

IN THE MAGISTRATES COURT OF FIJI
IN LABASA-NORTHERN DIVISION
CIVIL JURISDICTION

Civil Action No. 03 of 2010

BETWEEN: **FRED WEHREBERG**, of Nisusu Island, Savusavu

PLAINTIFF

AND: **INOKE BULIVOU**, of Director of A.P Consultants Ltd,
Savusavu

BEFORE: **RESIDENT MAGISTRATE, TOMASI BAINIVALU**

COUNSEL: *The Plaintiff- Appearing in person*
Non-Appearance of the Defendant

DATE OF HEARING: 18th October, 2013

DATE OF RULING: 4th August, 2014

PLACE : Labasa Magistrates Court

R U L I N G

A. THE INTRODUCTION

1. This is one matter that has been pending for quite a while and the court records had detailed the various reasons to the same.
2. The Plaintiff, initially filed his writ of summon on the 07th June 2010; and several adjournments being made thereafter on the preliminary issues. And one of the issue at the preliminary stage of the proceedings, was the where about of the Defendants being unknown to the Plaintiff and even despite several attempts made by the Plaintiff the Defendant seems to be avoiding the Plaintiff and the court for that matter.
3. The court therefore at first formally proofed the Plaintiffs evidence on the 20th January, 2011 and judgment was delivered therefore in favor of the Plaintiff on the 18th February, 2011. Thereafter, motion and

affidavit in support were filed by the Defendants Counsel then , Mr Naco to set aside the said judgment entered on 18/02/11.

4. And upon submissions filed by both the Plaintiff and the Defendant through his latter Counsel, the court ruled that the motion be granted and default judgment entered on the 18th February 2011 be set aside.
5. The High Court ruled on the appeal out of time issue on the 20th May 2013; where it further order that the matter be assigned an early hearing date in my court. I had therefore assigned the hearing on the earliest possible date, which is the 18th October 2013.
6. And again I must express my sincere apology to the Plaintiff for the long pending of this judgment and the inconvenience may have caused. And today I hereby deliver the judgment.

B. THE LAW

7. The laws and authorities are very clear in terms of the breach of contract and the non performance of any duty as agreed by parties to a contract.
8. The Plaintiff had furnished the court with some authorities, on which this court had decided to rely upon and again I must express my gratitude to the Plaintiff for furnishing them for ease of reference and I have reproduce them as follows, since majority of these authorities are persuasive to the common law principle in issue in this case.
9. The Defendant is the Director of A.P Consultants Ltd; Savusavu and the Plaintiff in his writ of summon is suing the said Defendant for **breaching the contract** due to his **non - performance**.
10. And following are some authorities that established the Plaintiffs legal standing in recovering what he claimed owed to him by the Defendant.

Procuring a breach of contract

- *Lewis v Yeeles* England and Wales Court of Appeal (2010) EWCA Civ 326, page 4

"26Procuring a breach of contract is a tort. In general, an individual tortfeasor is personally liable for his own torts, even if he is a Director of a limited liability company, which may also be liable for the tort. The fact that a director acts as agent for his company does not give him a defence to personal liability for torts committed by him."

And the court also noted the issue for liability of an agent as detailed on page 8 of the case of **Wearsmart Textiles Ltd. v General Machinery Hire Ltd**, Fiji Court of Appeal.

- **Thames Valley Housing Association Ltd & Anor v Elegant (Guernsey) Ltd & Ors** England and Wales High Court (2011) EWHC 1288 (Ch), page 21 to 24

"108. At best, from Mr. Macpherson's perspective similar principles apply in deciding whether a director is personally liable for procuring or inducing a breach of contract by a company. Here, however, Mr. Macpherson did not exercise control over elegant through the constitutional organs of the company. He pulled the strings from the shadows. Elegant did whatever Mr. Macpherson wanted it to do.

119. Does it make any difference that contribution is sought, not against Elegant, But against Mr. Macpherson? In my judgment it does not. Mr. Macpherson is the only person with an economic interest in Elegant. As he eventually accepted he is its ultimate beneficial owner. It was he who accused Elegant to be in breach of contract;

129. I find that Mr. Macpherson is liable to contribute 100 per cent of the loss incurred by TVHA as a result of Elegant's breach of contract."

- **Midland Beach Estate Ltd v Balgovind**
The High Court of Fiji (2012) FJHC 1043, page 8

Damages for breach in tort

"(78) In my mind, the defendant is entitled to damage in tort and for breach of contract. I have emphasized on the distinction, as damages in tort and damages in contract are calculated in different bases. Whilst damages in tort seeks to return the plaintiff to the position occupied prior to the commission of tort, damages in contract seeks to place the plaintiff in a position that would have placed the aggrieved party had the contract was performed.

(79) The first defendant is entitled under damages of tort and breach of contract to a refund of the deposit of \$100,000.00 and any resulting consequential loss such as interest. However, the

plaintiff had already refunded the deposit money thereby placing him in his original position.”

Damages for breach in contract

“(80) The defendant had to make the payment only on 30 November 2006. However, before the due date the plaintiff terminated the contract on 26 September 2006

(81) Clearly the termination is wrongful that give rise to damages.

(84) In the circumstances, I will award USD 50, 000.00 as damages for breach of contract.”

• **Photo Production v Securicor Transport Ltd**

House of Lords England (1980) AC 827, page 7 and 8

“A basic principle of the common law of contract, ..., is that the parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, if they do, the statement is determinative;

Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach; but, with two exceptions, the primary obligations of the parties so far as they have not yet been fully performed remain unchanged. This secondary obligation to pay compensation (damages) for non-performance of primary obligations I will call the “general secondary obligation”. It applies in the cases of the two exceptions as well.”

