IN THE COURT OF APPEAL, FIJI
[APPELLATE JURISDICTION]

CIVIL APPEAL NO. ABU 0054 of 2013
(High Court File No. HBC 18 of 2009 Labasa)

BETWEEN	:	**NORTH [FIJI] GROUP LIMITED**
		Appellant
AND	:	1. **GARY SCOTT MOTIL**
		2. **LAURIE J MOTIL**
		Respondents
Coram	:	**Calanchini, P** **Lecamwasam, JA** **Amaratunga, JA**
Counsel	:	**Mr. I. Fa for the Appellant** **Mr. A. Sen for the Respondents**
Date of Hearing	:	**9 September, 2016**
Date of Judgment	:	**23 February 2017**

JUDGMENT

Calanchini, P

[1] This is an appeal by the Appellant against the orders of the learned High Court Judge at Suva dated 27 August 2013. The learned Judge ordered that North (Fiji) Group (the Appellant/First Defendant) pay to the Motils (the Respondents/Plaintiffs) $683,966.10 with interest at 3% from 28 July 2011 to 27 August 2013. The Plaintiff's claim for special damages, exemplary damages and their claim against the Second Defendant (not a party to this appeal) were all dismissed. The counterclaim by the First Defendant /Appellant (North (Fiji) Group Limited) was also dismissed.

[2] Being dissatisfied with the order to pay damages to the Motils and with the dismissal of its counterclaim the Appellant (North) filed a timely notice of appeal on 02 October 2013. Being dissatisfied with the quantum of damages awarded with particular reference to the claims based on misrepresentation and the Fair Trading Decree the Respondents (the Motils) filed a Respondent's notice on 30 March 2015.

[3] To avoid confusion it should be noted the Appellant, North (Fiji) Group Limited was the vendor and the Respondents, Gary and Laurie Motil, were the purchasers of land situated on Vanua Levu. The relevant facts are set out in the judgment of Lecamwasam JA.

[4] It is necessary to comment briefly on the date of filing of the Purchasers' (Respondents') Notice. Rule 19(4) of the Court of Appeal Rules (the Rules) that a Respondent's notice shall be served on an Appellant (amongst others) within 21 days after service of the notice of appeal on a respondent. The record shows that the notice of appeal was served on the Respondents (purchasers) on 3 October 2013. Service of the Respondent's Notice on 30 March 2015 is about 16 months out of time. There does not appear to have been any application for an enlargement of time to file and serve a respondent's notice. This would ordinarily be a matter of some concern to the Court. However, it is not necessary to consider the timeliness of the notice filed by the Respondents (purchasers) since the Court has determined that the claim by the Respondents cannot be sustained. I agree with the orders proposed by Lecamwasam JA.

[5] I venture to add a further observation on section 6(1) of the Land Sales Act Cap 137. The effect of non-compliance with that section was considered by the Supreme Court in **Gonzalez v Akhtar and Khan**; [2004] FJSC 2; CBV 11 of 2002; 21 May 2004. The Court noted at paragraph 112:

> *"In our opinion the words of the sub-section are clear and unambiguous. No non-resident shall, without the prior consent in writing by the Minister, make any contract to purchase land."*

It should be noted that the requirement does not apply when the land to be purchased does not exceed one acre in area.

[6] At paragraph 113 the Court stated:

> *"According to orthodox statements of contract law, a contract may be illegal because making or performing it is prohibited by statute, expressly or by implication."*

[7] At paragraph 114:

> *"If making or performing a particular contract is expressly prohibited by statute, the contract is illegal unless the statute itself indicates that a prohibited contract shall nevertheless be enforceable. In the absence of any such indication, a contract the formation or performance of which is expressly prohibited by statute is illegal."*

[8] At paragraph 118:

> *"A contact entered into a breach of Section 6 (1) is in our view a clear example of a contract expressly prohibited by statute".*

The Supreme Court concluded that a contract made in breach of Section 6(1) was illegal and unenforceable. Therefore the Respondents cannot establish causes of action based on the agreement that is pleaded in paragraph 4 of the Statement of Claim.

