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

Civil Action No. 180 of 2013

BETWEEN : **INSPIRED DESTINATIONS (Inc) LIMITED** a limited liability company having its registered office at Level 1, 112 Castlereagh Street, Sydney NSW 2000, Australia.

PLAINTIFF

A N D : **BAYLEYS REAL ESTATE (FIJI) LIMITED** having its registered office at Level 3, Aliz Building, Martintar, Nadi.

1st DEFENDANT

A N D : **GRANT ROBERT GRAHAM** and **BRENDON JAMES GIBSON** of level 16, 45 Queen Street, Auckland, New Zealand in their capacity as Joint and Several Receivers and Managers of **AANUKA ISLAND RESPORT LIMITED** trading as Amunuca Island Resort and Spa.

2nd DEFENDANTS

A N D : **BANK OF SOUTH PACIFIC LIMITED** a company incorporated in Papua New Guinea which has established a place of business in Fiji within Suva and having branches throughout Fiji.

3rd DEFENDANT

Date of Trial : **Wednesday 14th and Thursday 15th March, 2018**
Date of Judgment: Friday 19th October 2018

Counsel : (Ms) Natasha Feroz Khan for the Plaintiff
Mr. Devanesh Prakash Sharma for the First Defendant
(Ms) Pulekeria Maibatiki Low for the Second Defendants
(Ms) Shoma Singh Devan for the Third Defendant

JUDGMENT

(A) INTRODUCTION

(1) By an Amended Writ of Summons and Amended Statement of Claim dated 28th April 2014, the Plaintiff, Inspired Destinations (Inc.) Limited brought an action against the Defendants claiming for return of the deposit (earnest money) (under the law of restitution) paid by the Plaintiff pursuant to a Contract for the sale and purchase of a leasehold interest in Native Land.

(2) At the hearing of the action, the Plaintiff discontinued the action filed against the **First Defendant** with the leave of the Court.

(B) THE FACTUAL BACKGROUND

(1) The Amended Statement of Claim which is as follows sets out sufficiently the facts surrounding this case from the Plaintiff's point of view as well as the prayers sought by the Plaintiff.

> *1. THE Plaintiff is a limited liability company having its registered office at Level 1, 112 Castlereagh Street, Sydney NSW 2000, Australia*
>
> *2. THE 1st Defendant is a Real Estate Agency carrying its business in and about the Fiji Islands and at all material times were the agents of the 2nd Defendant.*
>
> *3. THE 2nd Defendants were appointed as Receivers of Aanuka Island Resort Limited (In Receivership), by the 3rd Defendant.*
>
> *4. THE 3rd Defendant is a financial institution and were the mortgagors of Aanuka Island Resort Limited.*
>
> *BACKGROUND*
>
> *5. SOMETIMES in March, 2010, the Plaintiff and the 2nd Defendants entered into a contract for sale of the Resort business known as Amunuca Island Resort and Spa under the control of the 2nd Defendants, as Receivers.*
>
> *6. UNDER the said contract for sale, the Real Estate Agents were Bayleys Real Estate, New Zealand and all deposit monies payable under the contract was*

to be paid by bank cheque or cleared funds to the 1st Defendants trust account in Fiji Dollars.

7. *ON 10th March, 2010, the Plaintiff paid sum of FJ $850,000.00 into the trust account of the 1st Defendant in their account with Australia and New Zealand Banking Group Limited (ANZ) and on 2nd September, 2010 a further sum of FJ$ 50,000.00 was paid by the Plaintiff into the 1st Defendant's same trust account as further deposit.*

8. *ON 2nd December, 2011, the 2nd Defendant cancelled the contract for sale with the Plaintiff.*

9. *AT the time of cancellation of the said contract it was void ab initio in that it lacked the consent of iTaukei Board to any alienation or dealing with iTaukei land or iTaukei Lease. The said Resort being on iTaukei land subject to iTaukei Lease 29157.*

10. *THE Plaintiff made demands for refund of the deposit monies from the 1st Defendant only to be informed by the 1st Defendant that it had paid out the deposit monies to the 2nd Defendants.*

11. *THE 2nd Defendant's receivership has since ceased.*

FIRST CAUSE OF ACTION AGAINST THE 1ST, 2ND and 3RD DEFENDANTS

12. *THE 1st Defendant was at all times agents and/or were acting on instructions of the 2nd Defendants and/or its agents.*

13. *THE 2nd Defendant was at all material times agents and/or were acting on instruction of the 3rd Defendant and/or its agents.*

14. *THE 1st Defendant were to have held the deposit monies paid under the sale contract in their trust account and could have only paid the same out after proper determination as to the party entitled to the monies.*

15. *THE 1st Defendant ought not to have paid the deposit monies to the 2nd and/or to the 3rd Defendants and the 2nd and/or to the 3rd Defendant ought not have demanded and/or received the said deposit monies.*

THEREFORE THE PLAINTIFF CLAIMS FROM THE DEFENDANTS

i) *Refund of the deposit monies in the sum of FJ$900,000.00;*

ii) *Compound interest on the sum of FJ$900,000.00 from 2nd December, 2011 at Reserve Bank approved Commercial Lending Rate; and*

iii) *Costs on a Solicitor – Client indemnity basis.*

iv) *Such further or other relief this Honourable Court deems just.*

2ND CAUSE OF ACTION AGAINST THE 1ST DEFENDANT
(Breach of Statutory Duty)

16. THE *1st Defendant was at all times agents and/or were acting on instructions of the 2nd Defendants and/or its agents.*

17. THE *Duties of the 1st Defendant as Real Estate Agent is embodied in the Real Estate Agents Act. The said act sets out the requirements and procedures in regards monies held by the 1st Defendant in trust.*

18. IN *breach of its said Statutory Duties, the 1st Defendant released the said trust monies to the 2nd Defendants.*

PARTICULARS OF BREACH

i) *Releasing the monies to the 2nd Defendant despite the knowledge that the contract for sale had been cancelled due to lack of iTaukei Land Trust Board consent;*

ii) *Releasing the monies to the 2nd Defendants when it was not the lawful entity entitled to the same;*

Alternatively releasing the monies to the 2nd Defendants, in circumstances whereby any prudent Real Estate Agent would have been in doubt as to the person and/or entity lawfully entitled to the said monies.

iii) *Releasing the monies to the 2nd Defendant without the authority of the Plaintiff; and*

iv) *Failing to render an account in writing, setting forth particulars of all deposit monies, and as to its application to the Plaintiff.*

THEREFORE THE PLAINTIFF CLAIMS AGAINST THE 1ST DEFENDANT OR ITS PRINCIPAL, THE 2ND DEFENDANTS AND/OR ITS PRINCIPAL, THE 3RD DEFENDANT

i) *Damages*

ii) Interest

iii) Costs on a Solicitor – Client indemnity basis.

iv) Such other Remedial Orders under the Real Estate Agents Act.

v) Such further or other relief this Honourable Court deems just.

3RD CAUSE OF ACTION – (Punitive Damages)

19. THE 1st Defendant was at all times agents and/or were acting on instructions of the 2nd Defendants and/or its agents.

20. THE 1st Defendant's action was such that the Plaintiff's claims punitive damages against them.

PARTICULARS OF PUNITIVE DAMAGES

i) Releasing the monies held in trust by them without first consulting the Plaintiff;

ii) Failing to give any accounts in regard the Plaintiff's monies held by the 1st Defendant in trust;

iii) Knowing that the Plaintiffs were foreign investors and as such not familiar with the Laws of Fiji and despite such knowledge as trustees of their monies releasing the same to the 2nd Defendant.

iv) Acting as per the terms of the sale contract with full knowledge that the same was void ab initio.

v) At all times acting in total disregard to the Plaintiff's interest.

THEREFORE THE PLAINTIFF CLAIMS FROM THE 1ST DEFENDANT OR ITS PRINCIPAL, THE 2ND DEFENDANT AND/OR ITS PRINCIPAL, THE 3RD DEFENDANT

i) Punitive Damages (including aggravated damages)

ii) Interest

iii) Costs on a Solicitor – Client indemnity basis.

iv) Such further or other relief this Honourable Court deems just.

