IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 257 of 2018

BETWEEN : **RATU JONA JOSEVA** proprietor of Solevu Village, Malolo, Fiji Islands and **WOODY JACK**, Businessman of 7/25 Leonard Parade, Currumbin, Queensland 4223, Australia.

PLAINTIFF

AND : **iTAUKEI LAND TRUST BOARD** statutory Trustee/Manager of iTaukei Land of 431 Victoria Parade, Suva, Fiji Islands

1st DEFENDANT

AND : **SOLOMON NATA**, Deputy General Manager of 431 Victoria Parade, Suva, Fiji, **AKUILA RATU,** Team Leader of 1st Floor, Keasuna Complex, Sigatoka, Fiji, **SAVENACA SAUVOU**, Estate Assistant of 1st Floor, Keasuna Complex, Sigatoka, **MARIKA LEWAYADA**, Estate Officer of Nadi Airport, Fiji and **ASAELI MOCE**, Team Leader of Nadi Airport, Fiji

2nd DEFENDANT

AND : **LOTE KOROI DRUADRUA** and **FERO NAMIRA NO.1,** Businessman of Solevu Village, Malolo, Fiji Islands, in their personal capacity, and as agents and/or representatives of unincorporated group of persons trading as Mataqali Narukusara

3rd DEFENDANT

AND : **FREESOUL REAL ESTATE DEVELOPMENT (FIJI) PTE LTD** a limited liability company having its registered office at 7 Thompson Street, Suva, Fiji.

4th DEFENDANT

AND : **DIRECTOR OF ENVIRONMENT** under the Environment Management Act.

5th DEFENDANT

AND : **DIRECTOR OF TOWN AND COUNTRY PLANNING** under the Town Planning Act [Cap 139]

6th DEFENDANT

AND : **DIRECTOR OF LANDS** under the State Lands Act [Cap 132]

7th DEFENDANT

AND : **ATTORNEY GENERAL FOR FIJI** pursuant to the State Proceedings Act

8th DEFENDANT

Counsel:		
	Plaintiff:	**Mr. P.C. Suguturaga**
	3rd Defendant:	**Mr. V. Rokodreu**
	4th Defendant:	**Mr. D. Toganivalu**
	5th, 6th, 7th and 8th Defendants:	**Mr. M. Motofoga**

Date of Hearing: **20.2.2023**
Date of Judgment: **9.3.2023**

Catch words
Environment Management Act Sections 47, 50, Civil Evidence Act Section 17, Sentencing and Penalties Act 2009 Sections 3(1), 51, balance of convenience, undertaking as to damage - impecunious – irreparable damage –destruction of mangrove-climate change, Limitation Act 1971.

INTRODUCTION

1. Plaintiff instituted this action on 27.8.2018, by way of writ of summons and endorsement of claim, and also sought injunctive reliefs. At *intre partes* hearing an injunctive order was made against fourth Defendant, and further hearing was adjourned. At adjourned hearing by consent, orders were made on 9.4.2019, and hearing of the action yet to commence. The orders entered through consent, by the parties restrained fourth Respondent, from interference with Plaintiff's land and also carrying out any development works on the foreshore area, until further order of the court. This was due to some development work already done and mangrove forest area along with some foreshore cleared and channel dug without Environmental Impact Assessment (EIA). Irreparable damage to eco system vulnerable to climate change had occurred by the development activities of fourth Defendant who was convicted for three charges under

under Environment Management Act 2005. Fourth Defendant was also required to do 'remedial work' or 'restoration work' to foreshore including and not limiting to any damage to reef and or seabed. Orders were made on 9.4.2019, nearly four years ago, but there is no evidence of EIA as to restoration or remedial work obtained. During this time fourth Defendant was also prosecuted for three charges relating to illegal development activities and convicted for said charges and sentenced. At the sentencing Plaintiffs sought leave to intervene to seek compensation, but the leave to intervene refused. In my mind rejection to intervene at the time of sentencing to seek compensation under Section 47 (2) (a) of Environment Management Act 2005 had not determined any of the claims before this court finally. The scope of award of compensation under section 47(2) of Environmental Management Act 2005 is dependent on evidence produced by prosecution before conviction for the proof of charges made, hence cannot cover the scope of civil claim where the burden of proof is with the Plaintiffs. Plaintiffs can call witnesses or produce documents, to prove their claims as of right. They did not get such an opportunity, during prosecution of criminal action. So the Plaintiffs' rights cannot be denied, irrespective of the result of an application under Section 47 of Environment Management Act 2005. Civil claims, also include trespass, and damage to **Plaintiffs' land** which are private claims. Rejection or an award made under Section 47(2) of Environment Management Act 2005, does determine the success or failure of civil action. If damages were awarded in civil action the court can take that, in to consideration of compensation already paid and deduct such sum. If no compensation paid that is not an issue estoppel, as regards to the facts needed to establish civil claim.