Lecamwasam, JA

[9] This is an appeal preferred by the appellant against the order of the learned High Court Judge of Suva dated 27th August 2013. The Orders of High Court are:

(a) The first defendant shall pay the plaintiffs by way of damages, the sum of $683, 955.10 together with interest at the rate of 3 % per annum on that sum from date of writ, 28 July, till date of judgment.

(b) The plaintiff's claim for special damages is declined.

(c) The claim against the second defendants is dismissed.

(d) The claim for exemplary damages is declined.

(e) The counterclaim is declined.

(f) The first defendant shall pay the plaintiffs costs summarily assessed in a sum of $5,000.00.

[10] Facts of this case are succinctly stated by the learned High Court Judge in his inimitable way in the opening paragraph of the judgment in the following manner.

'1. In these proceedings, the plaintiffs seek a declaration that the defendants have breached an agreement entered into between the plaintiffs and the first defendant company for the sale and purchase of the first defendant company's land, alternatively for specific performance of the agreement and damages. A claim is made against the first and the second defendants, as directors and representatives of the first defendant company and in purpura persona, for damages for misrepresentation inducing them to complete the transfer. The defendants counterclaim for breach of the covenants of the Transfer document.'

[11] Paragraphs 3 and 4 of the statement of claim of the Plaintiffs (purchasers) are important for my purposes in identifying the relevant land. I reproduce verbatim the said paragraphs of the statement of claim.

*'**IN** or around July 2006, the plaintiffs came in contact with the 2nd defendants through a mutual friend and subsequently in September 2006 the plaintiffs travelled to Fiji, in the process minded to invest in the development of the plaintiff by purchasing a lot from the subdivision (full particulars of the subdivision is detailed later paragraphs). The plaintiffs requested to see the project details and future developments of the defendants to determine whether they would invest in Fiji in particular in the development undertaken by the defendants.*

***BY** an agreement in writing dated 28th October 2006 made between the plaintiff and the 1st defendants. The 1st defendants agreed to sell and the plaintiff agreed to buy part of 1st defendants land contained in Certificate of Title No. 36452 known as Narewa (part of) namely 1.5369 hectares part of 36452 DP no. 9305 and 9306 and situated in the District of Dreketi on the Island of Vanua Levu at the purchase price of **US$400,00.00**.*

(The plaintiff will at the time hereinafter refer to the following agreement:- preliminary agreement executed on 28th October 2006 and memorandum of sale annexed to preliminary agreement of even date for full terms and the true purport hereof).'

[12] In answer to paragraph 4 of the Statement of Claim the defendants took up the following position in paragraph 4 of the Statement of Defence:

"The Defendants agree that there was an agreement for the purchase of part of the land as contained in CT 36452 but further adds that the actual lot sold is Lot 1 on DP 9307 and apart from the above admissions makes no further admissions in respect to paragraph 4."

[13] The Plaintiffs (purchasers) in turn replied the Defendant's position (vendor) by their **Reply to defence** in the following manner:

"4. As to paragraph 4, the plaintiffs say that they will refer to the agreement dated 28th October 2006 for full terms and the true purport at trial."

It is to be noted, although the Plaintiffs had stated that they would refer to the agreement dated 28th October 2006 for full terms and true purport at trial, the document in fact produced is the preliminary agreement dated 25th January 2007. In the Memorandum of Terms of Sale too, the Annexure to the Preliminary Agreement under 'property sold' refers to Lot 1 on DP 9307 and not to 9305 or 9306.

[14] As the identity of the land is crucial to an eventual determination in respect of the agreement in issue, and especially in view of the above position taken up by the Defence in their Statement of Defence, Plaintiffs (purchasers) ought to have sought an amendment to the Writ/Statement of Claim to correct the Lot number of the land which they had failed to do. At a minimum, the plaintiffs (purchasers) ought to have been vigilant when the statement of defence was filed, and taken measures to remedy the issue with regards to the identification of the land promptly.