(2) The Second Defendants in their Statement of Defence pleaded, *inter alia*, that;

Without Prejudice to their Defence;

1. *THE Second Defendants aver that the Plaintiff's action be summarily dismissed on the grounds that:-*

   (a) *It has not been issued in compliance with Order 6 rule 6(i) of the High Court Rules 1988.*

   (b) *It discloses no reasonable cause of action against the Second Defendants and/or is otherwise frivolous, vexatious and an abuse of the process of the Court.*

   (c) *The Second Defendants have been incorrectly named as party to this litigation. Pursuant to clause 15.3 of the agreement the receivers are not personally liable in relation to any alleged loss or damages arising out of or in connection with the agreement either in contract, tort or otherwise.*

2. *THE Second Defendants admit the allegations contained in paragraph 3 of the Amended Statement of Claim and further plead that their appointment has been brought to an end by the Third Defendant after the sale of the Resort to a third party. Accordingly it has been wrongly joined as a party to this action.*

3. *THE Second Defendants admit the allegations contained in paragraph 4 of the Amended Statement of Claim. The Third Defendant remain the mortgagee of Aanuka Island Resort Ltd (In Receivership).*

4. *THE Second Defendants admit the allegations contained in paragraph 5 of the Amended Statement of Claim in so far as the entering of a sale and purchase agreement ("the agreement") is concerned, but further aver that the sale was between Aanuka Island Resort Limited (In Receivership), as Vendor, a limited liability company, and the Plaintiff as Purchaser. The Second Defendants were not personally a party to the agreement and were at all times agents of the Vendor. As such they are not the appropriate party to be joined as a Defendant.*

5. *<u>THE</u> Second Defendants admit the allegations contained in paragraph 6 of the Amended Statement of Claim.*

6. *AS to the allegations contained in paragraph 7 of the Amended Statement of Claim, the Second Defendants, pursuant to the contract noted at paragraph 5 of the Amended Statement of Claim:-*

   (a) *admit the payment of 10% as deposit or earnest for the sale of property and assets of the business known as Amunuca Island Resort and Spa Tokoriki Island; and*

   (b) *admit that the sum of $50,000.00 paid by the Plaintiff subsequently was a further deposit but states that this payment made by the Plaintiff pursuant to clause 5.1 of the Agreement was so that settlement could be deferred.*

7. *AS to the allegations contained in paragraph 8 of the Amended Statement of Claim, the Second Defendants admit the agreement was cancelled on 2nd December, 2011 but stipulate that this was done by the Vendor, Aanuka island Resort Limited (In receivership), not the Second Defendants. The Second Defendants further aver that the contract was cancelled by the Vendor for the following reasons:-*

   (a) *The Plaintiff failed to provide completed iTaukei Land Trust Board ("iTLTB") application forms for Consent and Transfer.*

   (b) *The Plaintiff failed to obtain consent from iTLTB to transfer the Native Lease and to remedy that breach within 10 days after being given notice to do so;*

   (c) *The Plaintiff failed to maintain the Resort by not having necessary insurances cover for the Resort;*

   (d) *The Plaintiff failed to attend to settlement of the said Native Lease on 18th November 2011; and*

   (e) *The Plaintiff failed to remedy the default on or before 2nd December 2011 as required in the Default Notice dated 18th November 2011.*

8. *AS to the allegations contained in paragraph 9 of the Amended Statement of Claim, the Second Defendants plead as follows:-*

   (a) *It was an express obligation in the agreement for the Purchaser to use its best endeavors to obtain the iTLTB's consent for the sale of the subject property;*

(b) *The Plaintiff was delivered all of the necessary documentation prepared by the Vendor to enable it to obtain iTLTB consent, but failed and/or refused to do so;*

(c) *The Purchaser failed and/or refused to obtain iTLTB consent and, as such, it cannot rely upon its own breaches to seek any remedy or relief;*

(d) *Denies that the entire agreement was void ab initio and further relies on strict construction of the terms and conditions mutually agreed between the parties.*

9. *THE Second Defendants have no knowledge of the allegations contained in paragraph 10 of the Amended Statement of Claim but further aver that the deposit sum as well as the additional sum for deferment of settlement was retained by the 3rd Defendant as the Mortgagee of the Vendor Aanuka Island Resort Limited (In Receivership) pursuant to Clause 7.8(a) of the agreement, if the Vendor cancels the agreement pursuant to Clause 7 (purchaser default), the Vendor may forfeit and retain the deposit.*

10. *THE Second Defendants deny the allegations contained in paragraph 11 of the Amended Statement of Claim. Further it is noted that the company Aanuka Island Resort Limited was duly wound-up by the court in Lautoka High Court Winding Up Action No. HBF 47 of 2007 on 12 April 2010.*

11. *SAVE for admitting that the Vendor, Aanuka Island Resort Limited (In Receivership) appointed the First Defendant as their agents to assist it in selling the Resort, the Second Defendants otherwise deny the allegations contained in paragraph 12 of the Amended Statement of Claim.*

12. *THE Second Defendants deny the allegations contained in paragraph 13 of the Amended Statement of Claim.*

13. *SAVE for the Vendor Aanuka Island Resort Limited (In Receivership) denying proper determination was required given that the agreement expressly related to and provided for the Vendor to forfeit the deposit upon failure of the Plaintiff to perform its obligations under the agreement which it failed to do as stipulated in paragraph 7 above, the Second Defendants deny the allegations contained in paragraph 14 and 15 of the Amended Statement of Claim as they personally did not instruct, demand or receive money from the First Defendant.*

14. *THAT the allegations contained in paragraph 16, 17 and 18 of the Amended Statement of Claim relate to the First Defendant and, as such, the Second Defendants neither admit nor deny the allegations contained therein.*

15. *SAVE for admitting that the Vendor Aanuka Island Resort Limited (In Receivership) appointed the First Defendant as its agent to sell the property, they otherwise deny the allegations contained in paragraph 19 of the Amended Statement of Claim.*

16. *THE Second Defendants vehemently deny the allegations contained in paragraph 20 of the Amended Statement of Claim.*

17. *SAVE for any admission contained herein, the Second Defendants join issue with the allegation contained in the Amended Statement of Claim.*

(3) WHEREFORE the Second Defendants pray for the following Orders:-

(a) *The relief sought in respect of all the causes of action prayed to be dismissed*

(b) *This action be dismissed;*

(c) *Costs of and incidental to this proceeding; and*

(d) *Such further or other relief this Honourable Court may deem fit just and expedient.*

(4) The Third Defendant in its Statement of Defence pleaded, *inter alia,* that;

1. *THE 3rd Defendant admits paragraph 1 of the Amended Statement of Claim ("the Amended Statement of Claim")*

2. *AS to paragraph 2 of the Amended Statement of Claim, the 3rd Defendant admits to the contents of the paragraph only to the extent that the 1st Defendant were real estate agents engaged to market and sell Aanuka Island Resort trading as Amunuca Island Resort and Spa to the Plaintiff.*

3. *THE 3rd Defendant admits paragraph 3 of the Amended Statement of Claim.*

4. *AS to paragraph 4 of the Amended Statement of Claim, the 1st Defendant says it is a commercial bank providing banking, financial and related services and it is registered in Fiji having its registered office at Level 12, BSP Suva Central Building, Cnr of Renwick road & Pratt Street, Suva.*

5. *<u>AS</u> to paragraph 5 of the Amended Statement of Claim, the 3rd Defendant says that the Plaintiff and the 2nd Defendant as Receivers of Aanuka Island Resort Limited entered into a Sale and Purchase Agreement dated 4th March 2010 ("the Agreement"). The relevant terms of the Agreement were:*

   a) *Purchase Price of $8,500,000 plus Vat, subject to apportionments set out in the Sale and Purchase (Particulars of Agreement);*

   b) *Settlement to occur on the date being 6 months after the date of the Agreement (Particulars of Agreement);*

   c) *Deposit of 10% of the Purchase Price upon execution of the Agreement by both parties. The deposit shall be paid by bank cheque or cleared funds to the 1st Defendant trust account in Fiji in Fiji Dollars (Particulars of Agreement and Clause 2.1);*

   d) *The Plaintiff to be responsible for management of the Resort (Clause 3);*

   e) *The Plaintiff shall be responsible for obtaining the consent from the Native Land Trust Board for the transfer of the Native Lease to the Plaintiff (Clause 4.1);*

   f) *The Plaintiff may, upon the paying of an additional deposit of $50,000 to the 2nd Defendant exercise an option to defer settlement for a period of up to 6 months (Clause 5.1);*

   g) *If the Plaintiff defaults in payment of any money due or in the observance of any condition in the Sale and Purchase Agreement, the 2nd Defendant may serve a settlement notice on the Plaintiff requiring the default to be remedied within 10 working days from the date of the notice and if not remedied, the 2nd Defendant may cancel the Sale and Purchase Agreement (Clause 7.7)'*

   h) *If the 2nd Defendant cancels the Agreement pursuant to clause 7.7, the 2nd Defendant may forfeit and retain for the 2nd Defendant own benefit the deposit paid by the Plaintiff (Clause 7.8);*

   i) *If neither party is ready to settle on the Settlement Date (as that is determined), the Settlement Date shall be deferred to the next working day following the day on which one of the parties gives notice to the other that is has become ready, willing and able to settle (Clause 7.11).*

6. *AS to paragraphs 6 and 7 of the Amended Statement of Claim, the 3rd Defendant says that deposit amounting to 10% of the purchase price was paid by the Plaintiff as required by the Agreement.*

7. *THE 3rd Defendant further says additional $50,000 paid by the Plaintiff was only accepted after the Plaintiff was advised of their breach of the Agreement which was to settle within 6 months of the execution of the Agreement. The Plaintiff was allowed to exercise its right to defer settlement by 6 months on specified conditions even though the Plaintiff had failed to issue the notice exercising its option 40 days prior to the Settlement date.*

8. *AS to paragraph 8 of the Amended Statement of Claim, the 3rd Defendant says that the Agreement was cancelled only after adequate notices were given to the Plaintiff outlining the Plaintiff's breach of the terms and conditions of the Agreement. The Plaintiff breached the Agreement by:*

   a) *Failing to provide completed NLTB application forms to Consent and Transfer;*

   b) *Failed to obtain Consent from NLTB to transfer the Native Lease and to remedy the breach within 10 days;*

   c) *Failing to maintain the Resort by not having necessary insurances cover for the Resort;*

   d) *Failing to attend to settlement of the said Native Lease on 18th November 2011; and*

   e) *Failing to remedy the default on or before 2nd December 2011 as per Default Notice dated 18th November 2011;*

9. *THAT the 3rd Defendant as to paragraph 9 of the Amended Statement of Claim repeats paragraph 8 herein above.*

10. *THAT the 3rd Defendant as to paragraph 10 of the Amended Statement of Claim says that Plaintiff has no rights to make demands on refund of deposit monies as the Plaintiff had breached the Agreement thus forfeiting its deposit.*

11. *THE 3rd Defendant admits paragraph 11 of the Amended Statement of Claim.*

12. *AS to paragraphs 12 & 13 of the Amended Statement of Claim, the 3rd Defendant says that the 1st Defendant & 2nd Defendant was acting as agents*

for the 3rd Defendant only in relation to sale and administering receivership respectively for Aanuka Island Resort Limited.

