

IN THE MAGISTRATES' COURT OF FIJI  
AT NADI  
CRIMINAL JURISDICTION

*Criminal Case No. 208 of 2019*

THE STATE

v.

**FREESOUL REAL ESTATE DEVELOPMENT (FIJI) PTE LIMITED**

**For the State :** Ms. S. Kiran, *of counsel*, and Ms. M. Naidu, *of counsel*, for the Director  
of Public Prosecutions

**For the Defendant:** Mr. D. Toganivalu, *of counsel*, and Mr. T. Cagilaba, *of counsel*, of  
Toganivalu Legal

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JUDGMENT

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1 **FREESOUL REAL ESTATE DEVELOPMENT (FIJI) PTE LIMITED** stand  
charged as follows:

**COUNT 1**

*Statement of Offence*

**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 8<sup>th</sup> day of June 2017 and 6<sup>th</sup> day of December 2018 at Malolo in the Western Division carried out development activity on 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.

**COUNT 2**

*Statement of Offence*

**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 8<sup>th</sup> day of June 2017 and 6<sup>th</sup> 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 which is subject to the Environmental Impact Assessment process without an approved Environmental Impact Assessment (EIA) Report.

**COUNT 3**

*Statement of Offence*

**FAILURE TO COMPLY WITH A PROHIBITION NOTICE:** contrary to section 21 (4) and 46 of the **ENVIRONMENT MANAGEMENT ACT 2005**

*Particulars of Offence*

**FREESOUL REAL ESTATE DEVELOPMENT (FIJI) PTE LIMITED** between the 1<sup>st</sup> day of June 2018 and 6<sup>th</sup> day of December 2018 at Malolo in the Western Division failed to comply with a Prohibition Notice issued against the Company on the 1<sup>st</sup> of June 2018 to prohibit from undertaking foreshore and any construction activity at Wacia (Part of) Malolo Levu Island.

2. There is no statutory power to roll up environmental offences. Digging up a channel is one development activity, destroying mangroves to make way for a board-walk or to create roads might be another, building houses or buildings or offices might yet be another. The State must confine itself to the one development activity it alleges was unauthorized.
3. First, this is due to considerations of fairness. There should be no ambiguity in the details of the charge against him: see Deo v. State [2011] FJHC 372; HAA010 of 2011 (06 July 2011) and State v. Serutamana [2021] FJCA 69; AAU100.2018 (12 March 2012) at [11]. The principle is that "the defendant should be able to tell from the indictment or charge against him [or her], the precise nature of the charge or charges against him or her so as to be in a position to put forward his or her defence and direct his or her evidence to meet them": DPP v Solomon Tui 22 FLR 4. Second, "the indictment must not be double that is to say, no one count of the indictment should charge the defendant with having committed two or more separate offences." *Archbold, Criminal Pleading, Evidence and Practice* (44<sup>th</sup> Ed. 1995), Vol 1, p. 75.
4. The learned Director of Public Prosecutions, through his counsel, Ms. S. Kiran took the principled position that despite the plural used in the Statements of Offence for Counts 1 and 2 of his Amended Charge, the State could only and did in fact only allege one unauthorized development per count.
5. For Count 1, the State specifically allege that **Freesoul Real Estate Development (Fiji) Pte Limited** between the 8<sup>th</sup> day of June 2017 and the 6<sup>th</sup> day of December 2018 at Malolo in the Western Division dug up a channel along the foreshore facing and on the land at Wacia, an activity which was the subject to the Environmental Impact Assessment process without an approved Environmental Impact Assessment Report.
6. For Count 2, the State specifically allege that **Freesoul Real Estate Development (Fiji) Pte Limited** between the 8<sup>th</sup> day of June 2017 and the 6<sup>th</sup> day of December 2018 at Malolo in the Western Division destroyed mangroves on the dry land at Qalilawa and the foreshore facing Qalilawa, an activity which was subject to the Environmental Impact Assessment process without an approved Environmental Impact Assessment Report.

7. For Count 3, the State specifically allege that **Freesoul Real Estate Development (Fiji) Pte Limited** between the 1<sup>st</sup> day of June 2018 and the 6<sup>th</sup> day of December 2018 at Malolo in the Western Division failed to comply with a Prohibition Notice issued against it on 1<sup>st</sup> June 2018 when it continued to extend an artificial channel it had created along the foreshore facing Wacia onto the dry land that was part of Wacia.

### **PRESUMPTION OF INNOCENCE & BURDEN & STANDARD OF PROOF**

8. I remind myself that **Freesoul Real Estate Development (Fiji) Pte Limited** is presumed innocent until proven guilty and that it is for the State to prove each element of each offence charged beyond reasonable doubt. It is not for **Freesoul Real Estate Development (Fiji) Pte Limited** to prove its innocence.