ANALYSIS

2. This is an application by fourth Defendant seeking dissolution of orders made on 9.4.2019, including mandatory injunction for restoration.

3. After said orders being made, fourth Defendant was prosecuted for three specific charges, under Environment Management Act 2005 and was convicted as charged. The focus of said prosecution were to prove the charges and not to prove any damage to Plaintiffs.

4. There is no evidence before me whether Plaintiffs gave evidence in the criminal prosecution and or particulars of their claim were presented through evidence by the prosecution to seek any compensation at sentencing.

5. Plaintiffs in said action had made an attempt to intervene as an 'aggrieved' party in order to seek compensation under Section 47(2) of Environment Management Act 2005. This application for invention had refused. So prima-facie Plaintiffs' claims were not determined by a court of law. So there cannot be 'cause of action estoppel' or 'issue estoppel' to be considered as *res judicata.*

6. Halsbury's Laws of England Civil Procedure (Volume 11 (2020), paras 1–496: Volume 12 (2020), paras 497–1206; Volume 12A (2020), paras 1207–1740)1568. **Basis for doctrine of res judicata**, states,

> "The doctrine of res judicata provides that, where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot be reopened by parties bound by the decision, save on appeal. It is most closely associated with the legal principle of 'cause of action estoppel', which operates to prevent a cause of action being raised or challenged by either party in subsequent proceedings where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties (or their privies), and having involved the same subject matter3. However, res judicata also embraces 'issue estoppel', a term that is used to describe a defence which may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, but, in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue" (foot notes deleted)

7. The application seeking dismissal of orders made on 9.4.2019, did not state *res judicata* as a ground in the motion or submission, but paragraph 28 and 29 of affidavit in support indicate such objection, on *res judicata*.

8. According to paragraph 28, the deponent was advised by the solicitors that 'the only issue before this court is whether the 4th Defendant has trespassed /is trespassing the Plaintiffs properly and that has been determined by Criminal Court not to be true' (para28).

9. When an action or fact is already determined it can form basis for res judicata. According to above paragraph, all the claims of Plaintiffs contained in statement of claim including claim for trespass, were determined by the court when an application for intervention to seek compensation was refused.

10. At paragraph 29 of affidavit in support of this application further stated;

> 'That beside the issue of trespass, the Plaintiffs cannot prove a claim against the 4th Defendant for loss in value and lost opportunity'

11. The affidavit in support of fourth Defendant state grounds for dissolving injunction from paragraph 13 onwards and accordingly the reasons can be summarised;

    a. Rejection of Plaintiff's application to seek compensation for breaches of fourth Defendant is a finding against Plaintiff to the effect that claims in this action cannot maintain.

b. No serious triable issue (again based on rejection of intervention in criminal action)

c. Balance of Convenience.

i. cannot perform sentencing orders for rehabilitation of damage to the environment, due to conflict with orders of 9.4.2019

ii. The channel dug up illegally and ordered by criminal court and this court to restore, may be authorized in future!

d. No sufficient undertaking by Plaintiffs as evidence presented to court are not sufficient.

12. Above grounds for dissolution (a), (b), and (c) relate to criminal action against fourth Defendant for violations of Environment Management Act 2005, and, conviction and the sentencing. Plaintiff's application seeking leave for intervention was rejected, before sentencing.

13. Plaintiff had obtained leases, for some land in Malolo Island.

14. Fourth Defendant had commenced a massive development project in Malolo Island and had commenced preliminary development work without due regard to the environment for which it was issued a prohibition order by fifth Defendant but that prohibition order was also not obeyed .

15. It had allegedly violated more than twenty conditions attached to conditional approval granted by fifth Defendant as statutory position created in terms of Environment Management Act 2005.

16. Accordingly fifth Defendant had issued Prohibition Notice to fourth Defendant, and also prosecuted for the breaches under Environment Management Act 2005 including, failure to comply with Prohibition Notice, and after trial convicted and sentenced.

17. Fourth Defendant was charged on three counts and they are;

> "1.Undertaking unauthorized Developments contrary to Section 43 (1) of the Environment Management Act 2005."
>
> **Particulars of offence**
>
> Freesoul Real Estate Development (Fiji) Pte Limited between the 8th Day June 2017 and 6th Day December, 2018 at Malolo in the Western Division carried out development activity in the dry land at Wacia and the foreshore facing Wacia As

per the lease in the attached annexure A which is subject to the Environmental Impact Assessment process without an approved Environmental Impact Assessment (EIA) Report.