13. *AS to paragraphs 14 & 15 of the Amended Statement of Claim, the 3rd Defendant denies each and every allegation made and says that as per the Agreement:*

    a) *The Plaintiff deposited $850,000 as part payment of the Purchase Price under the Agreement;*

    b) *The Plaintiff paid additional $50,000 on specified conditions agreed by the Plaintiff for the Plaintiff to be allowed to exercise its right to defer settlement by 6 months.*

    c) *That the Agreement was cancelled due to the breach occasioned by the Plaintiff thus forfeiting its total deposit amount and/or its rights to the same (if any) given by the Agreement.*

    d) *That there are no express instructions and/or provisions in the Agreement to allow the 1st Defendant to retain the deposit monies indefinitely in the cause of Agreement being cancelled and/or nullified due to breaches occasioned by the Plaintiff.*

14. *THAT the 3rd Defendant denies each and every allegation contained in paragraph 15 (i) – (iv) (both inclusive) on recovery orders sought from the Court on deposit paid and further says that the Plaintiff's claims should be made pursuant to necessary avenues provided for in the Agreement.*

15. *AS to paragraphs 16 to 18 of the Amended Statement of Claim, the 3rd Defendant repeats paragraphs 8 & 13 respectively above.*

16. *THAT the 3rd Defendant denies each and every allegation made on paragraph 18 (i) – (iv) (both inclusive) of the Amended Statement of Claim in regards to particulars of breach as the same does not relate to the 3rd Defendant and puts the Plaintiff to strict proof thereof.*

17. *THE 3rd Defendant further says that it denies each and every allegation made in regards to claims against the 3rd Defendant.*

18. *THAT the 3rd Defendant denies each and every allegation on punitive damages made on paragraphs 19 & 20 (i) – (iv) (both inclusive) of the Amended Statement of Claim as the same does not relate to the 3rd Defendant and puts the Plaintiff to strict proof thereof.*

19. *<u>THE</u> 3rd Defendant further says that it denies each and every allegation made in regards to claims against the 3rd Defendant.*

20. *<u>BY</u> way of further defence the 3rd Defendant says that no cause of action has been pleaded against it and seeks dismissal of the Plaintiff's action against the 3rd Defendant with costs on an indemnity basis.*

21. *<u>SAVE</u> for any express admissions contained herein the 3rd Defendant denies all other allegations and matters contained in the Claim as if the same were traversed seriatim and puts the Plaintiff to strict proof.*

(C) <u>PRE-TRIAL CONFERECE</u>

The Pre-Trial Conference has not been held in this case and it is dispensed with.

(D) <u>ORAL EVIDENCE</u>

(i) <u>On behalf of the Plaintiff</u>

<u>(Mr) John Lawrence Orford (Solicitor)</u>

The crux of his evidence was that because no consent had been obtained on the sale and purchase agreement from i-Taukei Land Trust Board, the contract was void *ab initio* and therefore, the Plaintiff is entitled to the return of its deposit paid under the Sale and Purchase agreement. He further deposed that the contract was cancelled on grounds of rescission by the Second Defendant.

(ii) <u>On behalf of the Second Defendants</u>

<u>(Ms) Alesi Macedru [Solicitor at Howards Lawyers]</u>

(i) She stated that the Second Defendants were appointed the Receivers and Managers of the Resort.

(ii) Messrs. Howards Lawyers were appointed as local Counsel for the Second Defendant in relation to the sale transaction and she was the Counsel in carriage and in liaisons with all parties at the material time.

(iii) She stated that she worked throughout the transaction until the deal was

cancelled.

(iv) *She stated that as per the sale agreement, a 10% deposit was received and date of settlement was scheduled after 6 months (i.e. by 4/3/10).*

(v) *In accordance with clause 4.1 of the sale agreement, the Plaintiff as the Purchaser was required to obtain ITLTB consent over the dealing (i.e. the transfer).*

(vi) *In accordance with clause 5.1 of the sale agreement, the Purchaser had the option to defer settlement with 40 days prior written notice and payment of additional $50,000.00 deposit.*

(vii) *If 5.1 was exercised, the purchase price would increase and deposit increased to $900,000.00.*

(viii) *She gave evidence that the Purchaser's (i.e. Plaintiff's) local solicitors were Messers. Parshotam & Company.*

(ix) *She stated that whilst the Plaintiff attempted to exercise the right of deferment of settlement date under clause 5.1, proper notice had not been given.*

(x) *The Vendor put forth conditions that if the settlement were to be deferred, it would be only deferred by 3 months and with payment of additional $50,000.*

(xi) *Ultimately, the Plaintiff paid a further $50,000 and settlement was deferred.*

(xii) *She stated that a new settlement date was agreed. Messrs. Howards took all steps to ensure that they received all documents from Purchaser to complete settlement.*

(xiii) *She said that application for consent to transfer was prepared and signed by the Vendor and sent to Messrs. Parshotam.*

(xiv) *She said that it was a normal conveyance practice that transfer and iTLTB consent forms would be prepared and sent to parties for execution and lodgment by purchaser's solicitors.*

(xv) *She said that despite new settlement date of 4/3/11, parties did not settle, the reason being that Plaintiff and/or its solicitors had not obtained ITLTB consent on the transfer.*

(xvi) *She stated that breach/default notices were then issued to the Purchaser and time to remedy the defaults however no steps were taken by the Plaintiff and/or its solicitors to remedy the breach/default.*

(xvii) *She said that notice of settlement was sent under clause 7.11 of the sale agreement. When settlement was not affected, a further default notice was issued under clause 7.7.*

(xviii) *Thereafter, notice to cancel agreement was sent to the Plaintiff and/or its Solicitors. No response was received to any of the default notices or the cancellation notice from the Plaintiff and/or its solicitors.*

(xix) *She stressed that the Plaintiff had 1 year and 8 months had surpassed without the Plaintiff complying with clause 5.1 of the sale agreement.*

(iii) At the opening of the Third Defendant's case, Counsel for the Third Defendant indicated to Court that no witnesses will be called for the Third Defendant on the basis that there was no cause of action or allegation against the Third Defendant.

(E) DOCUMENTARY EVIDENCE

(i) Plaintiff

No documents were tendered by the Plaintiff at the trial. The Plaintiff relied on the documents tendered by the Second Defendants to lead evidence on the sale transaction, circumstances of termination of the transaction and the events that followed.

(ii) Second Defendants

2DE – (1) ⟶ Email dated 23/08/10
2DE – (2) ⟶ Email dated 25/8/10 and letter dated 24/8/10
2DE – (3) ⟶ Email dated 31/08/10 and letter dated 31/8/10 from Parshotam & Co.
2DE – (4) ⟶ Letter dated 3/09/10
2DE – (5) ⟶ Letter dated 7/09/10 from Howards
2DE – (6) ⟶ Letter dated 7/9/10 from Parshotam
2DE – (7) ⟶ Letter dated 22/02/11 from Howards (with 2 annexures)
2DE – (8) ⟶ Letter dated 7/3/11

2DE – (9)	→	Letter dated 29/4/11
2DE – (10)	→	Letter dated 17/11/11
2DE – (11)	→	Letter dated 18/11/11
2DE – (11b)	→	Default Notice
2DE – (12)	→	Notice of Cancellation
2DE – (13)	→	Sales and Purchase Agreement

(F) DISCUSSION AND DETERMINATION

(1) Counsel for the Plaintiff and the Third Defendant tendered extensive written submissions in support of their respective cases. I am grateful to Counsel for those lucid and relevant submissions and the authorities therein collected which have made my task less difficult than it otherwise might have been.

(2) A preliminary point was raised by the Third Defendant as to whether Mr. John Orford could testify in Court on behalf of the Plaintiff Company.

The objection raised by Counsel for the Third Defendant was that no written authority was tendered to Court by Mr. John Orford to show that he was duly authorized by the Plaintiff Company to testify on behalf of the Plaintiff Company.

As soon as the objection was raised, Counsel for the Plaintiff tendered a written authority dated 13th March 2018 from Mr. Victor Chua, the Director of the Plaintiff Company, authorizing Mr. John Orford to testify on behalf of the Plaintiff Company.

Counsel for the Third Defendant submitted that the written authority that the Plaintiff sought to rely upon could not be regarded as a proper authority from the Plaintiff Company because;

- **The authority did not appear under the seal** or hand of the Plaintiff Company.

- The authority was not signed by Mr. Victor Chua **as a Director of the Plaintiff Company.**

Dealing with the argument about as to whether Mr. John Orford could testify in Court on behalf of the Plaintiff Company, I do not think there is any substance in it because;

- The sale and purchase agreement (2DE-13) was signed by Mr. Victor Chua and **it was not signed under the seal of the Plaintiff Company**.