Breach of Duty of Care

- **16 Jade Street, LLC v R. Design Construction Co., LLC and Carl R. Aten Supreme Court** of the State of South Carolina, Opinion No. 27107, page 4.

“We are persuaded by those authorities that hold that both limited members and corporate officers should be treated in a similar manner when they are engaged in tortious conduct. Indeed, Judge Posner once observed, “You don’t buy immunity from suits for your torts by being a member of a business corporation.

A shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his acts or conduct.

For the foregoing reasons, we affirm as modified the circuit court’s holding that Aten is personally liable for his negligence.”

- **Dicks v Hobson Swan Construction Ltd (in Liquidation) and Ors.** New Zealand High Court (2006) NZHC 1657, page 18 and 21.

"(54) In *Morton v Douglas Homes Ltd* (1984) 2 NZLR 548 Hardie Boys J found the directors of a building company liable because of the control they exercised over the building work. He reasoned:

The relevance of the degree of control which a director has over the operations of the company is that it provides a test of whether or not his personal carelessness may be likely to cause damage to a third party, so that he becomes subject to a duty of care. It is not the fact that he is a director that creates the control, but rather that the fact of control however derived may create the duty. There is therefore no essential difference in this respect between a director and a general manager or indeed a more humble employee of the company. Each is under a duty of care both to those with whom he deals on the company's behalf and those with whom the company deals insofar as that dealing is subject to his control.

(62) His carelessness is, on the *Morton v Douglas Homes* analysis, a breach of a duty of care owed by him to Mrs. Dicks. He is therefore personally a tortfeasor (as well as having his conduct attributed to Hobson Swan as its tort).

(63) I therefore hold that Mr. McDonald is personally liable to Mrs. Dicks in tort as well as for breach of contract."

- ***Drouzhba v Wiseman & Anor***

England and Wales High Court (2006) EWHC 2708 (QB), page 17 to 19

"97. Moreover, Chadwick LJ laid emphasis on the judgment of Aldous LJ in *Williams v Natural Life* as set out in paragraph 45 of the MCA judgment above. In that instance the joint tortious liability of the director is based upon a procurement of the company to carry out the necessary tortious acts without any proof that the director himself personally carried out the tortious acts. In the instant case, as I have found the activities of Mr. Wiseman and of SD were so closely intertwined that one cannot untangle them satisfactorily. Since the essence of the case is representations as to the Company's credit which were almost all in fact made by Mr. Wiseman himself, the analysis must be that Mr. Wiseman both made those representations personally and procured the company to make them. No other analysis is possible on the facts.

103 The situation of a corporation and a controlling director is distinguishable from that of a partner and a partnership, particularly when the relevant director has the sole practical control over the affairs of the company. This is the situation which I have found to be the fact in the instant case.

110-For all the above reasons, I find that the Claimants should have judgment against the first defendant."

- ***Wah Tat Bank Ltd and Oversea – Chinese Banking Corp. Ltd v Chan Chang Kum Privy Council* (1975) UKPC 8, page 3**

"If however the Chairman or Managing Director procures or directs the commission of the tort he may be personally liable for the tort and the damage flowing from it"

- ***Sturm v Harb Development LLC***

Supreme Court of Connecticut, USA, No. 18447, page 2 and 4

"Where, however, an agent or officer commits or participates in the commission of a tort, whether or not he acts on behalf of his principal or corporation, he is liable to third persons injured thereby. Thus a director or officer who commits the tort or who directs the tortuous act done, or participates or operates therein, is liable to third persons injured thereby, even though liability may also attach to the corporation for the tort.

It is well established within the construction context that a builder must exercise "that degree of care which a skilled builder of ordinary prudence would have exercised under the same or similar conditions.

A duty to use care may arise from a contract from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act."

- ***Carol Davis v Jennifer Freedman and Carlo Fraioli***

Superior Court of Connecticut, USA, FSTCV0750041425S, page 3

"It is a black letter law that an officer of a corporation who commits a tort is personally liable to the victim, regardless of whether the corporation itself is liable.

Where, however, an agent or officer commits or participates in the commission of a tort, whether or not he acts on behalf of his principal or corporation, he is liable to third persons injured thereby."

Piercing the corporate veil

- ***Coughlin Constructions Co Inc v Nu Tec Industries Inc***

Supreme Court of North Dakota, USA, No. 20070311, page 3 and 4

"(19)..... The corporate veil may be pierced when the legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime. To apply the alter ego doctrine, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist,....."

And also the court had cited the case of ***Intercept Corp v Calima Fin. LLC***, that discusses the same principle.

Fiji Legislation

Commerce Commission Decree 2010

4(1) in this decree, unless the context otherwise requires –
“services” includes any rights (including rights in relation to, and interests in, real or personal property) benefits, privileges, accommodation or facilities that are, or are to be provided, granted or conferred in trade or commerce and without limiting the generality of the foregoing includes the rights, benefits, privileges and facilities that are, or are to be provided, granted or conferred under –

(a) a contract for or in relation to –

i. the performance of work (including building work and work of a professional nature)

ii. whether with or without the supply of goods;

Accepting Payment without Being Able to Supply as Ordered

88 – (1) A person shall not, in trade or commerce, accept payment or other consideration for goods or services where, at the time of the acceptance –

(a) The person intends –

(i) not to supply the goods or services;

(2) A person who contravenes this section shall be guilty of an offence.

Liability of Employer, Agent and Employee

“132 – (1) Any manager, agent or employee who in the course of his duties does or omits to do any act which if done or omitted to be done by his principal or employer would be an offence against any of the provisions of this decree or of any regulations or orders made there under shall himself be guilty of such offence, and shall be liable to the penalties provided therefore under this decree or, as the case may be, such regulations or orders.