[15] Hence, such remiss is undoubtedly reflective of the fact that the Plaintiffs (purchasers) were claiming to have agreed to buy part of the 1st defendant's (vendor's) land depicted in Certificate of Title Number 36452 known as Narewa (part of) containing in extent 1.5369 hectares which forms part of 36452 DP No. 9305 and 9306 and situated in the District of Dreketi. According to the Plaintiffs, the agreement had been reached in respect of the land in DP 9305 and DP 9306 and not any other.

Further, the Land Sales Act Cap 137 in Section 6 specifies:

'(i) No non-resident or any person acting as his agent shall without the prior consent in writing of the Minister responsible for land matters make any contract to purchase or to take on lease any land. Provided that nothing contained in the subsection shall operate to require such consent or prevent a non-resident from making any such contract if the land together with any other land in Fiji of such non-resident does not exceed in the aggregate an area of one acre.

(ii) The Minister responsible for land matters may require any application for his consent mentioned in subsection (1) to be in the appropriate form and may refuse his consent without assigning any reason, or may specify terms whether by way of imposition of bond or otherwise upon which such consent is conditional.'

[16] In view of the above provisions it was incumbent on the Plaintiffs (purchasers) to have obtained such consent of the relevant Minister. On a perusal of the record before me, I find that the original Plaintiff had faithfully taken steps to obtain the Hon. Minister's consent, which the Hon. Minister had given on the 25th January 2007. The Minister's consent states thus:

"I hereby approve the transaction subject to:

(i) that the transfer of the said property be completed within three (3) months from the date this consent is given;

(ii) that the funds for the project be brought from offshore;

(iii) that the proposed developments on the said property be completed within two (2) years from the date of transfer;

(iv) that clearance be obtained from the Commissioner of Inland Revenue and the Governor, Reserve Bank of Fiji;

(v) that FTIB approval be obtained if the said property will involve any commercial. business activity.

Date: 25.01.2007 *Minister for Lands & Mineral Resources*

"IMPORTANT NOTICE"

My consent to this dealing is being given on the understanding that the Purchaser(s) and all those who may reside on this property shall respect and comply with the Laws of Fiji, more particularly in relation to the following:-

(a) the acceptance of Fiji's sovereignty and jurisdiction over the property;

(b) the right of public access to all parts of the foreshore, including beaches up to the high-water mark;

(c) the laws and practices on Fijian customary fishing rights in the surrounding foreshore areas; and

(d) the right of access to public officials in the performance of statutory duties and functions.

Date: 25/01/2007 ***Minister for Lands & Mineral Resources***

[17] It is important to advert to the fact of the Minister's consent in order to determine the land in respect of which Consent was granted. Such determination is necessary for the ultimate determination on the validity of the contract in dispute. On a perusal of the Minister's consent letter in isolation, one cannot readily identify the land in respect of which the Minister had given consent. To ascertain the identity of the land to which the Minister has given consent, one must advert to the **Application for Consent to a Dealing (Section 6 & 7 Land Sales Act, Cap 137)** made by the Plaintiff to the Minister. Paragraph (a) on the same application gives the legal description of the property, tenure and the location etc. Therein it is stated that the relevant land is Lot 1 on **DP 9307** [part of CT 36452].

Therefore it is manifestly clear the land that was to be purchased was none other than the land depicted on DP 9307. Therefore, it is not in doubt that Hon. Minister had given consent in respect of the land depicted on DP 9307 and not any other land. As such, available consent is in respect of Lot 1 on DP 9307 and not in respect of any land on DP 9305 or 9306. In other words there is no consent in respect of the land described in paragraph 4 of the statement of claim in respect of which the parties have agreed upon. Plaintiff being a foreigner, it is mandatory to have obtained the Minister's consent before purchasing a land over one acre in Fiji.