- The written letter of authority clearly states that;

> *"I Victor Chua of 46 Mabel Street Willoughby NSW 2068 Australia, Director of Inspired Destinations (Inc) Limited hereby authorize John Laurence Orford to testify on my behalf in the High Court proceedings being Civil Action No. 180 of 2013.*
>
> *Mr Orford's wife Vicki Elizabeth Orford is also a shareholder in IDI. Furthermore, the deposit monies were paid on behalf of IDI by Mr. Orford and he is the person with firsthand knowledge as to the deposit paid.*

(3) The above satisfies the Court the competency of Mr. John Orford to testify on behalf of the Plaintiff company. Therefore, I cannot uphold the Third Defendants' objection as to the competency of Mr. Orford to testify on behalf of the Plaintiff company.

(4) Let me summarize my understanding as to the salient facts of this case as follows. On 04th March 2010, the Plaintiff (the Purchaser) and the Second Defendants as Receivers of Aanuka Island Resort Limited (the vendor) entered into a Sale and Purchase agreement (Contract) for the Sale and Purchase of the resort known as 'Amunuka Island Resort and Spa'. **(Exhibit 2DE-13)**

The Resort is built on Native Land at 'Mamanuca Islands'. Thus, it is an agreement for sale and purchase of a leasehold interest in Native Land in respect of which control and administration were vested in the Native Land Trust Board (Now i-Taukei Land Trust Board) by virtue of the provisions of the Native Land Trust Act, Cap 134, (Now i-Taukei Land Trust Act).

(5) The name of the land (property) is "Makanibeto", part of Lot-01 and Lot-02, on SO 5952. The land is 16.5958 hectares in extent.

(6) The purchase price of the Resort is FJ$8,500,000.00 plus Vat.

(7) The agreed terms of the contract were;

- *Settlement to occur on the date being 6 months after the date of the Agreement (Settlement date);*

- *Deposit of 10% of the purchase price upon execution of the Agreement by both parties. The deposit shall be paid by bank cheque or cleared funds to the 1st Defendant trust account in Fiji in Fiji Dollars (Particulars of Agreement and (Deposit, Clause 2.1);*

- *The Plaintiff to be responsible for management of the Resort (Clause 3);*

- *The Plaintiff shall be responsible for obtaining the consent from the Native Land Trust Board for the transfer of the Native Lease to the Plaintiff (Clause 4.1);*

- *The Plaintiff may upon the paying of an additional deposit of $50,000.00 to the 2nd Defendant, exercise an option to defer settlement for a period of up to 6 months (clause 5.1);*

- *If the Plaintiff defaults in payment of any money due or in the observance of any condition in the Sale and Purchase Agreement, the 2nd Defendant may serve a settlement notice on the Plaintiff requiring the default to be remedied within 10 working days from the date of the notice and if not remedied, the 2nd Defendant may cancel the Sale and Purchase Agreement (Clause 7.7);*

- *If the 2nd Defendant cancels the Agreement pursuant to clause 7.7, the 2nd Defendant may forfeit and retain for the 2nd Defendant own benefit the deposit paid by the Plaintiff (Clause 7.8);*

- *If neither party is ready to settle on the settlement date (as that is determined), the settlement date shall be deferred to the next working day following the day on which one of the parties gives notice to the other that it has become ready, willing and able to settle (Clause 7.11).*

(8) Under the said contract, the Real Estate Agents were Bayleys Real Estate, (the First Defendant) New Zealand and all deposit monies payable under the contract

was to be paid by bank cheque or cleared funds to the 1st Defendants' trust account in Fiji Dollars.

(9) The Second Defendants admitted in their pleadings that on 10th March, 2010, the plaintiff paid a sum of FJ $850,000.00 as deposit (earnest money) amounting to 10% of the purchase price, into the trust account of the 1st Defendant in their account with Australia and New Zealand Banking Group Limited (ANZ) and on 2nd September, 2010, a further sum of FJ$50,000.00 was paid into the First Defendant's Trust Account as further deposit.

(10) At all times the Second Defendants maintained that the said $50,000 paid by the Plaintiff was only accepted after the Plaintiff was advised of their breach of the Agreement which was to settle within 6 months of the execution of the Agreement. The Second Defendants asserted that the Plaintiff was allowed to exercise its right to defer settlement by 6 months on specified conditions even though the Plaintiff had failed to issue the notice exercising its option 40 days prior to the Settlement date.

(11) On 2nd December, 2011, the 2nd Defendants as Receivers cancelled the contract due to the breach occasioned by the Plaintiff. The Second Defendants alleged that the Plaintiff breached the Agreement by;

- Failing to provide completed NLTB application forms for Consent and Transfer of iTaukei Lease No. 29157 ("Lease");

- Failing to obtain Consent from NLTB (Now –Itaukei Land Trust Board) to transfer the said Lease and to remedy the breach within 10 days;

- Failing to maintain the Resort by not having necessary insurances cover for the Resort;

- Failing to attend to settlement of the said Lease on 18th November 2011; and

- Failing to remedy the default on or before 2nd December 2011 as per Default Notice dated 18th November 2011.

(12) The basis of the claim for repayment of deposit (earnest money) is as follows in paragraph (09) of its Statement of Claim;

> *9. AT the time of cancellation of the said contract it was void ab nitio in that it lacked the consent of iTaukei Board to any alienation or dealing with iTaukei land or iTaukei Lease. The said Resort being on iTaukei land subject to iTaukei Lease 29157.*

(13) To this, the Second Defendants replied;

> *8. AS to the allegations contained in paragraph 9 of the Amended Statement of Claim, the Second Defendants plead as follows:-*
>
> *(e) It was an express obligation in the agreement for the Purchaser to use its best endeavors to obtain the iTLTB's consent for the sale of the subject property;*
>
> *(f) The Plaintiff was delivered all of the necessary documentation prepared by the Vendor to enable it to obtain iTLTB consent, but failed and/or refused to do so;*
>
> *(g) The Purchaser failed and/or refused to obtain iTLTB consent and, as such, it cannot rely upon its own breaches to seek any remedy or relief;*
>
> *(h) Denies that the entire agreement was void ab initio and further relies on strict construction of the terms and conditions mutually agreed between the parties.*

(14) The Second Defendants rely very heavily on an argument that the agreement expressly related to and provided for the **vendor (the Second Defendants)** to forfeit the deposit upon the failure of the **purchaser (Plaintiff)** to perform its obligations under the agreement which it failed to do so. The Second Defendants submit that pursuant to Clause 7.8 of the agreement, if the Second Defendants as vendor cancel the agreement pursuant to Clause 7.7 (purchasers' default), the vendor is entitled to forfeit and retain the deposit. The Second Defendants also submitted that on 02nd December 2011, the Second Defendants as receivers cancelled the contract due to the breach occasioned by the Plaintiff. Finally the Second Defendants submit that upon cancellation the Second Defendants are

entitled to forfeit and retain the deposit. Put in a single sentence the Second Defendants point is; **the Plaintiff has no rights to make demands on refund of deposit monies as the Plaintiff had breached the agreement thus forfeiting its deposit.**

The pleadings are clear that the Plaintiff, at all times, maintained that the agreement which constituted the transaction involved alienating or dealing with the land without the prior consent of the Native Land Trust Board and therefore, the agreement was null and void *ab initio* and of no effect, in that it contravened Section 12 of the Native Land Trust Act. The Plaintiff goes on to say that there was no enforceable or valid agreement. The substantial defence of the Defendants is that the requirement for the Plaintiff to obtain consent on the transfer was a 'condition subsequent' or was a 'conditional contract' and the sale agreement was a valid contract.

Put in a single sentence the Defendants point is:- *"the arrangement is not caught by Section 12"*.

The Plaintiff says *"no, the arrangement is caught by Section 12"*.

(15) Since the issues are confined to the construction of the agreement which constitutes the transaction and the legal consequences flowing from that, I am not concerned to go into how or why that happened. I underline the first question relates to the legality of the agreement which constitutes the transaction.

To be more precise, the relief claimed by the Plaintiff raises two issues. The First is whether the agreement which constitutes the transaction breached Section 12 of the Native Land Trust Act? The Second issue concerns the right, if any, of the Plaintiff to recover all or any of the earnest money (deposit) paid into the First Defendant's Trust account pursuant to the agreement which constitutes the transaction. The fate of the proceedings must be determined by the effect of one provision in the statute upon the instant transaction.

(16) The subject matter of the agreement of sale is a Native leasehold property.

(17) It is common ground that Section 12 of the Native Land Trust Act (Now i-Taukei Land Trust Act), places restrictions on the lessee of the lease to deal with the land comprised in Native Leasehold. Any transaction which comes within the ambit of Section 12, is declared unlawful unless the consent of the Native Land Trust

Board (Now i-Taukei Land Trust Board) as lessor or head lessor is **first had and obtained**.

