on earlier. I informed Mr Naivalu in the course of the hearing that I do not consider matters reported in the media to be relevant to my determination of the legal issues in the case. A comparison of the affidavit material filed by the Plaintiffs in both cases shows that the facts giving rise to their complaints are substantially the same.

[24] Mr Naivalu contends that “there was no *res judicata*”. His submission on duplicity is confined to the *res judicate* argument. He appears not to understand the distinction between *res judicata* and issue estoppel. A simple analysis of the distinction is set out by the learned author, Bernard C Cairns of *Australian Civil Procedure* 4th ed at p 171 and I quote:

Res judicata is different from issue estoppel. Issue estoppel occurs when a particular matter is taken to have been decided in earlier proceedings. In deciding what issues were decided, the court may consider any material. Pleadings are relevant in the inquiry, but not decisive. Any material that identifies the issues is admissible. On the other hand, *res judicata* relates to the entire cause of action. Sometimes it is referred to as cause of action estoppel. It applies when the same cause of action is reasserted in new proceedings.

[25] I have already ruled on the Plaintiffs earlier application for injunctive relief, which has been renewed by the filing of essentially the same application in these proceedings. The factual and legal issues involved are the same and have already been adjudicated upon in my earlier judgment.

5 [26] The two leading authorities on the applicable principles where directors who have been removed from directorship by resolution at an allegedly irregularly convened meeting were referred to in my earlier judgment. In *Bentley-Stevens v Jones* [1974] 1 WLR 638; [1974] 2 All ER 653 at 655, Plowman J expressed the guiding principle as follows:

10 In my judgment, even assuming that the plaintiff's complaint of irregularities is correct, this is not a case in which an interlocutory injunction ought to be granted. I say that for the reason that the irregularities can all be cured by going through the proper processes and the ultimate result would inevitably be the same. In *Browne v Trinidad Lindley LJ* said: "I think it is most important that the Court should hold fast to the rule
15 upon which it has always acted, not to interfere for the purpose of forcing companies to conduct their business according to the strictest rules, where the irregularity complained of can be set right at any moment." It seems to me that the motion which is before me falls within the principle stated by Lindley LJ.

20 [27] As I had decided earlier the P2s remedy lies only in damages. They are not entitled to injunctive relief restoring them to the pre-31 July 2006 position. They cannot be restored as directors by way of injunctive orders. The law does not lend support to their contentions. Had Mr Naivalu considered the authorities referred to in my earlier judgment, it may have occurred to him that the renewed application is doomed to fail.

25 [28] I have not dealt with the substantive matter, either in the earlier case or in these proceedings. I decline the Defendants submission that the amended expedited originating summons herein be struck out. However in light of the provisions which Mr Krishna has referred me to in the Companies Act and the articles of the company, it is obvious that the P2s case is weak and is not likely
30 to succeed but this is not a ground for striking it out.

My orders

- (i) The company is struck out as P1.
- (ii) I decline to strike out Ratu Apisai Naevo from the proceedings.
- 35 (iii) Mr Naivalu is to pay costs of \$250 each to Ratu Tevita Lewaravu, Sivaniolo Waqa Naulago and Semi Leiwere for improperly instituting proceedings on their behalf without their consent. These costs are to be paid 7 days from today.
- (iv) Mr Isimeli Bose, Ratu Viliame Ratuvo and Isikeli Mulase are struck
40 out as P2s.
- (v) I decline to strike out the amended expedited originating summons dated 16 August 2006.
- (vi) Leave is granted to the P2s to use the defective affidavits filed herein.
- (vii) The inter party notice of motion dated 10 August 2006 is dismissed.
- 45 (viii) The Defendants are to file and serve an affidavit in opposition to the amended expedited originating summons in 14 days.
- (ix) The case is adjourned to 22 September 2006 at 9 am for directions and to fix a hearing date.