133. Where any offence against this decree or against any regulations or orders made there under is committed by a company, firm or other association of individuals, every person who at the time of the offence was a Director, Manager, Secretary or other similar officer of such company, firm or association or who was at that time concerned in or purported to act, in the management of it, affairs, shall be severally liable in prosecution and punishment, in like manner as if he had himself committed the offence, unless he proves that the offence was committed without his consent and connivance and that he took all reasonable steps to prevent its commission.”

C. THE APPLICATION / CLAIM

11. That the Plaintiff and his wife are the joint owners of one freehold island of Nisusu in the Savusavu district and are living on the island since July 2004. And the Defendant who is the Director of A.P Consultants Ltd; Savusavu and is sued for **breach of contract** due to his non – performance.

12. That on the 9th of February 2005 the plaintiff entered into a contract with the Defendant for the construction of his residence, a double story concrete house (9.5 x 9.5x 5.5m) at Nisusu Island.
13. That the agreed contract price for the residence was \$105,000,000. The contract price included the supply of materials to furnish labour, transport, supervision, tools, drawing and to obtain all approvals and Structural Engineers Certificate. It **excluded** however from the contract the electrical installation and the delivery and fitting of all aluminum windows and sliding doors which was the Plaintiffs responsibility to sub contract.
14. That the plaintiff made the first payment of \$1,600.00 on 9.2.2005 and the Defendant instructed his architectural designer Mr. Maika to seek the necessary approvals.
15. That on 27.5.2005 the defendant visited the plaintiff at Nisusu Island and showed the Plaintiff a letter from the Local Authority given building permission for the residence.
16. That the defendant confirmed to the plaintiff that he is ready to start the construction, but requested that the 2nd and 3rd payment be increased to \$30,000.00 each instead of \$22,700.00 each as stipulated in the contract and therefore the 4th payment should be reduced accordingly by \$14,600.00 to a total of \$28,400.00. The Plaintiff reluctantly agreed and made the 2nd payment of \$30,000.00 on 27/5/2005 and soon thereafter the Defendants workers began the construction with completion scheduled to be in 25 weeks.
17. That after the completion of the foundation and concrete floor the Defendant dismissed the supervisor Mr. Abdul in August 2005, reason being that he was too expensive. The plaintiff noticed with great concern that the workmanship and efficiency of the workers deteriorated dramatically, because there was no proper supervision on site. That the
18. Plaintiff raised his concern about this matter on numerous occasion but the Defendant ignored it and the Plaintiff was just left to deal with the impossible situation on site.
19. That on 26.09.2005 the Defendant who had gone to Suva asked therefore his Manager Mr. Usaia Jeke for the 3rd payment of \$30,000.00 from the plaintiff despite the fact that the ground floor was far from complete. The Plaintiff raised the following concerns:-

- a) That the ground floor was far from complete because the concrete ceiling was missing.
- b) That the workmanship and efficiency of the workers was bad and that the Plaintiff had to be on site and supervise and give technical advice nearly every day.
- c) That the Plaintiff had already made the 2nd payment higher by \$7,300.00 and that he was surprised where all his funds had gone.

That the Manager promised to improve the situation and for the sake of making progress and make this project work, the Plaintiff reluctantly agreed to make five part payments between 26.09.2005 and 2.3.2006 totaling \$29,500.00

20. That on 4.9.2006 after the Plaintiff had made three payments totaling \$61,325.00 the Defendant suddenly withdrew all his workers from the construction site and told his Manager Mr. Jeke to advise the Plaintiff that there is no money to carry on.
21. That the Plaintiff was shocked and outraged because;
 - a) The Plaintiff had performed all his obligations under the contract and in fact had already paid \$14,325.00 more than required by contract.
 - b) The 3rd payment which the Plaintiff had made was for the construction of the 1st floor but the Defendant had failed to complete the 1st floor because the concrete roof, facia including some interior walls had not even been constructed yet and the Defendant had already run out of the Plaintiffs funds totaling \$61,325.00
 - c) The time to carry out the whole job had already gone far past the 25 weeks.
22. That the Plaintiff tried to contact the Defendant who had disappeared to Suva, without success. Numerous attempts were made by the Plaintiff to contact the Defendant but to no avail as the Defendant closed his business in Savusavu and moved to Viti Levu in 2006. The Defendant has been avoiding the Plaintiff by not turning up to appointments, changing and diverting his mobile phone numbers, not replying to letters and constantly changing his residence.
23. The Plaintiff had to spend a total of \$131,646.91 for the construction of his residence, as detailed below:
 - a) Payment made by the Plaintiff to the Defendant
Between 9.2.2005 and 4.9.2006 was \$61,325.00;

- b) For the purchase of materials by the plaintiff between 2006 and May 2008 due to the Defendants mismanagement of \$32,961.33

Funds and breach of contract.

- c) For the purpose of materials and the hire of trades – men
By the Plaintiff between June 2008 and December 2009:- \$37, 360.58

To complete the said residence due to the breach of contract by the Defendant.