The relevant portion of Section 12 of the Native Land Trust Act (Now i-Taukei Land Trust Act) is in the following terms:-

> *"12(1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Ordinance to* ***alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained.*** *The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void:*
>
> (Emphasis Added)

(18) The leading case upon the interpretation of Section 12 of the Native Land Trust Act (Now i-Taukei Land Trust Act) is **Chalmers v Pardoe** [1963] 3 All E.R. 552, a decision of the Privy Council on appeal from Fiji Court of Appeal. By a "friendly arrangement" with the owner of native leasehold land, Mr. Chalmers had built a house and other buildings on part of that land and entered into possession. The consent of the Native Land Trust Board (Now i-Taukei Land Trust Board) was never obtained. The Privy Council was of opinion that the transaction amounted to an agreement for a lease or sublease but even regarding it as a licence to occupy coupled with possession, their Lordships considered that a "dealing" with the land took place.

A relevant observation made in the same judgment is as follows (at p. 557): -

> *"It is true that in Harnam Singh and Backshish Singh v Bawa Singh, the Court of Appeal said that it would be an absurdity to say that a mere agreement to deal with land would contravene s.12, for there must necessarily be some prior agreement in all such cases. Otherwise there would be nothing for which to seek the Board's consent. In the present case, however, there was not merely agreement, but, on one side, full performance: and the Board found itself with six more buildings on the "land without having the opportunity of considering beforehand whether this was desirable. It would seem to their Lordships that this is one the things that s.12 was designed to prevent."*

(19) The definition of "**alienation**" in Stroud, Vol 1, 3rd Ed.., at p.109 is as follows:-

> *"'**Alienation**' is as much to say, as to make a thing another man's; to alter or put the possession of lands, or other things from one man to another... It is the making of land or an interest therein; but not the making over of a mere personal right, not in the nature of property."*

In **Gaskell v. Walters** (1906) 2 Ch. D. p.1, Cozens-Hardy, L.J., says at page 10:-

> *"**Alienation** implies a transaction by which property is given to another person."*

(20) Of course, I do not deny for a moment that Section 12 does not prohibit the mere making of a contract.

All I am saying is that Section 12 prohibits the alienation or dealing with the land, whether by sale, transfer or sub-lease or any other manner whatsoever without the prior consent of the Native Land Trust Board (Now i-Taukei Land Trust Board) first had and obtained. **It is a prohibition of the performance of a contract, not against the making of the contract.**

(21) Clause 4 of the agreement is headed "**consents**". Clause 4.1 states;

> *4.1 As soon as reasonably possible following the entry into this Agreement, **the Purchaser shall**, at the Purchaser's cost in all respects:*
>
> ***(a) Obtain the consent of the Native Land Trust Board in Fiji to the transfer of the Lease to the Purchaser; and***
>
> *(b) Obtain licences for the sale of liquor from the Property, the consumption of liquor on the Property and for the management of the Business under the Hotel and Guest Houses Act 1973 (Fiji).*

(Emphasis Added)

However, the primary responsibility for applying the native Land Trust Board's consent undoubtedly lies on Second Defendants as Vendor. See; **Chalmers v Parade** (supra).

In the present case, no application for consent to the dealing between the present parties was ever submitted to the Native Land Trust Board.

(22) It is necessary now to examine the nature of the transaction which is evidenced by the said agreement between the Plaintiff and the Second Defendants.

The question is whether, upon the true construction of the agreement which constitutes the transaction "alienate or deal with the Native Leasehold, whether by sale, transfer or sublease or in any other manner whatsoever" took place without the prior consent of the Board had or obtained?

(23) Turning now to the meaning and legal effect of the agreement, I bear in mind that in the process of constructing an agreement the Court must ascertain the meaning to be given to the language used by the parties in the express terms of their agreement. It is a matter of deciding by the express terms of the contract or necessary inference therefrom, exactly what was agreed, and what was the intention of the parties.

In considering the approach to be adopted interpreting the agreement and the relevance of the evidence, I bear in mind the judgment of Masion J in **Codelfa Construction Pty Ltd v State Railway Authority of NSW** (1982) 149 CLR 337. However, I consider that greater guidance can be derived from the following observations of Lord Hoffman in delivering the judgment of the majority in the House of Lords in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 All ER 98 at 114:

> *"My Lords .... I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in Prenn v. Simmonds [1971] 3 All ER 237 at 240-242 [1971] 1 WLR 1381 at 1384 – 1386 and Reardon, Smith Line Ltd. v. Hansen-Tangen, Hansen-Tangen v. Sanko Steamship Co [1976] 3 All ER 570, [1976] 1 WLR 989, is always sufficiently appreciated. The result has been subject to one important exception, to assimilate the way in which such documents are interpreted by Judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarized as follows.*
>
> *(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*

(2) *The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*

(3) *The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterance in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*

(4) *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see Mannai Investment Co Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] 3 All ER 352, (1997) 2 WLR 945).*

(5) *The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios [1984] 3 All ER 229 at 233 [1985] AC 191 at 201:*

"....if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."

Lord Hoffman's approach was adopted by the Court of Appeal in New Zealand in **Boat Park Ltd v Hutchinson** [1999] 2 NZLR 74. 81.

(24) With these considerations in mind, I now turn to examine the nature of the transaction which is evidenced by the terms of the agreement.

(25) Clause 4.1 (a) required the Plaintiff as purchaser to apply and obtain the consent of the Native Land Trust Board in Fiji to the transfer of the Lease to the Plaintiff.

By clause 4.4 the Second Defendants as vendor agreed to provide reasonable assistance to enable the Plaintiff to obtain the consents.

(26) Clause 7 is headed "**Settlement**" and clause 7.4 reads (so far as is relevant)

> *On payment by the Purchaser of the balance of the Purchase Price and all other money (if any) payable under this Agreement in the manner provided for in clause 7.1, and upon the further performance by the Purchaser of the Purchaser's obligations under this Agreement, the Vendor will deliver to the Purchaser (in so far as it is able):*
>
> *(a) Vacant possession of the Property (subject to occupation of the Property by any fee paying guests);*

(27) Clause 9 is headed "**Tenancies**" and states;

> *9. TENANCIES*
>
> *9.1 The access date on 1 April 2010 or earlier by mutual agreement, provided that the purchaser must obtain the consents in clause 4.1 (b) prior to the access date such consents are required for the purchaser to operate the business.*
>
> *9.2 Possession from the access date shall be subject to the occupation of the property by any fee paying guests and free of any obligation to any third party in relation to the management of the business.* ***The parties acknowledge that the purchaser shall be responsible for the operation of the business during the 'Interim Period 'in accordance with the terms of annexure C.***
>
> (Emphasis added)

(28) Clause 10 is headed "**Operation of Business**" and clause 10 reads; (so far

as is relevant)

10. OPERATION OF BUSINESS

10.1 The parties acknowledge that the purchaser shall be entitled to possession of the property and assets to operate the business during the interim period.

(Emphasis added)

(29) Clause 3 is headed "**Management Agreement**" and states;

3. *MANAGEMENT AGREEMENT*

3.1 The parties acknowledge that the purchaser shall be responsible for the operation of the business during the Interim Period in accordance with the management agreement terms set out in annexure C.

(Emphasis added)

(30) Pursuant to Clause 3.1 and Annexure "C" captioned "Management Arrangement", the Plaintiff, Inspired Destinations Inc. Limited, as purchaser was to take interim possession of the subject property in order to operate and manage the Resort from the access date until the date of settlement. The evidence disclosed that the possession was given and the Plaintiff entered upon the land as a purchaser for the operation of the business during the interim period in accordance with the management agreement terms set out in the Annexure C. The Plaintiff was asked to go into possession to commence/operate and manage the resort. Certainly, the Plaintiff assumed proprietorial privileges on the date of execution of the agreement. The possession was given for a particular purpose, i.e, to allow the Plaintiff to carry out the operation of the business.

It is crystal clear that the Plaintiff as the purchaser did obtain proprietorial interest in the land and possession of the land upon the execution of the agreement. This constitutes an alienation of the land.

The evidence disclosed, a deposit of 10% of the purchase price, namely FJ$850,0000 was paid into the trust account of the First Defendant immediately on execution of the agreement. The Plaintiff paid additional FJ$50,000.

By clause 2.2 of the agreement, the Second Defendants as vendor will apply the deposit in part payment of the purchase price. Selling, in the case of land,

includes the making of agreements for its conveyance in consideration of a price in money.

I have come to the clear conclusion that the arrangement between the Plaintiff and the Second Defendants did involve 'alienating or dealing with the land'. Upon a careful reading of the agreement as a whole this is the only construction that can be reasonably be given to what was intended to be the effect of the agreement. To adopt any other construction is to render the legislation futile.

Certainly, Clause 4.1 (A) of the agreement provides that;

> 4.1 *As soon as reasonably possible following the entry into this Agreement, **the purchaser shall**, at the Purchaser's cost in all respects:*
>
> ***(a)Obtain the consent of the Native Land Trust Board in Fiji to the transfer of the Lease to the purchaser; and.............***
>
> (Emphasis added)

I feel compelled to add that nowhere in the agreement the parties have expressly stipulated that "this agreement shall not become a contract for either acquisition or disposition of land unless and until it has the consent of the Native Land Trust Board first had and obtained."

There is no express provision that there is no binding contract to purchase land unless and until the NLTB's (now i-Taukei Land Trust Board's) consent has been secured. As per clause 3.1 and clause 10.1 of the agreement, the Plaintiff as purchaser was under an obligation for the operation of the business upon signing the agreement. The Plaintiff did acquire possession and interest in the land upon signing the agreement. Thus, at the time of the execution the parties' intention is to establish the legal relationship necessary for there to be a contract for sale and purchase of a leasehold interest in Native Land. Under the Act, the required consent is a condition precedent to formation and performance of the contract to purchase. What that means is that the N.L.T.B's consent must be obtained before either party has incurred any obligations or acquired rights of any description in respect of the sale and purchase of land. In the instant case, as per Clause 3.1 and Clause 10.1, the Plaintiff as the purchaser has incurred obligations and acquired rights in respect of the sale and purchase of land before obtaining the consent of the N.L.T.B.