2. Undertaking unauthorized developments contrary to Section 43(1) of the Environment Management Act 2005
Particulars of offence

Freesoul Real Estate Development (Fiji) Pte Limited between the 8th day of June 201 and 6th day of December 2018 at Malolo, in the Western Division carried out development activity on the dry land at Qalilawa and the foreshore facing Qalilawa as per the lease in the attached annexure B without an approved Environment Impact Assessment (EIA) Report.

3, Failure to comply with a Prohibition Notice contrary to Section 21(4) and 46 for the Environment Management Act 2005.

Particulars of Offence

Freesould Real Estate Development (Fiji) Limited between the 1st day of June 2018 and 6th Day of December 2018, at Malolo, in the Western Division failed to comply with a Prohibition Notice issued against the Company on the 1st of June 2018 to prohibit from undertaking foreshore and any construction activity at Wacia (Part of) Malolo Levu Island."

18. Fourth Defendant was convicted as charged, for all three charges, and accordingly it was fixed for sentencing.

19. Before sentencing Plaintiff tried to intervene as a "person aggrieved", in terms of Section 47(2)(a) of Environment Management Act 2005, in order to seek compensation from the court that convicted fourth Defendant for all three above offences.

20. Section 47(2) of Environment Management Act 2005 states:

"(2) If a person is convicted of an offence under this Act, the **court may, when sentencing the offender** and on the application by a person aggrieved, order the **convicted person to pay to the person aggrieved-**

(a) Compensation for loss or damage to property or income **proved to have been suffered by that person** as a result of the commission of the offence; or

> *(b)* the cost of any **preventative or remedial action** proved to have been reasonably taken or caused to be taken by that person as a result of the act or omission that constituted the offence."(emphasis added)

21. Accordingly an 'aggrieved person' could make an "application" to the court that is sentencing, the offender in terms of Environment Management Act 2005. This is an option available to any person who is 'aggrieved' by the said violation for which a party is already convicted, but before sentencing.

22. This option does not determine the civil rights of the parties for a civil action, but an economical, and convenient path to seek loss or damage to property or income or cost of preventive or remedial action.

23. When application under Section 47(2) of Environment Management Act 2005, is made court needs to be satisfied that, such applicant is an aggrieved party due to the violations of charges under Environment Act 2005 for which already conviction was made. This is the preliminary requirement. If there are no evidence to establish the applicant under this provision as an 'aggrieved' person, the application to intervene to seek monetary relief under said provision cannot succeed.

24. The 'aggrieved' person who is seeking compensation should also establish that loss or damage he is claiming incurred 'as a result of the commission of the offence' for which the offender is already convicted. So the scope of compensation or remedial cost is limited to the actions of the offender that constituted offences convicted.

25. So the alleged grievance or loss or damage to an applicant under said provision of law needs to show a link between the offence or offences committed and grievance for which compensation sought. The loss can even be to income, so the scope of loss is not confined to damage to property, but there should be evidence to prove such losses to income or property and this must also be a result of the offence for which conviction was made.

26. Once the court considers the applicant as an 'aggrieved' person, it can proceed to award a compensation, but this is discretionary.

27. If the applicant under Section 47(2) of Environment Management Act 2005, is an aggrieved person due to the violations under said Act for which already conviction is made, the court has a discretion to grant , such aggrieved party
    a. Compensation **or**
    b. Cost of preventive or remedial action

28. The court is not obliged to grant 'compensation' or 'cost of preventive or remedial' measures and there is no restriction on the discretion and the grant or rejection depends on the circumstances.

29. This is not as same as proof of a right in civil tort on balance of probability and assessment of damages, where no discretion of the court is involved and party is seeking relief as of right.

30. So Plaintiffs cannot seek compensation at sentencing as of right, but the request is subject to discretion of the court. As such by nature of Section 47(2) of Environment Management Act 2005, cannot determine rights of an 'aggrieved party' in a civil action finally.

31. The above position is clear from the wordings of Section 51(3) and 51(4) of Sentencing and Penalties Act 2009 reads,

> "(3) Nothing in this section or the Regulations made under it affect the right of any person to take action to recover damages for losses, damage or injury against an offender by way of civil proceedings.
>
> (4) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the court shall take into account any sum paid or recovered as compensation under this section."