### **NATURE OF THE CRIMES ALLEGED**

9. The first question to be determined is whether these offences are offences of strict liability or whether these are crimes that require proof of a fault element in order to be made out.
10. For many years, our courts had to look to the common law for assistance in determining whether or not offences for which no fault element had expressly been provided for were *mens rea* crimes, crimes of strict liability or crimes of absolute liability.
11. The principles enunciated in **Nurse and Canserve Limited v. Republic of Trinidad and Tobago** [2019] UKPC 43 sets out the English common law position:

"2. ... The Board considers that the five-point summary of the law given by Lord Scarman, giving the advice to Her Majesty, in *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1985] AC 1, which also addresses regulatory offences, sets out the relevant fundamental principles conveniently with great clarity:

"In their Lordships' opinion, the law relevant to this appeal may be stated in the following propositions (the formulation of which follows closely the written submission of the appellants' counsel, which their Lordships gratefully acknowledge):

- (1) there is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence;
- (2) the presumption is particularly strong where the offence is 'truly criminal' in character;
- (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute;
- (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue;
- (5) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by promoting greater vigilance to prevent the commission of the prohibited act."(p 14).

19. A key point in *Sweet v. Parsley* is that the House of Lords held that, in cases of difficulty over the mens rea required by any statutory offence, the court must apply the presumption that Parliament intended that a criminal offence should require mens rea in relation to every element of the actus reus for that offence. Lord Reid expressed the point in the following way at pp. 148 – 149:

"Sometimes the words of the section which creates a particular offence makes it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy for what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea.

Where it is contended that an absolute offence has been created, the words of Alderson B in *Attorney General v. Lockwood* (1842) 9 M & W 378, 398 have often been quoted:

"The rule of law, I take it, upon the construction of all statutes, and therefore applicable to the construction of this is, whether they be penal or remedial, to construe them according to the plain, literal, and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act, or to some palpable and evidence absurdity."

That is perfectly right as a general rule and where there is no legal presumption. But what about the multitude of criminal enactments where the words of the Act simply make it an offence to do certain things but where everyone agrees that there cannot be a conviction without proof of mens rea in some form? This passage, if applied to the present problem, would mean that there is no need to prove mens rea unless it would be a 'plain and clear contradiction of the apparent purpose of the Act' to convict without proof of mens rea. But that would be putting the presumption the wrong way round: for it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that it is not necessary."

20. The presumption that any criminal offence should involve mens rea is a totally fundamental point. Lord Pearce held at p. 156:

"The notion that some guilty mind is a constituent part of crime and punishment goes back far beyond our common law."

21. Lord Reid continued:

"Our first duty is to consider the words of the Act: if they show a clear intention to create an absolute offence that is an end of the matter. But such cases are very rare."

22. Although absolute offence would be rare, in the judgment of Lord Morris of Borth-y-Gest:

"The question must always be – what has Parliament enacted?" (p 153)

23. Lord Morris answered that question as follows:

"[t]he inquiry must be made... whether Parliament has used words which expressly enact or impliedly involve that an absolute offence is created."  
(p 153)

24. So there is a high hurdle to be overcome by the prosecution when it asserts that an offence is one of strict liability that does not require a mental element in relation to any particular ingredient of the actus reus. It must rebut the presumption that mens rea is required, and so clear words will be needed. But the presumption enunciated in *Sweet v Parsley* is nonetheless one that can be rebutted."

12. In Fiji these principles are codified. Section 10 of the **Crimes Act 2009** makes clear that the purpose of **Chapter 2: General Principles of Criminal Responsibility** of the said Act is to "codify the general principles of criminal responsibility under laws of Fiji" and it further states that the "Chapter contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created."

13. Section 13 of the **Crimes Act 2009** provides that:

"13. (1) An offence consists of physical elements and fault elements.  
(2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.  
(3) The law that creates the offence may provide different fault elements for different physical elements."

14. Pursuant to section 23 of the **Crimes Act 2009**:

-23 (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element."

15. The language of section 24 and section 25 of the **Crimes Act 2009** makes clear that crimes are crimes of strict or absolute liability if, and only if, the law that creates the offence provides that the offence is an offence of strict or absolute liability.

16. Ms. Kiran, *of counsel*, for the learned Director of Public Prosecutions and Mr. Toganivalu, *of counsel*, for **Freesoul Real Estate Development (Fiji) Pte Limited** each submit that the offences charged for are *mens rea* crimes and as such, fault elements apply in respect of each offence. In respect of Counts 1, 2 and 3, they each submit that intention is the fault element that applies in respect of the physical elements set out therein.

17. I agree with the positions taken by learned counsel for the State and the Defendant and I am indebted to them for the careful attention they have given the matter and for their helpful written submissions and oral addresses before me.

### ELEMENTS OF THE CRIME CHARGED

18. The elements that the State must prove Count by Count are listed as follows:

#### *Count 1:*

- (i) **Freesoul Real Estate Development (Fiji) Pte Limited**
- (ii) Intentionally
- (iii) Carried out a development activity, namely the digging of a channel along the foreshore facing Wacia
- (iv) A development activity which was subject to the Environmental Impact Assessment process
- (v) Without an approved Environmental Impact Assessment Report.