This arrangement is caught by Section 12. Undoubtedly, the agreement gave rise to binding obligations, to be performed on execution.

On execution, the agreement conveyed leasehold interest to the purchaser. The Plaintiff was entitled to possession and operation of the resort business upon execution of the agreement.

As I understand Clause 4.1 of the agreement, the agreement makes the NLTB consent a condition subsequent "**to formation and performance** "of the contract to purchase and is in breach of Section 12 of the Native Land Trust Act.

The part payment of the purchase price and the entry into possession to operate and manage the resort constitutes performance of the agreement for sale. Therefore, obtaining the consent of the Native Land Trust Board is a condition subsequent to the formation and performance of the agreement and does infringe Section 12.

If an agreement is signed and held inoperative and inchoate while the consent is being applied for, I fully agree that it is not rendered illegal and void by Section 12. An agreement for sale of Native Land would become void under Section 12 as soon as it was implemented in any way touching the land without the consent having being at least applied for. Such a stage was reached when the Plaintiff went into possession of the land to manage and operate the resort assuming proprietorial privileges.

(31) At the cost of some repetition I state that the Plaintiff did obtain interest in the land, upon the execution of the agreement. The possession is parted with to the Plaintiff as purchaser pursuant to the agreement. The granting of such interest in the land and possession constitutes a dealing with the land so as to come within the provisions of Section 12 of the Native Land Trust Act (now i-Taukei Land Trust Act).

The consent of the Native Land Trust Board was admittedly not obtained prior to this dealing, which thus becomes unlawful and acquires all the attributes of illegality.

(32) The evidence is that the Plaintiff, pursuant to the agreement, took possession of the subject property on or about 01st April 2010. The possession was given for a particular purpose, i.e, to allow the Plaintiff to carry out the operation of the

business. No consent of the Native Land Trust Board was obtained for the transaction of sale or for the entry into possession.

The transaction was unlawful. As a result, the agreement which constituted the transaction and entered into between the parties was and remains null and void *ab initio* because no consent of the board as lessor first had and obtained to the transaction as required under Section 12 of the Native Land Trust Act.

(33) The transaction was prohibited by statute. As a result, the agreement which constitutes the transaction was illegal. The Court cannot render assistance in enforcing an illegal contract.

(34) Scrutton, L.J., clearly indicated in **Mahmoud v. Ispahani** (1921) 2 K.B. at p.728, what the position is in relation to an illegal contract when his Lordship said:-

> *"I think the law is laid down in* ***Cape v Rowlands*** *(2 M. & W. 157), where Parke, B., delivering the judgment of the Court said: 'It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, thought the statute inflicts a penalty only, because such a penalty implies a prohibition: Lord Holt, Bartlett v Vinor (Carth. 252). And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract? If the contract is prohibited by statute, the Court is bound not to render assistance in enforcing an illegal contract.... ....*
>
> *And in my view, if an act is prohibited by statute for the public benefit, the Court must enforce the prohibition, even though the person breaking the law relies upon his own illegality. I say nothing about the cases to which Parke B., refer in Cope v. Rowlands (2 M. & W. 157, 158), where the statutory prohibition is for the benefit of a particular person, and not for the benefit of the public. It may be that different rules apply to such a case, but in this case it is clear that the prohibition is for the benefit of the public."*

(35) The Second Defendants submission is that the money paid into the trust account of the First Defendant has been forfeited pursuant to Clause 7.8 of the agreement and the Plaintiff has no right to make demands on refund of deposit as the Plaintiff had breached the agreement.

(36) I reject the Second Defendant's submission on forfeiture of deposit. The transaction and the agreement which constitutes the transaction is null and void *ab initio* and of no effect, because it is tainted with illegality.

The Second Defendant is not entitled to proceed to exercise its rights under Clause 7.8 to forfeit and retain the deposit (earnest money), because the agreement is unenforceable. If a contract is illegal the rule is that neither side can exercise its rights under the contract. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal.

(37) I now turn to the Plaintiff's application for orders concerning the return of earnest money (deposit) paid to the First Defendant's Trust Account. That brings me to the crux of this case.

(38) The alternative defence of the Defendants is that the Plaintiff had no right to the return of the deposit (earnest money) because the Plaintiff is ***in pari delicto*** with the Defendants.

The maxim that *"in pari delicto potior est conditio possidentis"* is a maxim of law, founded on the principles of public policy, which will not assist a party who has paid over money or handed over property in pursuance of an illegal or immoral contract, to recover it back, "for the Courts will not assist an illegal transaction in any respect".

Having regard to the wording of Section 12; *"it shall not be lawful for any **lessee** .... to alienate or deal with the land ...... whether by sale, transfer or sublease or in any other manner whatsoever"*, I am impelled to the conclusion that the primary responsibility for applying for NLTB's consent lies on the Defendants as vendor.

Therefore, I am of opinion that the Plaintiff (the purchaser) is not *in pari delicto* with the Defendants (vendor) and its position is not tainted by the illegality of the transaction.

(39) The general principle of *'Ex turpi causa non oritur actio'* is founded on the public policy that any transaction tainted with illegality in which both parties are equally involved, is beyond the pale of law and as such no person can claim any right or remedy whatsoever from such contract.

This old and well-known legal maxim is founded in good sense, and express a clear and well-recognised legal principle.

Let me assume for a moment in favour of the Defendants that the Plaintiff's position is tainted by the illegality of the transaction.

I cannot shut my eyes to the fact that the Defendants would be **unjustly enriched** if the sum paid as earnest money was not returned.

On the other hand, if returned, the Court might be seen to be lending assistance to a party (the Plaintiff) to an illegal contract.

(40) In **Manohan Alumuniun & Glass (Fiji) Ltd v Fong Sun Development Ltd** [2018] FJCA 23; ABU0018.2015 (8 March 2018), the Fiji Court of Appeal discussed unjust enrichment thus:

> *Unjust enrichment has been described as follows:*
>
> > *"Unjust enrichment arises in a situation in which the defendant is enriched at the expense of the claimant and there is in addition a reason, not being a manifestation of consent or a wrong, why that enrichment should be given up to the claimant". (Peter Berks, Unjust Enrichment, second ed. 2005).*
>
> *[34] Unjust enrichment has also been described as follows:*
>
> > *"The principle of unjust enrichment requires first, that the defendant has been enriched by the receipt of a benefit, secondly that this enrichment is at the expense of the claimant, and that the retention of the enrichment be unjust and finally that there is no defence or bar to the claim". (Chitty on Contracts, Vol 1, para 29-018, Sweet & Maxwell, 2004).*
>
> *[35] The particular terms of the contract may sometimes make it difficult to ascertain the extent of their enrichment.*
>
> > *"Services may take many forms and while some result in an indirect accretion to the defendant's wealth, for instance by improving his property, other 'pure' services do not. (Chitty on Contracts, Vol.1, para 29-021, (supra).*
>
> *[36] The second witness for the Plaintiff was Samuto Chang, from View Tech the company that had given the quotation for the replacement of the windows. He said that since the installed windows were of residential quality, and were*

improperly designed, the company was not prepared to risk attempting repair. He thus recommended a total removal of the existing windows and replacement with windows suitable for the 'environment'. In view of this, it also included the price of scaffolding. It quoted a sum of $76,840.00 for the removal of the existing windows and installation of new windows, and $24,000.00 for the scaffolding. This makes up the sum of $100,840.00 set out in the Respondent's Statement of Claim. However, the learned trial Judge did not allow this sum on the basis that the design in the proposed new windows was different from the design of the existing windows installed by the Appellant.

[37] Despite the Respondent's willingness to deposit the balance sum of $10,000.00 in the Solicitor's Trust Accounts until the Appellant rectified the faulty windows, the Appellant was unwilling to accept this course of action and continued to refuse to attend to the repairs. The failure to repair could be attributed to more than one reason; that the Appellant itself knew that the windows were so badly structurally designed that it saw no purpose in attempting to repair them, or that the Appellant was unwilling to perform the contract. Either way, it made no difference to the correct finding that there had been a breach of contract by the Appellant.

[38] In Daydream Cruises Ltd v Myers [2005] FJHC 316, Connors J considered the issue of unjust enrichment in respect of a claim of breach of contract and unjust enrichment. The Plaintiffs pleaded that the Defendants had benefitted from the use of the name "Daydream Island". In determining this claim, Connors J. having considered the relevant authorities said:

> *"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep." – Fibrosa Spolka Akcylina v Fairbarn Lawson Combe Babarbaur LD [1943] A.C. 32 at 61 per Lord Wright.*
>
> *The remedy for unjust enrichment is restitution which is the reversal of an unjust enrichment of the defendant at the expense of the plaintiff. The measure of the plaintiff's recovery in restitution is the benefit or gain of the defendant and not, as in compensatory damages, the loss suffered by the plaintiff. A restitutionary order once made, compels the defendants to disgorge, and the plaintiff to recoup, benefits which have been unjustly obtained and retained by the defendants to the detriment of the plaintiffs.*

In Pravery & Mathews Pty Ltd v Paul [1987] HCA 5, [1987] 162 CLR 221, the High Court of Australia recognized unjust enrichment as a valid basis of liability in a claim for restitution for quantum merit."