32. Section 3(1) of Sentencing and Penalties Act 2009, applies to all, 'criminal offences' and applies to offences under Environment Act 2005. So, an award of compensation in criminal action, can take account of what was already paid but it does not prevent proceeding with the proof of civil liability and damages. So the failure to award cannot prevent civil claim being pursued. Though this provision was not used by the sentencing order the rationale in compensation order after conviction is clear.

33. Section 50 of Environment Management Act 2005, states;

> "**50.**-(1) A person who has suffered loss which **includes** contracting health-related problems as a result of any **pollution incident** may institute a civil claim for damages in a court, which may include a claim for-
>
> *(a)* **economic loss** resulting from the pollution incident or from activities undertaken to prevent, mitigate, manage, clean up or remedy any pollution incident;

(b) **loss of earnings arising** from <u>damage to any natural resource</u>;

(c) **loss to or of any natural environment or resource**;

(d) costs incurred in any inspection, audit or investigation undertaken to determine the nature of any pollution incident or to investigate remediation options.

(2) **A claim under this section may be set off against any compensation paid under section 47(2).**"
(emphasis added)

34. Accordingly, Section 50(1) of Environment Management Act 2005 , allows a civil suit which includes a 'health related problems' to seek compensation including economic loss, but the compensation paid in civil suit 'may be' set off by compensation paid under Section 47(2) of the said Act. This also shows that compensation paid under Section 47(2) of the Act is not an impediment or bar for civil suits, but a complementary provision. Similarly, if an application for compensation under Section 47(2) of the Act, is refused that should not be considered as finding of a fact or relevant fact finally against the applicant.

35. Section 17 of Civil Evidence Act 2002, deals with admissibility of evidence of and conviction , but this admissibility is subject to Section 17(3) of the same provision and it reads;

"*Convictions as evidence in civil proceedings*

17.-(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the Fiji Islands or elsewhere is, subject to subsection (3), admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that the person committed the offence, whether the person was so convicted upon a plea of guilty or otherwise and whether or not the person is a party to the civil proceedings.

(2) No conviction other than a subsisting one is admissible in evidence by virtue of this section.

(3) **In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the Fiji Islands-**

(a) the person is taken to have committed that offence unless the contrary is proved; and

(b) **without affecting** the reception of any other **admissible evidence** for the purpose of **identifying the facts on which the conviction was based**, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person was convicted, are admissible in evidence for that purpose.

(4) Nothing in this section affects the operation of section **19** of this Act or any other written law whereby a conviction or a finding of fact in any criminal proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.

(5) If in any civil proceedings the contents of any document are admissible in evidence by virtue of subsection (3), a copy of that document, or of the material part of it, purporting to be certified or otherwise authenticated by or on behalf of the court or authority having custody of that document, is admissible in evidence and must be taken to be a true copy of that document or part unless the contrary is shown."(Emphasis added)

36. Section 17(3) of Civil Evidence Act 2002, while allowing the 'fact' of conviction admissible in court , it is 'without affecting' the 'other admissible evidence' for the purpose of 'identifying the facts on which conviction was based'. This shows clearly a finding of a fact even by criminal court is not conclusive to civil action and this is logical considering several grounds.

37. Firstly the burden of proof in civil and criminal actions are different. It is well accepted principle in evidence that criminal charges needs to be proved beyond reasonable doubt as opposed to balance of probability on civil action. So in theory even if conviction failed for the same issue or fact can be proved in civil litigation due to low burden on the evidence to prove a fact in issue or relevant fact.

38. Next, is when the criminal action is prosecuted the court could not deal with all 'aggrieved' parties' claims as for compensation or costs , due to emphasis was on the proof of charges or offences, under Environment Management Act 2005. This does not undermine the utility of Section 47(2) of Environment Management Act 2005 in appropriate action.

39. Another feature under compensation under Section 47(2) of Environment Management Act 2005, is that unlike a civil tort there is no application of Limitation Act 1971, any 'aggrieved' party could intervene to seek compensation. This is equally applicable to

recovery of preventive or remedial cost arising from the offences convicted under Section 47(2)(b). So the utility of Section 47(2) of Environment Management Act 2005 is wide and discretionary depending on circumstances of the offences and the purpose was to mitigate the impact of the offences committed by the offender to 'aggrieved' parties without considering restrictions such as limitations applicable to civil claims and also costs of such claims and time taken etc.