Total **\$131,646.91**

24. That as a direct result of the said breach of contract by the Defendant the Plaintiff had to pay \$31, 546.91 more than the contract price agreed upon as shown below:

- | | |
|--|------------------------|
| a) Total cost to construct and complete residence | :-\$131, 646.91 |
| b) Contract price | :- \$105,000.000 |
| c) Adjustment to contract price as per clause 6 of contract. | |
| 175 sqm of floor tiles at \$55.00 per square meter was stipulated | |
| In contract but plaintiff selected floor tiles at \$27.00 per square meter | |
| A saving of | :- \$100,100.00 |
| Extra Cost of | :- <u>\$31, 546.91</u> |

25. Wherefore the Plaintiff Claims as follows:-

- a) *Special damages in the sum of \$30.826.91*
- b) *General Damages*
- c) *Damages for distress and mental anguish caused to Plaintiff and wife*
- d) *Damages of the 4 years delay until the construction of residence was finally completed*
- e) *Interest on damages*
- f) *Cost of this action, plus costs of \$2000.00 for bailiff, motions, advertisements etc to locate the Defendant who was evading the litigation process*
- g) *Such further and/or other relief as this Honorable Court may deem just and expedient*

D THE EVIDENCE

26. I must express my sincere appreciation to the Plaintiff for detailing the full transactions and dealings between himself and the Defendant via Affidavit of Evidence in chief together with the bundle of exhibits confirming every transaction made, for ease of the courts reference and its perusal leading to the conclusion of its final determinations.
27. I therefore had reproduced all the relevant evidence in chief as follows:-

AFFIDAVIT OF FRED WEHREBERG

"I, FRED WEHREBERG of Nisusu Island, Savusavu, Electrical Engineer make oath and say as follows:

1. ***THAT*** I am the plaintiff herein and make this affidavit in support of my common law suit against the defendant InokeBulivou for his tortious acts of negligence, personal carelessness, breach of duty of care, misappropriation of my funds and non-appearance which resulted in the breach of contract.
2. ***THAT*** in 2002 MrArun Prasad the former Director of A.P Consultants Ltd. In Labasa surveyed the freehold island of Nisusu and filed the necessary plans at the Titles Office for purposed that I could purchase the island and obtain Certificate of Titles. Mr Prasad carried out his work to my satisfaction.
3. ***THAT*** in late 2004 I was looking for a drafting office in Savusavu to computerise the detail sketches of my proposed double story residence for approval and tendering process, when I noticed a signboard of A.P Consultant Ltd. On the main street town. As I had made good experience with A.P Consultant Ltd. Labasa, I enquired at A.P Consultant's Office in Savusavu
4. ***THAT*** I met the defendant MrInokeBulivou who was the director of A.P Consultants Ltd. And I asked him whether he can computerise my sketches for the double story residence. MrBulivou was interested and he advised me that he is in the process of employing an architectural designer, as the wants to expand his survey business into the building industry.
5. ***THAT*** in January 2005 defendant InokeBulivou introduced me to his architectural designer MrMaika and during detailed discussions the defendant was very keen and persuasive to take on the complete project (design, approval,

construction and supervision, incl. completion certificate and engineering certificate) of the double story building.

6. **THAT** between January 2005 and 9th of February 2005 I met with defendant together with his architectural designer on numerous occasions in his office to come to an agreement on the contract price, which was based on the bill of quantities and the detail drawings produced by Mr Maika after making inquiries with the Local Authority and a Civil engineer. Mr Bulivou was always present in those meetings and was in charge of the negotiations. Mr Bulivou made site visits to inspect the building site and to establish the method of transportation of building materials from the mainland to the island of Nisusu and Mr Bulivou decided that he would get a boat.
7. **THAT** after obtaining and considering the quotes from other building companies I and my wife entered on 9th of February 2005 into a contract with the defendant Inoke Bulivou of A.P Consultant Ltd. For construction of my residence, a double story concrete house (9.5 × 9.5 × 5.5m) at Nisusu Island. The agreed contract price for the residence was \$105,000.00.

The contract price included the purchasing and supply of materials, labour, transport, supervision, tools, drawings and to obtain all approvals, incl. structural engineer certificate.

That however, the contract excluded the electrical installation and the delivery and fitting of all aluminum windows and sliding doors, which was my responsibility to sub-contract. (Refer paragraph 10 and 11 of contracts, Annex P1)

8. **THAT** the said contract and the price, including the payment schedule were worked out only between Inoke Bulivou, my wife and me at Mr Bulivou's office. The contract was signed by the defendant Inoke Bulivou, my wife and I. According to the paragraph 17 and 18 of the contract the total time to carry out the job was to be 25 weeks, with the following payment schedule:

a) 18. **Payments Schedule**

First Payment

Upon execution of this agreement

Sum of \$1,600.00

Second Payment

Upon receiving the approval from Nasavusavu Rural Authority

\$22,700.00

Third Payment

*Upon completion of ground floor
c/w exterior interior walls and concrete ceiling
sum of \$22,700.00*

Fourth Payment

*Upon completion of first floor
c/w exterior & interior walls and concrete roof
but not earlier than 18.7.2005
Sum of \$43,000.00*

Fifth Payment

*Upon completion of all jobs finish and issue of engineers
Certificate and Nasavusavu Rural Authority's Certificate
Sum of \$15,000.00*

Total \$105,000.00

9. **THAT** because the contract included not only the construction of the double story building, but also the drawings, approvals by the Nasavusavu Local Authority and the structural engineers certificate, it was agreed that any variation to the structure (i.e. concrete block size and steel thickness) made as a result of miscalculation by the defendant and Mr Maika would be without any additional cost to me.

Paragraph 1 of the Contract states as follows:

"1. The overall main building foundation and exterior/interior wall structure, stairs, plus roof structure to be all concrete, as per drawing. Concrete block size, steel thickness to be specified by Structural Engineer without any additional costs to F. & W. Wehrenberg."

10. **THAT** I never made any changes to the overall size of the building, the number and size of rooms, doors and windows.

The changes to concrete block size and amount and size of steel were made by the structural engineer, hired by defendant Inoke Bulivou, as a result of a mistake made by his employee Mr Maika.

In paragraph 3 (b) of the defendant's statement of defence filed on 2.4.2012 this fact is admitted:

"3. b. The differences in the plans were due to the wrong advise given by Maika."