The three elements of a claim for unjust enrichment are – National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd [1997] 1 NZLR:

[i] Proof of enrichment by receipt of a benefit;
[ii] Enrichment at the expense of the plaintiff; and
[iii] That retention of the benefit is unjust.

[39] In Daydream Cruises Ltd v Myers (supra) the claim of unjust enrichment was upheld on the basis that the 1st Defendant has received the benefit of the use of the Plaintiffs' name, and the infrastructure and facilities erected on it by the Plaintiff together with the expertise and services of the Plaintiffs. In the circumstances of that case, it was held that the right to use that island was clearly a 'significant enrichment' of the 2nd Defendant.

[40] In the present case, the property in the windows passed to the owner when the contract price was paid by the Respondent. The fact that twelve years after the breach of the contract, the windows were, due to the efforts of the Respondents yet in place, does not amount to due performance of the contract by the Appellant nor does it amount to unjust enrichment on the part of the Respondent. There can be no unjust enrichment based on goods and services manufactures and delivered in breach of contract.

[41] The retention of the faulty windows by the Respondent cannot be regarded as unjust enrichment, because the Respondent had paid for them. Even a claim for set-off would not have been possible because the Respondent had paid $20,000.00 and the Appellant claimed $10,459.61 being the balance due. However, since the Appellant had breached the contract, the Counterclaim was correctly dismissed by the learned trial Judge.

[42] When the money was paid by the Respondent, and the windows were affixed, as part of the contract of services, the property in the goods passed from the Appellant to the Respondent. Thus, in the totality of the circumstances of the case, I hold that the learned trial Judge did not err in not considering that the windows that were affixed to the Respondent's building, belonged to the Appellant. I therefore dismiss the third ground of appeal.

[43] In my view, the Respondent suffered loss and damage as a result of the leakage in the windows manufactured and installed by the Appellant. The

leakage was a direct cause of the failure on the part of the Appellant to properly perform the contract entered into between the parties. This entitles the Respondent to damages. In the absence of a pro-rated breakdown in the Appellant's quotation distinguishing between the goods and services components respectively, (i.e. the cost of the windows as distinguished from the cost of the installation of the windows), I am of the view that the contract entered into between the parties, was a contract for services, and the Appellant failed to perform the contract. I am of the view that in all the circumstances of this case, it would not be correct to hold that the Respondent has benefitted or that its property has been enriched by the faulty windows installed by the Appellant".

(41) The leading authority is **Bowmakers Ltd v Barnet Instruments Ltd [1945] K.B. 65; [1944] 2 All E.R. 579**. In that case the Defendants, who had been given possession of machine tools under hire purchase agreements which the Court was ready to assume were affected by illegality on the ground that the original sale to the Plaintiffs, negotiated in concert with the Defendants, contravened the Control of Machine Tools Order 1940, after making some only of the agreed payments, converted certain of the tools to their own use by selling them, and refused to return to the Plaintiffs other tools still in their possession. The Plaintiffs accordingly sought to recover damages for the conversion of all the tools. The judgment of the Court was delivered by Du Parco L. J. who said: *"Mr Gallop is, we think, right in his submission that, if "the sale by Smith to the Plaintiffs was illegal, then the first and second hiring agreements were tainted with the illegality, since they were brought into being to make that illegal sale possible, but, as we have said, the Plaintiffs are not now relying on these agreements or on the third hiring agreement.* ***Prima facie, a man is entitled to his own property, and it is not a general principle of our law (as was suggested) that when one man's goods have got into another's possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by an action. The necessity of such a principle to the interests and advancement of public policy is certainly not obvious. The suggestion that it exists is not, in our opinion, supported by authority. It would, indeed, be astonishing if (to take one instance) a person in the position of the Defendant in Pearce v Brooks, supposing that she had converted the Plaintiff's brougham to her own use, were to be permitted, in the supposed interests of public policy, to keep it or the proceeds of its sale for her own benefit. The principle which is, in truth, followed by the Courts is that stated by Lord Mansfield, that no claim founded on an illegal contract will be enforced and for this purpose the words 'illegal contract' must now be understood in the wide sense which we have already indicated and no technical meaning must be ascribed to the words founded on an illegal***

contract. The form of the pleadings is by no means conclusive. More modern illustrations of the principle on which the Courts act are Scott v Brown, Doering, McNab & Co. and Alexander v. Rayson but as Lindley L.J. said in the former of the cases just cited: 'Any rights which (a Plaintiff) may have irrespective of his illegal contract will, of course, be recognized and enforced.' In our opinion, a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the Trial, that the chattels in question came into the Defendant's possession by reason of an illegal contract between himself and the Plaintiff, provided that the Plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim".

(Emphasis added)

(42) The Plaintiff in the case before me has paid a sum of FJ$900,000.00 as earnest money to the Defendants pursuant to clause 2.1 of the contract. It is money paid on a consideration which has wholly failed because the contract which constituted the transaction is void as being illegal from the start. The Plaintiff's action was to recover the money it had paid as money received by the Defendants to the use of the Plaintiff, being money paid on a consideration which has wholly failed. **There is a total failure of consideration because no document of title was delivered to the Plaintiff.** Therefore, the doctrine of 'failure of consideration' applies. The application of an old established principle of common law does enable a man who has paid money and received nothing for it to recover the money so expended.

The Plaintiff's claim for repayment is not based on the contract which is void as being illegal from the start, but on the fact that the Defendants had received the money and has in the events which have supervened (illegality) no right to keep it. The payment was conditional. The deposit money is paid for a consideration which is to be performed after the payment. The condition of retaining money is eventual performance of the consideration.

The consideration was not performed (*viz*, no document of title was delivered to the Plaintiff) and the consideration totally failed because the contract is void as being illegal from the start. When the condition and consideration fails, the Defendants right to retain the money also simultaneously fails.

It is the failure of consideration (*viz*, no document of title was delivered to the Plaintiff) and not the illegality of the contract which enables money paid as deposit to be recovered.

Lord Mansfield rationalized the action for money had and received in ***Moses v Macferlan*(1760) 2 Burr 1005, 1 Wrn BI 219, 12 Digest 539, 4478 at page 1012** as follows:

> *"It lies for money paid by mistake; or **upon a consideration which happens to fail**; or for money got through imposition (express, or implied); or extortion; or oppression; or an undue advantage taken of the Plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word the gist of this kind of action is, that the Defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."*

(Emphasis added)

The gist of the action before me is an action for money had and received. The action for money had and received is an action outside the contract. The action for money had and received is not based on the contract. The action is not dependent on the illegal contract but solely on the unjustifiable detention by the Defendant of claimant's money. There is no *turpis causa* in the matter. The restitution is regarded as a separate principle of law independent of contract. Restitution is the response to unjust enrichment, and unjust enrichment is the event which triggers the response. A remedy in unjust enrichment is not claim of damages. Nor is it a contractual remedy.

See; (1) *Restitution, Present and Future, Essays in Honour of Gareth Jones* (1998), Misnomer, p1, **Professor Birks.**

(2) **Andrew Burrows,** *The Law of Restitution, 2nd Edition* (2002)

(3) **Jacques Du Plessis,** *"Towards a Rational Structure of Liability for Unjust Enrichment: Thoughts from two mixed Jurisdictions"* 122 South African Law Journal 143.

(4) The work by Sir William Evans entitled " **An Essay on the Action for Money Had and Received"**. It was published in 1802 and dedicated to Sir Edward Law (later Lord Ellenborough). It is

reprinted in (1998) RLR3. In its opening paragraphs, Sir William Evans identified the subject-matter of his study as *"the action for money had and received, as enforcing an obligation to refund money which ought not to be retained."* Sir Evans quoted as "proper introduction" to the subject the famous passage from the judgment of Lord Mansfield CJ in **Moses v Macferlan (1760) 2 BUR 1005** (at p 102);

*"This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies for money which, ex aequo et bono, the Defendant ought to refund; it does not lie for money paid by the Plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play: because in all these cases, the Defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or **upon a consideration which happens to fail**; or for money got through imposition, (express or implied) or extortion; or oppression; or an undue advantage taken of the Plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. **In one word, the gist of this kind of action is, that the Defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity, to refund the money."***

(Emphasis added)

For the reasons which I have endeavored to explain in this paragraph, I come to the conclusion that the Plaintiff succeeds on its claim.

(43) I take comfort in the oft-quoted words of Lord Roche from the decision of **'Fibrosa Spolka Akevina v. Fairbairn Lawson Combe Barbour Ltd' (1943) AC 32;**

"It is, I think, a well settled rule of English law that, subject always to special provisions in a contract, payments on account of a purchase price are recoverable if the consideration for which that price is being paid wholly fails: see: Ockenden v. Henley EB & E 485, 492. Looking at the terms of the contract in the case now under consideration, I cannot doubt that the sum sued for was of this provisional

nature. It was part of a lump sum price, and when it was paid it was no more than payment on account of the price. Its payment had advantages for the (defendant company) in affording some security that the (Plaintiff) would implement their contract and take up (the transfer) and pay the balance of the price, and it may be that it had other advantages ..... but if no ....document of title were delivered to (the plaintiff)...(or, as in this case, the contract is declared illegal ab initio) then, in my opinion, the consideration for the price including the payment on account, wholly failed and the payments so made is recoverable.