40. While prosecuting the offender to prove charges, evidence may be adduced to show, that there were 'aggrieved parties' due to said actions or inactions of an accused party. When such evidence is before the court and it is proved, that there is at least an 'aggrieved' party, an intervention at sentencing for compensation or for costs can be allowed. If such a fact to prove them as 'aggrieved' parties were not before the court which convicted, then such parties cannot intervene at the time of sentencing to seek relief in terms of Section 47(2) of Environment Management Act 2005. Rejection of intervention only proved that there was no evidence to prove such applicant as 'aggrieved' party as a result of the offences committed under said Act. This does not prevent the same party to seek civil remedy.

41. Applying the above analysis of law, it is clear what fourth Defendant seeks in this application for the variation of orders entered on 9.4.2019 cannot granted based on the ruling of 7.2.2022 by the sentencing court that rejected intervention of Plaintiffs or sentencing order made on 28.4.2022.

42. Plaintiffs' application for intervention was sought only at the stage of sentencing after conviction. So by that time all the evidence relating to the offence had concluded. So unless the evidence before the court for criminal sanction also proved that loss or damage to 'aggrieved' parties they cannot intervene in the said action to seek compensation for damage to property or income or cost for remedial measures.

43. Conviction is a prerequisite for intervention to seek compensation or costs for preventive or remedial actions, but all convictions will not contain all the evidence Plaintiffs desired to establish civil claims for damages. So, their day in court should not be denied in civil action, irrespective of the grant or rejection of compensation, even on the merits, which is not the case in this matter.

44. Even if there was sufficient evidence, allowing intervention at sentencing was a discretionary power of the sentencing court. The sentencing court could refuse when there was a pending action in civil court for determination or any other factor that sentencing court thinks relevant. So such a rejection of compensation or cost for remedial or preventive action was in no way can be considered as 'cause of action estoppel' or 'issue estoppel', which were discussed earlier, in this judgment.

45. In this case as I have stated earlier, civil claim is not limited to destruction of environment but also it included trespass to Plaintiff's land and damage to it due to the activities of fourth Defendant. These are private claims which Plaintiffs have burden to prove through evidence.

46. Apart from that Section 47(2) (a) Environment Management Act 2005, requires proof of loss and or damage to 'property or income' of the aggrieved party. This is when already sentencing court had determined a party as 'aggrieved' from the evidence presented in proof of the charges under Environment Management Act 2005. Ruling of 7.2.2022 had refused the Plaintiffs' application to seek leave to intervene, and had not proceeded to the issues relating to Plaintiffs' claims.

47. In my mind a party can be considered as 'aggrieved' from the evidence provided by the aggrieved party for conviction when aggrieved person was the complainant and as a witness in the criminal prosecution or through other evidence provided by third parties or when the damage to aggrieved party or loss of income by nature of the conviction was not an issue, and or inevitable consequence of the offence is damage or loss of income to third parties.

48. In the same way, an aggrieved person could seek remedial or preventive cost 'proved to have been reasonably taken or caused' by the convicted person as a 'result of' wrong doing for which conviction was made in terms of Section 47(2)(b) of Environment Management Act 2005. There was no such application for remedial or preventive costs being made either by Plaintiffs or any other party.

49. Plaintiff had made an application in terms of Section 47(2)(a) of Environment Management Act 2005 and it was rejected by sentencing court on 7.2.2022 as his lordship Gounder J, held '... I refuse to allow the applicants' leave to intervene to seek compensation for loss or damage to their property'.

50. So, leave for intervention was refused and the reasons given for such refusal is not binding on this court, as such facts are not finally determination in terms of Section 17(2) of Civil Evidence Act 2002 which was dealt earlier.

51. So the rejection of application made under Section 47(2) (a) of Environment Management Act 2005 and the reasons given in the Ruling of 7.2.2022 annexed DP-2 to the affidavit in support, are not a reason for this court to dismiss the Orders granted on 9.4.2019 and or consider such facts contained in the Ruling of 7.2.2022 to prevent or curtail, Plaintiffs seeking civil remedies in this action.

52. Fourth Defendant was sentenced on 28.4.2022 in following manner:

a. "The offender is fined an aggregate sum of $1m for two counts of carrying out unauthorized developments.

b. The offender is to post a refundable environmental bond of $1.4m with the Department of Environment and rehabilitate the affected areas to the satisfaction of the Department of Environment at its own expenses. Once the affected areas have been rehabilitated to the satisfaction of the Department of Environment the bond may be refunded to the offender.

c. It is a matter for the Department of Environment to lift the Prohibition Notice that was issued to the offender on 1 June 2018.

d. There will be no order for costs."

53. So, before orders for sentencing were made on 28.4.2022, on 9 .4. 2019, Court made the following orders by consent:

1. "That the 4th defendant by itself or through its servants, employees, agents or invitees or otherwise howsoever shall be restrained from crossing over or otherwise howsoever **interfering with the plaintiffs' land**.