[18] Further, the transfer document refers only to Lot 1 on DP 9307 there being no reference to 9306 or 9305. Therefore I am amply convinced that the Hon. Minister had not given consent with regards to the land described in paragraph 4 of the statement of claim. Without such consent a non-resident cannot enter into any contract to purchase any land exceeding one acre in Fiji.

[19] It is manifest now from the material on record that the Minister's consent had not been obtained for the Respondents (purchasers) to have any right to the land they claim. The Minister's consent was a condition precedent for the Respondents (purchasers) to have acquired any right over the land they were claiming. Therefore the purchaser cannot succeed in any action for a land, without the consent of the Minister having been obtained prior to the purchase of the land. On such basis, I conclude there was no proper consent extended to the land depicted on 9305 or 9306. Any agreement based on the lands 9305 or 9306 is therefore void *ab initio*.

[20] The original Plaintiff (Respondent) alleges misrepresentation, fraud and breach of Sections 53 and 54 of the Fair Trading Decree on the part of the Defendant (Appellant). For the reasons I have already set out, it is not necessary for me to go into these allegations as the Plaintiff (Respondent) instituted this action on a wrong basis, i.e. by filing action in respect of wrong land.

[21] In view of the above the learned High Court Judge should have rejected the writ in limine.

[22] '*A condition is a restraint or bridle annexed and joined to a thing, so that by the non performance or not doing thereof a party to the condition receives prejudice and loss.*' (see: Stroud's Judicial dictionary of words and phrases, sixth edition, Vol. 1 at p.472).

[23] The condition in question falls into the category of conditions in law. The Land Sales Act decrees the pre-requirement or pre-condition of the Minister's consent. It was a *sine qua non* to getting the land. Here in this case there is no Minister's consent in respect of 9305 and 9306.

[24] It is surprising that the appellant (vendor) had not noticed this glaring error albeit he had mentioned the fact in passing in paragraph 4 of the statement of defence.

[25] By virtue of the provisions contained under Section 13 of Court of Appeal Act I am confident that this Court has the power to deal with the case at hand and dismiss the original action.

[26] Therefore I would order the dismissal of the Writ filed by the original Plaintiffs (present Respondents – Purchasers). As a result the Respondent's notice is dismissed. It also follows that the Appellant's appeal against the award of damages also succeeds.

[27] Now I advert attention to the Appellant's (vendors) amended grounds of appeal filed on 30 May 2016 which reads thus:

"1. The Learned Trial Judge erred in law and in fact in failing to find that the contract of the 8th of July 2006 between the Respondents and the Appellant and its terms and conditions was the only binding Agreement between them and no other.

2. That the Learned Trial Judge erred in law and in fact in finding that there was an agreement between the Respondent and Appellant, in which conferred on the Respondents benefits that were not included in or were part of the Agreement of the 8th of August 2016 between the Respondent and the Plaintiff for the purchase by the Plaintiff of land contained in Certificate of Title No. 36452 known as Narewa (part of) namely 1.5369 hectares part of 36452 DP No. 9305 and 9306 and situated in the district of Dreketi in the island of Vanual Levu for the sum of US$400,00.00 (Four hundred thousand dollars), but rather were part of a package of benefits that were to be for the purchasers of land in an integrated resort development known as the Narewa Club which were being sold by the Defendant at a price of $1.6 million, which was neighboring development to the land that the Respondent had purchased.

3. *That the Learned Trial Judge had erred in Law and in fact in finding that the Respondent's had succeeded in establishing a case for deceit as:*

   (i) The Sale and Purchase Agreement between the Appellant and the Respondent of the 8th of August 2016 was conclusive of the parties agreement and their obligation to each other;

   (ii) That the development of an integrated resort and Narewa club was not part of the Sale and Purchase Agreement entered into by the Appellant and the Respondent of the 8th of August 2016, but rather part of a separate development where club membership was to be sold at $1.6 million of which the Respondents had not purchased;

   (iii) That the Appellant's website which contained representations relied on by the Respondents and accepted by the High Court as false representations which induced the induced the Respondents to enter into the Sale and Purchase Agreement with the Appellant was put up in 2008, well after the Respondent had entered on the 8th of August 2016 and were representations that relate to a different contract to the one which the Respondents had entered into.