The floor plans made by Mr Maika in January 2005 (annex "P2") and the plans approved by the structural engineer (annex "P3) a few months later are annexed herewith. ANNEX "P2 + P3"

11. **THAT** the defendant Inoke Bulivou did not mention any of the changes, nor did he ask me and my wife for an increase of the agreed contract price, because he was aware of paragraph 1 of the contract.
12. **THAT** after the signing of the contract on 9.2.2005 I gave a cheque of \$1,600.00 as first payment to Inoke Bulivou, who then instructed Mr Maika to seek the necessary approvals. ANNEX "P4"
13. **THAT** on 27.5.2005 Inoke Bulivou visited me and my wife at Nisusu Island and showed me letter of the Nasavusavu Local Authority giving building permission for my residence.
14. **THAT** Inoke Bulivou confirmed during this visit that he is ready to start the construction, but requested that the second and third payment be increased to \$30,000.00 each instead of \$22,700.00 each as stipulated in the contract and that therefore the fourth payment should be reduced accordingly by \$14,600.00 to a total of \$28,400.00. The contract price of \$105,000.00 would remain the same.

I did not like Mr Bulivou's request, but because he was very persuasive and I had been told that he was a pastor of a church, I reluctantly gave him a cheque of \$30,000.00 on 27.5.2005.

That Inoke Bulivou did definitely **not** ask to increase the total contract price of \$105,000.00 and neither my wife nor I would have agreed to it.

It was mutually agreed on 27.5.2005 that the increased amount of \$7,000.00 foreach (the 2nd and 3rd progress payment) to be deducted from the 4th progresspayment, as stated in paragraph 1. (e) 1. Of my letter dated 11.5.07 to the defendant. ANNEX "P6"

15. **THAT** in June 2005 Inoke Bulivou came to our island with his survey equipment to determine the exact position of the foundation of the double story building. Soon thereafter the construction team, led by Mr Abdul arrived on site and the work commenced.
16. **THAT** soon thereafter Inoke Bulivou took the following careless action:
 - (a) Dismissed his architectural designer Mr Maika, who was well versed with the project and was supposed to have the overall supervision of the project, without replacing him.

(b) Dismissed the construction supervision Mr Abdul, soon after the completion of the foundation and the concrete floor in August 2005, without replacing him. The reason for the dismissal was that Mr Abdul was too expensive.

(c) Took no interest in the project and was increasingly absent from his office.

17. **THAT** as a result of Inoke Bulivou's carelessness and breach of duty of care

I noticed with great concern the following:

- a) The workmanship and efficiency of the workers deteriorated dramatically, because there was no supervision.
- b) Half of the workers were either sleeping on the job or going fishing.
- c) The foreman had only very little experience in reading plans and required constantly my assistance.
- d) There was at times chaos on site and the work progressed only very slowly.

I raised my concern about the above situation with the defendant Inoke Bulivou on many occasions verbally and later also writing, but he ignored it and I was just left alone to deal with the impossible situations on site. In my letter dated 11.5.2007 to the defendant Inoke Bulivou I wrote the following:

I raised my utmost concern about the following:

- (c) The enormous waste of labour costs, due to lack of supervision and bad management by A.P Consultants.
Workers going fishing, or sleeping and wasting constantly time during working hours. I made the A.P Consultants management aware of this problem right in the beginning and on many, many other occasions without real improvement
- (d) The bad working climate which A.P Consultants is creating by:
"removing the supervisor Mr Abdul from our building site after completion of foundation in August 2005 on grounds that he is too expensive and then leaving us to pick up the pieces. I had to spend since then an average of 4 hours per working day to make sure that the construction is done in accordance with the approval drawings and regulations"

ANNEX "P6"

18. **THAT** by September 2005 the defendant Inoke Bulivou had disappeared to Suva and his whereabouts was unknown.

However, Inoke Bulivou gave instructions to his manager Usaia Jeke, a surveyor, who was not versed with the project, to collect on 26.9.2005 the 3rd payment of \$30,000 from me, despite the fact that the ground floor was far from complete.

19. **THAT** I raised the following concerns to the Manager Usaia Jeke:

a) That the ground floor was far from complete because the concrete ceiling was missing.

In accordance with the payment schedule as per paragraph 18 of the contract, the 3rd payment is only due upon the completion of the ground floor, which includes all exterior and interior walls and the **concrete ceiling**.

b) That the workmanship and efficiency of the workers was bad and that I had to be on site and supervise and give technical advice nearly every day, because Inoke Bulivou had dismissed his supervisor Mr Abdul.

c) That I had already made the 2nd payment higher by \$7,300.00 and that I was curious to know where all my funds had gone.

20. **THAT** Usaia Jeke promised during his visit on 26.9.2005 to improve the situation and during intense interrogation he admitted the following:

a) That the defendant Inoke Bulivou required my 3rd payment for a bridge loan for setting up a sister company in Suva.

b) That there were not enough funds to construct the concrete ceiling.

That I refused to make any payment for a bridge loan, but for the sake of making progress and to make project work, I reluctantly agreed to make progress payments.

21. **THAT** from 26.9.2005 I made the following progress payments totalling \$29,500.00 until the concrete ceiling (3rd stage) was completed on 2.3.05:

a) 1 st progress payment	26.09.05	470	\$3,000.00
b) 2 nd progress payment	18.10.05	490	\$12,500.00
c) 3 rd progress payment	31.10.05	494	\$10,000.00
d) 4 th progress payment	16.12.05	515	\$2,500.00
e) 5 th progress payment	02.03.06	557	<u>\$1,500.00</u>
			\$29,500.00

ANNEX "P4"

22. **THAT** however, on 4.9.2006, after I had made 3 payments totalling to \$61,325.00; Inoke Bulivou suddenly withdrew all his workers from the construction site and told his manager Mr Jeke to advise me that there is no money to carry on.