(44) In the face of the dicta of **Lord Roche in <u>Fibrosa Spolka Akevina v. Fairbairn Lawson Combe Barbour Ltd' (1943) AC 32</u> and Lord Mansfield CJ in <u>Moses v Macferlan (1760) 2 BUR 1005</u>** , I hold that the Plaintiff is entitled to the return of the FJ$900,000.00 paid in advance as money paid upon a consideration which had wholly failed. I am satisfied that no rule of law, and no considerations of public policy , compel the Court to dismiss the Plaintiffs' claim in the case before me, and to do so would be, in my opinion, a manifest injustice.

The Second Defendants were appointed as Receivers of Aanuka Island Resort Limited (In Receivership) by the 3rd Defendant. The 3rd Defendant is the mortgagee of Vendor Aanuka Island Resort Limited (In Receivership). The deposit (earnest money) was retained by the Third Defendant as the mortgagee of the Vendor pursuant to clause 7.8(a) of the agreement.

<u>I order that the Second and Third Defendants jointly and severally return the Plaintiff's deposit of FJ$900,000.00 .</u>

(45) The Plaintiff claims **<u>compound interest</u>**. The claim that is made in this case is for restitution. The basis of the restitutionary right is the unjust enrichment principle. What was had and received was the enrichment. The reality is that the period over which the compound interest is sought is long. Of course, I do not deny for a moment that every creditor who is deprived of funds to which he is entitled and which he needs to run his business will have to incur an interest-bearing loan or employ other funds which could themselves have earned interest. All I am saying is that the claimant must claim and prove his actual interest losses if he wishes to recover compound interest. The claimant would have to show that his actual losses were more than he would recover by way of interest. See; (1) **<u>"Interest" by Professor Francis Rose in Birks and Rose, eds. *Lessons of the Swaps Litigation*, (2000)</u>**, (2) **Edelman and Cassidy, <u>*Interest*</u>**

Awards in Australia (2003). (3) Lord Hope of Craighead in '**Sempra Metals Ltd (formerly Metallgesellschft Ltd) v Inland Revenue Commissioners and Another' (2007) 04 ALL E.R. at p 657** said that '*the claimant must claim and prove his actual interest losses if he wishes to recover compound interest*". **In the case before me, the Plaintiff has not proved its actual interest losses.**

Moreover, the House of Lords held in the above case (at page 658) that in equity, the Court had jurisdiction to award 'compound interest' where the claimant sought a restitutionary claim for money paid under a **mistake of law**. Certainly, that is not the case here. The action before me is an action for money had and received **upon a consideration which has wholly failed**.

For the reasons which I have endeavored to explain above, I come to the conclusion that the Plaintiff is not entitled to 'compound interest' and it is entitled only to 'simple interest'.

In terms of Section 3 of the **Law Reforms (Miscellaneous Provision) (Death and Interest) Decree [Cap 27]** the granting of interest is discretionary. Further, according to Section 4 of the said Decree the Statutory post-Judgment interest rate is 4% per annum.

Section 3 of the Law Reform (Miscellaneous Provision) (Death and Interest) Act, (Cap 27) was amended by Act No. 46 of 2011. The aforementioned Section empowers the Court to determine the period for which the interest should be awarded. Thus, one cannot argue that it is mandatory to award interest from the date of the cause of action to the date of the judgment.

The recognized purpose of an award of interest is to ensure that a Plaintiff is properly compensated for the practical loss he has suffered; by not having the use of its money at the time it was due.

In **Jefford v Gee**, [1970] 1 All ER 1202 at 1206, Lord Denning MR, as his Lordship then was, tracing the history of granting of interest cited **London, Chatham and Dover Railway Company v South Eastern Railway Company** (1893) A.C. 429 in which Lord Hershell described the principle as follows:-

> "*... I think that when money is owing from one party to another and the other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice benefit by having that money in his possession and enjoying the use*

of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants or anybody in a similar position, interest upon the amount withheld from the time of action brought at all events".

In **Harbutt's Plasticine Ltd v Wayne Tank and Pump Co. Ltd** [1970] 2 WLR 198 at p.212, the court described interest as follows:-

... "the basis of an award of interest is that the defendant has kept the plaintiff out of his money, and the defendant has had the use of it himself. So, he ought to compensate the plaintiff accordingly."

In **Christopher Bernard Thompson v Karan Faraonio** [1979] UKPC 12 at p.5, the Privy Council (on appeal from the Full Court of the Supreme Court of South Australia) held that:-

"The reason for awarding interest is to compensate the plaintiff for having out of money which theoretically was due to him at the date of his accident"

In **BP Exploration Co (Libya) Ltd v Hunt** (No 2) [1979] 1 WLR 783 Rober Goff Justice quoting Lord Salmon in **General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd** [1975] 1 WLR 819 at 836 stated as follows, at p.846:

"It is for this reason that interest will generally run from the date of accrual of the cause of action in respect of money then due or loss which then accrues; and in respect of loss which accrues at a date between accrual of the cause of action and judgment, from that date. For convenience I shall refer to these dates compendiously as the "date of loss" ...."

His Lordship continued at p.847:

"The basic principle is, however, that interest will be awarded from the date of loss. Furthermore, the mere fact that it is impossible for the defendant to quantify the sum due until judgment has been given will not generally preclude such an award. Thus, in Admiralty, in collision cases where the ship is totally lost, interest has been held to run from the dated of the loss (see eg. The Berwickshire [1950] p.204 and Owners of Leisbosch Dredger v Owners of SS Edison [1933] AC 449, 468) and in the case of a salvage award, from the date of the rendering of the salvage services: see The Aldora [1975] Q.B. 748. There must have been many cases in the commercial court in which. Although the quantum of damages was in doubt until the date of the judgment, interest was awarded from the date of loss. Similarly, the mere fact that it is doubtful whether

the plaintiff's claim will succeed, and it is reasonable to contest his claim, will not generally require any departure from the general principle; nor generally will any doubt, however justified, as to the principles of law which will be applied."

In **Day v Mead** [1987] 2 NZLR 443 (CA) Somers J held at p.463 line 30:-

"Upon these considerations, I would conclude that generally justice may require interest to run from the date the cause arose down to judgment, for it is from that date that the plaintiff's entitlement to the debt or damages arises."

In **Grincelis v House** [2000] HCA 42; [2000] 201 CLR 321 at p.328, the High Court of Australia quoting from the judgment **in MBP (SA) Pty Ltd v Gogic** [1991] HCA 3; (1991) 171 CLR 657) held as follows:-

"There is no doubt that this is a very important purpose of statutory provisions providing for the award of interest on the amount of a debt or damages in respect of the period between the cause of action accruing (or, in some statutory provisions, the commencement of the proceedings (41) and the date of judgment. It may be, however that statutory provisions for interest serve not only that purpose, but also a purpose of encouraging early resolution of litigation. (42)"

In **Attorney General of Fiji v Cama** ABU 0021.2004S [2004] FJCA 31 (26 November 2004) at paragraph 23 the Court held as follows:-

"[23] The nature of an award of interest was considered by Bingham J in the Swiss Bank Corporation v Brink's-Mat Ltd and others [1986] All ER 188 at 189:

"Approaching an application for interest in circumstances such as this, I, like an English Judge, start off with an inclination to award interest. That is, after all, the order that ordinarily follows where a Plaintiff succeeds in establishing a breach of contract, in the absence of fairly compelling reasons why interest should not be awarded. The award of interest is not, of course, made as part of the damages but as interest on damages, and is paid not by way of any penalty against the defendant but as compensation to the plaintiff for having been kept out of his money for whatever period is deemed to be appropriate. The award of interest is, furthermore, seen as having a public policy purpose in that it tends to deprive a recalcitrant defendant of any advantage which he might otherwise have from protracting the proceedings."

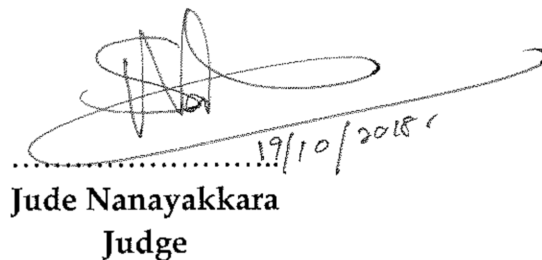
(G) Orders

(i) The Second and Third Defendants jointly and severally **refund** to the Plaintiff the deposit of **nine hundred thousand Fijian dollars** (FJ$900,000.00.) **within 14 days from the date of this judgment** .

(ii) The Plaintiff is entitled to 6% **simple interest** per annum from the date of filing of the Writ (i.e ,27th September 2013) to the date of the Judgment of this Court. (**Pre-judgment interest**)

(iii) The Plaintiff is entitled to 4% **simple interest** per annum from the date of the Judgment of this Court until payment is made in full. (**Post – judgment interest**)

(iv) The Second and Third Defendants jointly and severally pay the Plaintiff's costs of these proceedings which are fixed summarily in the sum of FJ$2000.00. **(Within 14 days from the date of this judgment.)**



............................19/10/2018

Jude Nanayakkara
Judge

At Lautoka,
Friday, 19th October 2018.