   (iv) That the Respondents did not have a contract with the Appellant which contained the representations referred to by the in paragraphs 6.1.4 of its judgment.

4. *That the Learned Trial Judge erred in law and in fact in finding that the Appellant was liable to the Respondent for damages in the sum of $580,966.00 (five hundred and eighty thousand nine hundred sixty dollars) as:*

   (1) There was in fact there was no agreement in place between the Appellant and the Respondents that the Appellant had breached, which caused the Respondents damages to the amounts awarded to them by the court.

(2) *That the Court had accepted a faulty valuation process in which is unmeritorious and flawed and should be disregarded.*

5. *That the Learned Trial Judge erred in Law and in fact in finding that the Appellant was liable to the Respondent in the sum of $103,0000.00 (one hundred and three thousand dollars) being costs of obtaining electricity and digging a bore well, when such a remedy was not warranted.*

6. *That the Learned Trial Judge erred in law and in fact to award the Appellant a remedy after finding that the Respondent had breached the covenants in the Transfer document to title to the land they had purchased from the Appellant pursuant to the contract of the 8th of July 2006.*

7. *The Learned Trial Judge erred in law and in fact in holding in the Judgment at "paragraph 6.1.7 that "representations were made to the Respondents by the 2nd Defendant, in so far as it accords with the link pages referred to in paragraph 6.1.4 of the Judgment.*

8. *The Learned Trial Judge erred in law and in fact in holding that other representations had been made by the Appellant to the Respondents.*

9. *The Learned Trial Judge erred in law and in fact in holding that the loss of financing was not a promising start.*

10. *The Learned Trial Judge erred in law and in fact in holding that the Respondents case on deceit succeeds and that the fraudulent misrepresentation was made out when such finding was against the weight of evidence and the pleadings did not assert the same.*

11. *The Learned Trial Judge erred in law and in fact in holding that the Appellant did not have the will or the ability to put their intention into effect, at the time the statements were made.* ***Ï conclude that the 2nd Defendants made false representations, as agents of Appellant company, in the Derry v Peek sense, and this induced the Respondents***

to purchase the land," as such conclusions cannot be upheld in the face of the evidence tendered.

12. *The Learned Trial Judge erred in law and in fact in holding that the clause in the Memorandum of Terms of Sales attached to the sale and purchase agreement, which acknowledges that the purchaser* ***"has caused the property to be inspected and the same is being purchased solely in reliance upon his own judgment and not due to any representation or warranty made the Vendor****"did not apply to the case of fraud.*

13. *The Learned Trial Judge erred in law and in fact in holding that the Respondents had suffered detriment and that an enforceable agreement existed.*

14. *The Learned Trial Judge erred in law and in fact in holding that the Respondents were entitled to damages for loss suffered arising from the fraudulent representation by the 2nd Defendants when the 2nd Defendants were absolved from liability.*

15. *The Learned Trial Judge erred in law and in fact in referring to subsequent events to determine the bona fides and truthfulness of representations, if any, alleged to be have been some years before as the basis of fraud.*

16. *The Learned Trial Judge erred in law and in fact in incorrectly assessing damages, which was based on a flawed valuation report, amongst other irrelevant considerations.*

17. *The Learned Trial Judge erred in law and in fact in awarding damages for electricity in the sum of $89,000 and water borehole for $14,000 when the same was not adequately proved nor was it an appropriate remedy in the circumstances.*

18. *The Learned Trial Judge erred in law and in fact in holding that the Appellant had accepted the breach of restrictive covenants when it had in fact not done so.*

19. *The Learned Trial Judge erred in law and in fact in dismissing the Appellant's counter-claim as unfounded when the Respondents 'breaches and the damages flowing from the Respondents 'breaches were proved.*