23. **THAT** I was shocked and outraged because:

- a) I had performed all my obligations in accordance with the contract and in fact had already paid \$14,325.00 more than required by contract.
- b) I had bent backwards to make this project work, by providing tools including ladders free of charge and by providing construction supervision.
- c) The 3rd payment which I made should have taken the construction to the fourth stage, which was the completion of the first floor.

The defendant had failed to complete the first floor, because the concrete roof was incomplete, as the facia, incl. some interior walls had not even been constructed yet.

Furthermore, no plaster or paint had been applied on any interior or exterior walls, no floor or wall tiles had been laid and no door frames had been mounted.

- d) I suspected foul play because I had made 3 payments, totalling \$61,325.00 and the defendant Inoke Bulivou had already run of my funds.
- e) The time to carry out the whole job was meant to be 25 weeks as per paragraph 17 of the contract, but the construction work had already taken 56 weeks.

24. **THAT** I made numerous attempts to contact the defendant Inoke Bulivou who had disappeared to Suva to no avail. Inoke avoided me by not turning up to appointment, changing and diverting his mobile phone numbers, not replying to my letters and constantly changing his address.

25. **THAT** in consequence I advised the defendant's manager Mr Jeke verbally and in writing that if they fail to resume the construction I would take legal action. In my latter dated 7.9.2006 I state as follows:

1. You have not completed the roof, as the facia is an integral part of the roof structure (Ref. paragraph 18 of the contract and approved roof plan).....
3. The time in which the whole construction should have been completed has already exceeded by approx. 9 months.

We have been extremely generous in supplying your company free of charge with our tools, construction supervision and even advanced payments (for materials needed for the roof, crushed gravel, cement etc) to you, because of your mismanagement of our funds....

If you fail to resume the construction by Monday the 11th of September 2006, we have no other option but to take the matter to Court on breach of contract.

26. *THAT on 8.9.2006 the defendant's manager Mr Jeke came for a meeting to my island. I advised him that unless the construction of the residence is continuing, I would take legal actions.*

Mr Jeke then admitted the following:

- a) *That the defendant Inok eBulivou had withdrawn large amounts from the company's bank account and had misused my funds for purpose other than what they were intended for.*
- b) *That he (Jeke) had no access to the company's bank account. The only one who had access to the bank account was the defendant Inoke Bulivou.*

27. ***THAT*** *the defendant's manager Mr Jeke then agreed on 8.9.2006 to carry on the construction work, if I would agree to pay for the materials only. The cost for the materials would be deducted from the contract price.*

Mr Jeke would be responsible for the employment of the workers and he would also pay their wages, from income he would make from his surveying.

That due to the difficulties circumstances, whereby the defendant had disappeared and misused my funds and could not be located, I agreed to the manager's proposal.

28. ***THAT*** *on 11.9.2006 a new team of workers carried on the construction work, which progressed very slowly.*

That I purchased the necessary materials and also had to conduct the construction supervision, which was very challenging and difficult at times, because the defendant's manager Mr Jeke did not pay the workers regularly and most of the workers were unskilled.

29. ***THAT*** *on 1.5.2007 at about 1.30pm I caught the defendant Inoke Bulivou who was on a brief visit at his office in Savusavu and I had a meeting with him and his manager Mr Jeke.*

In this meeting I stated my concerns as shown in paragraph 1 (a) to (h) of my letter dated 11.5.2007.

Finally, after 2 hours the following points were agreed upon, as stated in paragraph 1 (a) to (e) of the same letter to the defendant Inoke Bulivou:

- a) *"That A.P Consultants wants to make an extra effort to complete the construction of our residence.*
- b) *That Inoke Bulivou is arranging for plastermen to come from Suva.*

- c) *That the workers to camp at Mr Ben's place at Vatudamu.*
- d) *That Mr Inoke Bulivou is coming out on site for some weeks to look after and guide the workers.*
- e) *That the boat to be repaired and transported to Nisusu Island within a week."*

30. **THAT** *unfortunately all promises made by the defendant Inoke Bulivou on 1.5.2007 have been false and matters even got worse, as shown in paragraph 3 (a) to (e) of my letter dated 11.5.2007.*

- a) *Only one or two workers come for approx. 3 hours per day on three or four days a week and hardly any progress is made.*
- b) *The workers (some related to Usaia Jeke) are extremely rude, unfriendly and do not accept me (the client, designer and main contractor) to say anything towards the construction.*

And this despite the fact that the workers are not even interested to look at any drawings nor are they qualified.

- c) *The workers throwing the rubbish anywhere and defecating in our yard despite there is a toilet. We have constantly to clean after them and the workers treat me like I am their slave by trying to order me around.*
- d) *Worse to come. Now the workers stealing some of our belongings.*
- e) *The management of A.P Consultants turning their backs to the whole situation as they have the money (approx. \$16,000.00 more than what is on site) already in their pocket."*

31. **THAT** *on 23.5.2008, after I had purchased materials valued at \$32,241.33, which I selected in accordance with the contract and building standards, the construction work stopped because the workers had not been paid by the defendant nor his manager Mr Jeke. According to the contract the building should have been completed after 25 weeks but after 150 weeks the residence was still far from complete. A photo of the building as it was May 2008 is annexed.*

32. **THAT** *the purchase of the materials involved getting quotations, making many phone calls and numerous trips from Savusavu to Suva, selecting the materials and organize their shipment to Savusavu and to the building site.*

A list of the materials purchased by me between 2006 and May 2008 is annexed herewith.