2. That the 4th defendant is **prohibited from carrying out any development works on the foreshore** until **further orders from the Court.**

3. That the 4" defendant to **comply with the Prohibition Notice** of 1st June, 2018 issued by the Director of Environment **and** do **remedial works and/or restoration work of the foreshore to its original state (if there was a damage to reef/seabed that also needs to be restored).**

4a. If the remedial/restoration works stated in the previous order **needs an EIA, that also needs to be obtained and approved by the 5th Defendant,** Director of Environment and all the costs involved in that process should be borne by the 4th Defendant.)

4b. The Director of Environment (5th Defendant) **is to assess the progress of work by the 4" Defendant** relating to Order 3 and 4 and needs to be satisfied with the work of restoration in compliance with the orders of Court and other legal requirements in law.

5. That the plaintiff shall be at liberty to engage and enlist the services of Police from the nearest police station and/or bailiffs in the execution of these Orders so

long as their role is limited to ensure that there is no breach of peace in the execution of the Order.

6. That the costs of this application is summarily assessed at $2,000 FJD to be fully paid by the 4" defendant to the plaintiff within 30 days.

7. The matter to be listed before the Master for further directions of this action and also summons seeking leave for default judgment" (emphasis added)

54. Fourth Defendant is seeking to dissolve the orders made on 9.4.2019 on the ground that sentencing orders delivered subsequently, cannot perform. (See paragraph 33 of Affidavit in support).

55. At the hearing I requested the counsel for fourth Defendant to show any conflict of sentencing orders made on 28.4.2022. He could not. In fact they are complementary and I have already shown this previously.

Balance of Convenience

56. At paragraph 35 of affidavit in support of Dick Peng stated,

> "That the dug up channel (if approved) by 5th, 6th and 7th Defendants would provide and easier access to the 4th Defendant and Plaintiffs (sic) respective lands from the sea"

57. This is the reason for 'balance of convenience' according to affidavit support to dissolve the orders made on 9.4.2019. If this kind of activities are 'approved' by 5th, 6th and 7th Defendants it will not only create a bad precedence but also negate the deterrence for violators of Environment Offences.

58. Destruction of natural resources without proper assessment of the impact, by fourth Defendant was a criminal offence, and it is unconscionable to think such an illegal act, can be approved after conviction by fifth Defendant.

59. The above expectation of fourth Defendant's Director, sworn in the affidavit, conflicts with the consent orders of 9.4.2019 and sentence pronounced on 28.4.2022 for restoration of the damage done by destruction of mangrove, foreshore area and sea and also undertaking given by the same deponent to relevant authorities.

60. In the sentence pronounced on 28.4.2022 at paragraph 14 stated;

'At trial, the offender did not dispute that a channel was dug and mangroves removed, but argued that they were not responsible. This contention was rejected by the learned trail magistrate, because after the offender was issued with the Prohibition Notice no 1 June 2018, Mr. Peng wrote to the Department of Environment, apologizing for 'all that has transpired' and **promising to take rehabilitative measures**' (emphasis added)

61. There was no evidence of rehabilitative measures taken so far. This is despite obtaining consent orders to do 'remedial works' and or 'restoration work' on 9.4.2019 and also ordered on 28.4.2022 by the court that sentenced to 'post a refundable bond' with fifth Defendant and rehabilitate the affected areas.

62. Surprisingly, now Director of fourth Defendant thinks that the very act that was subject to criminal prosecution "if approved", it is convenient for them to have access to their land and also to Plaintiffs! This may to lure Plaintiffs the so called convenience will outweigh the expense of restoration and or rehabilitation ordered on 9.4.2019, and also sentence of 28.4.2022.

63. Fourth Defendant was also ordered to obtain EIA before restoration if that is required on 9.4.2019, but even after nearly four years there is no evidence that EIA is needed or not. All the evidence at this moment show it requires EIA, for restoration ordered.

64. This shows fourth Defendant is not keen about the rehabilitation or restoration or to mitigate the destructive activities, but wants the authorities to approve illegal environmental destruction only because it provides 'easy access to 'fourth Defendant and Plaintiffs, according to their own assessment.

65. This type of convenience, which had already resulted criminal prosecution and also conviction, cannot by any stretch of imagination be considered as a ground for balance of convenience where environmental destruction is alleged and interim orders are granted. If such 'convenience' as alleged in the affidavit in support of this application is considered to favour balance of convenience to fourth Defendant, it goes against the core principles of injunctive orders, which is equity. Equity will not favour illegal act for which criminally prosecuted and convicted.