20. *The Learned Trial Judge erred in law and in fact when the Appellant was denied natural justice and it witness was prevented from giving evidence in full on numerous occasions, the right to be heard being curtailed or cut short.*

21. *The Learned Trial Judge erred in law and in fact in failing to hold that the Respondents had not proved their claim to the standard of proof required, thus entitling the Appellant to a dismissal to this action with costs to the Appellant.*

22. *The Learned Trial Judge erred in law and in fact in not holding that the Respondents Statement of Claim, evidence and proof were inconsistent and had not proved the claim and that this action ought to have been dismissed with costs.*

23. *The Learned Trial Judge erred in law and in fact in not distinguishing between residential blocks on DP 9307 with resort blocks on DP 9306 with their respective entitlements and privileges and further not distinguishing the Narewa Club entitlements and who were entitled to the same.*

24. *The Learned Trial Judge erred in law and in fact in not placing sufficient weight and importance to the sale and purchase agreement entered into between the Appellant and the Respondents.*

25. *The Learned Trial Judge erred in law and in fact in arriving at his conclusion and orders without taking into consideration the lack of circumstantial and corroborative evidence, especially when the alleged representations were said to be oral.*

26. *The Appellant reserves the right to alter or add further grounds of appeal on the availability of the copy record."*

[28] The Learned Trial Judge had dismissed the counter claim filed by the Appellants (vendors) which pleaded, inter-alia:

"1. The Defendants are now seeking from the Plaintiff for their economic losses and other ancillary damages.

The Defendants ought not to be held liable for the global and economic fluctuation with external influences which they hold no responsibility financially or otherwise as is being claimed for by the Plaintiffs. The 2nd Defendants really should not be parties to this action at all.

2. *The first Defendant's land as a direct result of the Plaintiff's building of sub-standard and unauthorized structures thereon has diminished in value. The Plaintiff's failure to construct dwelling house(s) up to the standard required in the contract between the parties as referred to above detracts from the potential development of the resort area.*
3. *The Defendants claim interest on any judgment that might be awarded to them pursuant to the Law Reform (Miscellaneous Provisions) (Death and Interest) Act, Cap. 27.*
4. *The Plaintiffs have, through their frivolous and vexatious lawsuit caused the Defendants to lose potential investment opportunities due to the legal liabilities that such a suit creates."*

WHEREOF THE DEFENDANTS ARE NOW CLAIMING FROM THE PLAINTIFFS THE FOLLOWING:

i) *Special Damages (to be assessed);*

ii) *General Damages for breach of contract and consequential loss (to be assessed);*

iii) *Interest;*

iv) *Costs;*

v) *Such further orders and other reliefs as this Honourable Court thinks deem fit and just.'*

[29] On consideration of the counter-claim, it is apparent that the defendants (appellants) are relying on a contract (as per paragraph 2 of the counter-claim) entered into between the parties which they have failed to produce before courts. Hence any claim based on a document not before courts, this court is unable to grant any relief.

[30] Furthermore although the defendants (the appellants/vendors) counter claimed for damages, they failed to adduce any evidence as to damages apart from mere allusion. Hence as there is no proof claim for damages is also rejected.

[31] Despite the position taken in this Court and before the High Court and in their submissions, Defendants had not substantiated in evidence any of the relief claimed by their counter claim. Not only had they not substantiated the counter claim by adducing cogent evidence to that effect, but also had not even taken the trouble to put their position to the Plaintiff under cross-examination. In short, though they have claimed relief, there is no evidence before Court to grant any of the relief. Therefore, the learned High Court Judge is correct in arriving at the conclusion that '*the counter claim is unfounded'*. In the same vein, as there was no evidence before the Court the counter claim of the original Defendants (the Appellants) should fail and hence the appeal challenging the dismissal of the counter claim is dismissed.

Amaratunga, JA

I agree with the proposed orders.