33. **THAT** on 10.7.2008 my wife delivered a letter to the secretary of A.P Consultant Ltd, urging the defendant Inoke Bulivou and his manager to resume the construction work immediately and to complete the project until 30.9.2008, or legal action would be taken.

That I received no response from the defendant Inoke Bulivou, but the manager removed A.P Consultant's outside signboard and cleared out the office in mid August 2008.

34. **THAT** I made a complaint against the defendant Inoke Bulivou with the Fiji Independent Commission against Corruption for the defendant's fraudulent conduct and also sought their assistance in locating the defendant. A letter from FICAC dated 12.9.2008 is annexed.

35. **THAT** due to the breach of contract by defendant, I had to hire tradesman, plaster men, tile layer, plumber etc and had to purchase all materials necessary to complete my residence.

The finishing work included:

- a) The plaster on all exterior walls, including downstairs floor and ceiling,
- b) The application of Spanish plaster on exterior walls,
- c) The laying of 175 sqm floor tiles, as per paragraph 6 of the contract,
- d) The laying of wall tiles in showers, above vanities and kitchen wall as per paragraph 5 of the contract
- e) The hanging of doors and fixing of locks
- f) The construction of concrete balustrades for balcony and terrace,
- g) The fixing of mahogany handrail for stairs
- h) The installation and connection of taps, sink, vanities, toilets etc,
- i) The painting of all exterior walls, including roof and fascia,
- j) The painting of all interior walls with texture paint as per paragraph 2 of the contract.

36. **THAT** all the finishing work and all materials I purchased were in accordance with the contract and the building standards. There were on extras.

I had to spend an additional \$37,360.58 for materials and labour for workers, including for my own labour of 2005 hours to complete the residence.

A photo of the completed residence is annexed as "P14".

A list of the materials purchased by me between June 2008 and December 2009 is annexed herewith.

ANNEX "P10"

37. **THAT** I had to spend a total of \$130,926.91 for the construction of my residence as detailed below.

- a) Payments made by me to A.P Consultants Ltd
 Received by defendant and his manager between
 9.2.2005 and 4.9.2006. (Refer to Annex (P4)) \$61,325.00

- b) For my purchase of materials between 2006 and May 2008,
 Due to Inoke Bulivou's breach of duty of care,
 Mismanagement of funds and breach of Contract \$32,241.33
 (Refer to Annex "P7")

- c) For my purchase of materials and the hire of tradesmen
 between June 2008 and December 2009 to complete the
 said residence, due to the breach of duty of care and the
 non-performance of the contract by the defendant Mr Bulivou.
\$37,360.58 (Refer to Annex "P10") Total \$130,926.91

38. **THAT** as a direct result of the said tortious acts and breach of contract by the defendant Inoke Bulivou, **I had to pay \$30,826.91 more than the contract price** agreed upon as detailed below:

- a. total cost to construct and complete residence \$130,926.91

- b. Contract price (VIP) \$105,000.00

- c. Adjustment to contract price as per paragraph 6
 of contract 175 sqm of floor tiles at \$55.00 per sqm was
 stipulated in the contract, but I selected floor tiles at lesser price of \$27.00 per
 sqm, a saving of \$4,900.

Adjusted contract price	\$100,100.00	<u>\$100,100.00</u>
Extra Cost of		<u>\$30,826.91</u>

39. **THAT** on 29.12.2009 I wrote a registered letter to A.P Consultants Ltd, to both Savusavu and Labasa, as I did not know the whereabouts of the defendant Inoke Bulivou. I detailed the extra cost due to the defendant's breach of contract and ask for payments by 31.1.210, or I would take legal action. ANNEX "P11"

40. **THAT** while I, FICAC and my bailiff tried to locate the defendant Inoke Bulivou I became aware of the following:

- a) That Inoke Bulivou and his wife Sereana Bulivou are shareholders of A.P Consultants Ltd. Since 26.08.2004 and hold each 19999 shares at \$1.00 per share.

- b) The company A.P Consultants Ltd does not operate any more since mid-August 2008 and there are no assets.
The High Court issued a winding up order no. 0006 of 2008 which was taken out by Credit Corporation (Fiji) Limited against A.P Consultants Ltd.

Inoke Bulivou is since 25.9.2009 ignoring Official Receiver in Suva repeated requests to come to their office to sort matters out.

- c) That the defendant Inoke Bulivou is evading not only the Official Receiver and the Bailiff Anirudh Kumar, but also FICAC who are investigating Inoke Bulivou for fraud. The Officer of FICAC Mr James Sinclair conclude that Inoke Bulivou had no intention to complete my residence, but saw an opportunity to get hold of a large amount of money.
- d) That Inoke Bulivou's former landlord Mr Narayan of Suva informed me that Inoke Bulivou is not paying his rent and therefore he had locked the flat. Mr Narayan showed me a bus which Inoke Bulivou had brought since he had moved to Suva. This bus was now total write off at it had been involved an accident.

41. **THAT** this civil suit is a common law claim against the defendant, holding him personally liable for procuring a breach of contract and for breach of duty of care. That the defendant Inoke Bulivou was not only the director and shareholder of A.P Consultants Ltd, but he was also the mind and will of his company and personally exercised full control over the building project as shown below:

(a) Firstly, it was the defendant Inoke Bulivou who personally:

1. Persuaded me to give him the contract
2. Negotiated the conditions and the contract price,
3. Signed the contract,
4. Received the payments,
5. Hired and fired construction workers, supervisor and designer,
6. Had the sole control and access to the companies bank account,
7. Was the ultimate beneficiary of my funds as director and share holder.