Undertaking as to Damages

66. Fourth Defendant had also raised the issue of undertaking as to damages and capacity of Plaintiffs to compensate fourth Defendant.

67. This cannot be an issue as orders made on 9.4.2019 were made by consent of all the parties and subsequently fourth Defendant was convicted of destruction of environment

between 8.6.2017 and 6.12.2018, a development activity 'on dry land at Wacia and foreshore facting Wacia' without an EIA, and it was sentenced with an order to rehabilitate affected area. So, fourth Defendant was ordered by this action as well as in sentencing order of 28.2.2022 to take remedial measures to the satisfaction of fifth Defendant and Department of Environment respectively. Sentencing court also ordered 'to post refundable environmental bond of $1.4m' and though a year had passed, this was not complied. (See paragraph 17 (a) of affidavit in response of fifth Defendant).

68. So, fourth Defendant cannot seek to invoke discretionary remedy to dissolve injunctive orders, without complying with orders already made. How can fourth Defendant seek financial strength of Plaintiffs, to give an adequate undertaking as to damages, when it had not even deposited environmental bond ordered by sentencing court nearly a year ago? So, the issue of undertaking as to damages beyond usual undertaking given by Plaintiffs cannot be raised by fourth Defendant, without showing their financial strength to provide a refundable bond, by immediately depositing it with relevant authority.

69. *A fortiory*, in allegations of environmental destructions and claims based on such issues are alleged, undertaking to damage is not determinative in order to grant interim injunctive orders. If such a requirement is determinative, impecunious litigant who is genuinely 'aggrieved' will never be able to seek injunctive orders to stop environmental destruction by companies such as fourth Defendant. This goes against the grant of equitable remedy such as injunctive relief and will not be in the overall justice. Injunctive reliefs are discretionary in nature hence undertaking as to damages should also be equitable considering circumstances.

70. It should also borne in mind destruction to mangrove and marine life is irreparable, and there is no issue of fourth Defendant's ability to pay for the destruction of such an ecosystem.

71. When a party is already convicted for three offences under Environmental Management Act 2005, in my mind the balance of convenience lies heavily not to remove the interim orders, granted by consent of all parties including fourth Defendant.

72. So the undertaking as to damage is a balancing exercise of damage done or imminent danger of the Defendant as opposed to ability to pay for that. When the actions of fourth Defendant, are destruction of mangrove and foreshore, without its impact assessed, was an irreparable damage to environment, the issue of cross undertaking cannot arise. So the objection raised by fourth Defendant regarding undertaking as to damage is rejected.

73. In UK Court of Appeal decision a *Mareava injuction* was granted to an impecunious litigant to prevent leaving of an aircraft pending civil action for damages. *Allen and others v Jambo Holdings Ltd and others* [1980] 2 All ER 502. So there is no rigid rule as

to grant of injunctive relief, to provide adequate security even to grant an asset freeze, when it is just and equitable to do so.

74. Allen and others v Jambo Holdings Ltd and others, [1980] 2 All ER 502, held, (Per Lord Denning)

> "I do not see why a poor plaintiff should be denied a Mareva injunction just because he is poor, whereas a rich plaintiff would get it. **One has to look at these matters broadly. As a matter of convenience, balancing one side against the other**, it seems to me that an injunction should go to restrain the removal of this aircraft."(emphasis is mine)

75. *American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, [1975] AC 396, [1975] 2 WLR 316, HL*. Held,

> "As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be **adequately compensated by an award of damages** for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage .If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be **adequately compensated under the plaintiff's undertaking as to damages for the loss** he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason this ground to refuse an interlocutory injunction."

76. It is clear that in an action where environmental destruction had happened to the magnitude of criminal prosecution and also conviction the assessment of damage to environmental is irreparable by the nature of development activities of fourth Defendant which had destroyed costal ecosystem. In this instance from the evidence before me at this stage fourth Defendant had cleared a mature mangrove forest area, without EIA.

77. According to World Wildlife Fund (WWF)[1], mangroves plays a vital part in combatting 'Climate Change'. Accordingly,

"There are more than 60 different species of mangrove tree, all specialized to grow along waterlogged coastlines in tropical and sub-tropical regions. Despite being relatively unknown, they are an incredible group of plants. Not only do they have a unique ability to thrive in saltwater environments, but their strong and complex root systems also protect coastal communities and landscapes from extreme weather events, like hurricanes.