The Orders of the Court are:

1. *The Appellant's appeal against the award of damages is allowed.*
2. *The Respondents' notice is dismissed.*
3. *The Orders of the court below are set aside.*
4. *The Plaintiffs' (Respondents') writ is dismissed.*
5. *The Defendant's (Appellant's) counter claim is dismissed.*
6. *Parties to pay their own costs in the court below and in this court.*

Hon. Mr. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL

Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

Hon. Mr. Justice G. Amaratunga
JUSTICE OF APPEAL

ADDENDUM TO JUDGMENT

After the judgment in this appeal had been settled the Court's attention has been drawn recently to an undated and unsigned summons that was filed on or about 23 January 2017 by the solicitors for the Respondents.

In the summons the Respondents seek the following orders:

> *"1. That the supplementary record filed by the appellant in these proceedings be removed and discarded from the court record and no part therefrom be accepted for determination of this appeal.*
>
> *2. Consent of the Minister to the dealing between the appellant and respondent for purchase of CT No. 36452 in DP No.9306 and 9305 be accepted as part of court record.*
>
> *3. Leave be given to the respondent to provide further authorities in reference to the grounds of appeal."*

The application for those orders is said to be made under *"section 39 Rule 22"* of the Court of Appeal Rules. It should be noted that section 39 is presumably a reference to section 39 of the Court of Appeal Act and relates to the power of the President of the Court to make rules regulating practice and procedure under the Court of Appeal Act. Rule 22 is concerned with the general powers of the Court in civil appeals with particular reference to amendments and further evidence.

The application is supported by a document that purports to be an affidavit sworn by "*Gary Scott Motil of Narewa"* on 10 January 2017. The document is not an original document and nor is it a copy of the document with the signature of the deponent. Where the signature of the deponent should appear the words *"signed G S Motil"* appear. There is no document before the Court that indicates that the deponent actually swore and signed the affidavit on 10 January 2017.

The affidavit has annexed to it three pages consisting of a one page letter dated 26 January 2007 from the Ministry of Lands and Mineral Resources. There then follows a two page document

with the title "*Application for consent to a Dealing.*" The application is addressed to the Minister responsible for Land and from paragraph 1 of the document it is clear that it is an application for approval for the sale and purchase of Lot 1 on DP 9307 being part of CT 36452. Paragraph 5 of the document is concerned with information concerning the vendor's acquisition of the land which is now the subject of the application. In paragraph 5(e) the vendors provide particulars of the acquisition of CT 36452 subsequently sub-divided into DP 9306 and 9307.

The approval letter dated 26 January 2007 from the Ministry of Lands is brief. It is addressed to Messrs. Tikaram and Associates and reads as follows:

> "*Re: Application for Consent to a Dealing – Sale of Part of CT 36452 (Lot 1 on DP 9307) – North (Fiji) Group Ltd to Gary and Laurie Motil.*
>
> *This is to advise that the Hon. Minister has granted his consent to the above dealing subject to the conditions specified on the back of the Consent form a copy of which is attached for your further action.*"

The two documents that are annexed to the affidavit had previously been provided by the solicitor for the Respondents to the Court as attachments to two identical letters dated 13 September 2016 and received in the Registry on 14 and 19 September 2016 respectively.

The summons and the material has been considered by the Court. The matter can be dealt with briefly. First, for the reasons stated by this Court in **The Attorney-General of Fiji –v- Graham Burnett** (ABU 23 of 2009; 21 March 2012) it is too late, some four months after the hearing of the appeal, to seek to have the appeal record amended, let alone seek an order for the removal of material from the appeal record.

Secondly, the material that the Respondents now seek to have placed in the appeal record was material that had previously been provided to the Court at the request of the Court. Both parties provided additional material immediately after the appeal hearing at the request of the Court. There is nothing new for the Court to consider.

For all of the above reasons, the Court will not authorize the issue of the summons at this stage of the proceedings.

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Hon. Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL

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Hon. Mr Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Mr Justice G. Amaratunga
JUSTICE OF APPEAL