(b) Secondly, it was also the defendant Inoke Bulivou personally who **breached the duty of care**, when he exercised his control over the project by:

1. Sacking his construction supervisor Mr Abdul without replacing him, resulting in chaos on site, severe deterioration of workmanship and efficiency of workers,
2. Sacking his architectural designer Mr Maika without replacing him,

3. *Blatantly ignoring my repeated verbal and written requests for a supervisor and leaving me to deal with an impossible situation on site.*
- (c) *Thirdly, it was the defendant Inoke Bulivou who personally procured a Breach of Contract, which he himself negotiated and signed, when he:*
1. *Withdrew all the workers from the construction site,*
 2. *Disappeared to Suva and misappropriated my funds.*

Furthermore, the defendant has been evading me and the litigation process and he is now misusing his company as a device or façade to conceal his wrong doings.

42. ***THAT*** *I am aware that the Courts in Fiji, England, Australia, New Zealand and USA have ruled in the past in regard to the director's liability as follows:*

- a) *Procuring a breach of contract is a tort
In general, an individual tortfeasor is personally liable for his own torts, even if he is a director of a limited liability company, which may also be liable for the tort.
The fact that a director acts as agent for his company does not give him a defence to personal liability for torts committed by him.*
- b) *If the director performs the acts which constitute the tort, the director will be personally liable for the tortious act they have committed whether alone or in conjunction with others.*
- c) *Directors of a company are personally responsible for any torts committed by their company in the procuring of which they are personally implicated.*
- d) *In Australia and in England a director is no different position to an agent who, whilst binding their principal may also be liable for their tortious acts.*
- e) *That it does not follow that a director of a company would escape personal liability under cover of the company's responsibility if he himself became an actor.*
- f) *Those decisions that postulate that the liability of a director for the tortious conduct of their company requires the director to have procured or directed the acts in the knowledge that or with reckless indifference to whether the acts were unlawful or would cause harm to another, regard such a requirement as a necessary consequence of the doctrine of limited corporate liability.*

g) *This does not mean that director become personally liable merely because they are directors. Unless they procure or direct the tortious conduct the law does not impose upon them liability for the acts of other agents or employee, whether they are directors of large corporations or what is described as "one man" companies.*

h) *As directors in such circumstances are inherently more likely to be connected to any tortious conduct of the company, it is not surprising that empirical studies conducted in Australia, England and the United States all suggest that courts are more likely to expose the director to liability and lift the corporate veil where a single or small number of individuals control the company.*

i) *A shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct.*

We are persuaded by those authorities that hold that both limited liability members are engaged in tortious conduct.

"You don't buy immunity from suits for your torts by being a member of a business corporation"

43. *THAT as a result of breach of contract and breach of duty of care by the defendant Inoke Bulivou, I suffered special and general damages and costs:*

a) *Special damages in the sum of \$30,826.91*

b) *General damages:*

(i) *Damages for the stress and mental anguish caused to me and my wife*

(ii) *damages for the 4 year delay until the construction of the residence was finally completed*

c) *Interest on damages*

d) *Costs*

(i) *Cost of this action*

(ii) *Cost for Bailiff, motions and advertisements etc*

From June 2010 until September 2011 to locate the

Defendant who was evading the litigation process \$2,000.00

44. ***THAT*** I pray to this Honourable Courts for reasons aforesaid that compensation be granted for loss and damages I have suffered.

28. The court also in this judgment had considered the Plaintiffs wife namely WALBURGA WEHRENBEGs', affidavit of evidence in chief and I do not wish too reproduce the same as the court record has it. The Plaintiffs wife was the third party to the contract, which was signed by the defendant Inoke Bulivou, the plaintiff and herself on 9.2.2005.

E. THE DETERMINATION AND CONCLUSION

29. The Defendants obvious and unacceptable attitude towards the full proceedings when the matter was called before my court had deemed to be his indication on full admissions to the claim, by avoiding every court dates and even had failed to oppose the claim on the hearing date. At one stage, I have noted that the former Counsel, *Mr Naco* had lost touch in getting instruction from his client, that had resulted of him being withdrawn from representing the Defendant anymore.

27. I have also noted and perused every documents tendered in court as part of the Plaintiffs'; evidence and I am satisfied that there was indeed a breach of contract due to the Defendants non-performance of his duties and he had had failed to honor his part of the bargain as per contract executed by all the parties on the 09th February, 2005.

28. In considering all the above detailed evidence in chief, the authorities and principles reference to the issue of breach of contract, it is clear to this court and I am satisfied that the Defendant entered into a contract for the construction of the Plaintiff's residence and such there was a contract price of \$105,000.00, and the total cost to construct and complete the said residence was \$130,926.91; and due to the Defendants non-performance and failing to complete his obligations, the Plaintiff had to pay an extra \$30,826.91 together with the cost of the \$2000.00 as bailiff costs.

29. I have also noted and made to accept that the Plaintiff had suffered loss in terms of transportations, accomodations etc and must considered with some general damages caused upon him whilst being coming to court for the past four years.

30. The Court therefore Orders as follows:

- a. *The Defendant shall pay to the Plaintiff the total sum of \$30,826.91 being the refund of the extra cost he incurred to complete the construction of his residence.*
- b. *The Defendants shall further pay the Plaintiff the sum of \$2000.00 being costs for Bailiff, motions and advertisements.*
- c. *The Defendants shall further pay the Plaintiff the sum of \$6000.00 assessed by the court as general damages and for the delay of the proceedings caused by the Defendant.*
- d. *Therefore the total sum the Defendants shall pay the Plaintiff is \$38,826.91 being the total judgment sum.*

Dated at LABASA this 4th day of August, 2014.

Tomasi Bainivalu
Resident Magistrate

Tomasi Bainivalu (Mr)
RESIDENT MAGISTRATE
LABASA/SAVUSAVU