Mangroves are regularly referred to as a "nature-based solution"—a term often used in reference to tackling the climate crisis. A nature-based solution leverages the strengths that already exist in nature to mitigate or adapt to the impacts of change. One of mangroves' biggest strengths lies in their ability to capture and store carbon. The muddy soil that mangroves live in is extremely carbon-rich and over time the mangroves help to not only add to this store of soil by capturing sediment but hold it—and the carbon—in place. The amount of carbon stored beneath these trees is estimated to be up to four times greater than that stored by other tropical forests, making these coastal forests extremely valuable in the fight against climate change."

78. Fiji is a frontline island that is vulnerable to 'Climate Change' and also had taken initiatives to combat this through legislative measures such as of Climate Change Act 2021(yet to commence)[2] and other methods to mitigate adverse effects of climate change. So the destruction of mangrove and losses and damage to the environment is irreparable to such a vulnerable state. In such a scenario, fourth Defendant cannot rely on adequacy of Plaintiffs' undertaking as to damages to dissolve orders granted on 9.4.2019 as their actions had resulted irreparable loss, and rehabilitation and or restoration is a much essential.

79. I reject the grounds alleged in the affidavit in support of this application seeking dismissal of orders made on 9.4.2019 for the reasons given. Now I briefly deal with the objections raised by Plaintiffs for this applicator.

80. Fourth Defendant filed purported Notice of Motion in terms of Order 32 rule 4 and Order 19 rule 1 of High Court Rules 1988(HCR) on 6.10. 2022 seeking following relief:

(a) That the Injunction obtained by consent by the Plaintiff on 12th April 2019 be dissolved forthwith.

(b) That costs shall be in the cause

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[1] https://www.worldwildlife.org/stories/mangroves-as-a-solution-to-the-climate-crisis(8.3.2023)

[2] https://www.laws.gov.fj/Acts/DisplayAct/3290(8.3.2023)

(c) Any further or other orders this Honourable Court deems appropriate

81. Order 32 Rule 4 and Order 19 Rule 1 of the HCR, are irrelevant to this application, which is for dissolution of orders made disposing summons for interim injunction filed by Plaintiff.

82. The prohibition of all the development work contained in order 2 of orders made on 9.4.2019 was until further order of this court. So it could be lifted or varied with necessary additional conditions depending on the circumstances.

83. Plaintiffs' submissions had taken objections to mode of this application (i.e Motion and the Affidavit). Although they are valid objections I am not inclined to reject this application on technicalities and adopt the path of least resistance, considering that there are merits to be dealt, on interpretation of novel provisions of law. Such irregularities are curable, and if raised earlier, could have dealt with an order as to cost.

84. Plaintiffs have also raised an objection relating to affidavit in support. Order 41 rule 4 of High Court Rules 1988 allows flexibility to allow even a defective affidavit .The objection raised regarding the affidavit in support has not merit as an affidavit or evidence on behalf of any legal or natural person can be given by any person who had perceived the facts.

85. This is an affidavit to vary orders made by consent regarding interim orders and the affidavit is filed by a legal practitioner. The court presumes the evidence produced by legal practitioner were on behalf of the client unless contrary is proved.

86. The objection of Plaintiff regarding the principle of 'functus officio' is misconceived as order 2 of orders made on 9.4.2019 stated that it is valid till another order is made by this court, which allowed this court to vary or dismiss that order.

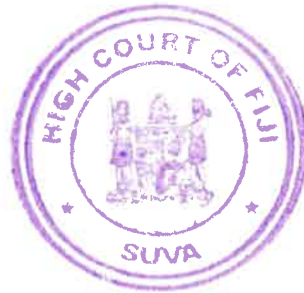
CONCLUSION

87. Fourth Defendant had not commenced remedial work ordered by this court and also supplemented by order for sentencing for restoration including and not limiting to destruction of mangrove that was on foreshore area and also destruction to any other natural surrounding including and not limiting reef and seabed. Without engaging in remedial work fourth Defendant is expecting fifth Defendant to authorize 'dug up channel' which resulted criminal prosecution and conviction. It is unconscionable to expect of fourth Defendant to destroy natural environment including mangrove, foreshore and also to dig sea, that resulted criminal conviction, and also seek approval of such activity thereafter. If such approval is granted to fourth Defendant at this time, it will create very bad precedent for future developers too. So this application for dissolution or

variation of orders made by consent on 9.4.2019 is rejected and the motion is accordingly struck off. No cost ordered, considering circumstances of this case.

FINAL ORDERS

a. Inter parte Notice of Motion filed on 6.10.2022 is struck off.
b. No cost awarded considering the circumstances of the case.



Dated at Suva this 9th day of March 2023.

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Justice Deepthi Amaratunga
Judge High Court, Suva