*Count 2:*

- (i) **Freesoul Real Estate Development (Fiji) Pte Limited**
- (ii) Intentionally
- (iii) Carried out a development activity, namely the clearing of mangroves along the foreshore facing Qalilawa and onto the dry land on Qalilawa
- (iv) A development activity which was subject to the Environmental Impact Assessment process
- (v) Without an approved Environmental Impact Assessment Report.

*Count 3:*

- (i) **Freesoul Real Estate Development (Fiji) Pte Limited**
- (ii) Failed to comply
- (iii) With a Prohibition Notice
- (iv) Issued upon it
- (v) By the Director of Environment.

**COUNT 3: FAILURE TO COMPLY WITH PROHIBITION NOTICE**

19. It is convenient to start with my analysis of the last count first.
20. In proving failure to comply, the State must prove that **Freesoul Real Estate Development (Fiji) Pte Limited** had intentionally committed an act expressly prohibited under that Prohibition Notice.
21. In addition, no person may be convicted of the offence of **Failure to Comply with a Prohibition Notice** unless the Court was satisfied beyond reasonable doubt that the Prohibition Notice was a valid notice issued pursuant to section 21 (2) of the **Environment Management Act 2005**.
22. Pursuant to section 21 (2) of the **Environment Management Act 2005**, "if the Director of Environment has reason to believe that an immediate threat or risk to the environment is occurring or may occur in any activity or undertaking of a Ministry, department, statutory authority, local authority or facility, the Director may issue a prohibition notice, in the prescribed form, to stop operation of the activity, or undertaking."

23. On a plain reading, to prove that the Prohibition Notice was valid the State must also prove beyond reasonable doubt that:

- (i) the Director of Environment
- (ii) had reason to believe
- (iii) that an immediate threat or risk to the environment
- (iv) was occurring or may occur
- (v) in any activity or undertaking
- (vi) of a ministry, department, statutory authority, local authority or facility.

24. The language of the statute is telling. It limits the application of section 21 (2) of the **Environment Management Act 2005** to activities or undertaking of a ministry, department, statutory authority, local authority *or* facility as opposed, *for example*, to "persons" generally. Clearly then, a prohibition notice may only be issued against a Ministry, department, statutory authority, local authority or facility and only in respect of an activity or undertaking of that ministry, department, statutory authority, local authority or facility that the Director of Environment had reason to believe posed or would likely pose an immediate threat or risk to the environment.

25. **Freesoul Real Estate Development (Fiji) Pte Limited** is clearly not a ministry, department, statutory or local authority. The State argue that it is a facility within the meaning of section 2 of the **Environment Management Act 2005**. That section defines a facility to mean a "commercial or industrial facility" and it further defines a "commercial or industrial facility" to mean:

"(a) a person (including Government) who engages in –

- (i) providing services; or
- (ii) manufacturing, production, processing, transportation, storage and packaging, mining, quarrying, sand exaction, coral mining, tourism, commerce, the preparation or processing of any agricultural produce or food or any other activity undertaken for financial gain, including any such services or activity conducted at or in residential premises;

(b) the place, land, or premises on, at or from which the activities mentioned in paragraph (a) are carried out."

26. The **Concise Oxford English Dictionary** defines the phrase "engage in" to mean "participate or become involved in." A person who engages in any of the activities noted under the definition is someone who participates in or becomes involved in that activity. An entity becomes a "commercial or industrial facility" when it participates in or becomes involved in the provision of a service or in manufacturing, production, processing, transportation, storage and packaging, mining, quarrying, sand extraction, coral mining, tourism, commerce, the preparation or processing of any agricultural produce or food or any other activity undertaken for financial gain.
27. It was not disputed at trial that **Freesoul Real Estate Development (Fiji) Pte Limited** had been issued a Prohibition Notice by the Director of Environment on 1<sup>st</sup> June 2018 and it was established beyond reasonable doubt that the Notice was served on **Freesoul Real Estate Development (Fiji) Pte Limited**.
28. Ms. Kelera Tokalau (PW 1) testified that Mr. Dick Peng had been the original contact person per the Environmental Impact Report Screening Application filed by **Freesoul Real Estate Development (Fiji) Pte Limited** but that at some point before 1<sup>st</sup> August 2017, Mr. Dick Peng had appointed a Mr. Anasa Tawake to act as liaison between **Freesoul Real Estate Development (Fiji) Pte Limited** as proponent and the Department of Environment.
29. When the Director of Environment issued a Prohibition Notice to **Freesoul Real Estate Development (Fiji) Pte Limited** on 1 June 2018, Ms. Kelera Tokalau had emailed a copy of the Prohibition Notice to Mr. Anasa Tawake. An email from Mr. Anasa Tawake acknowledging receipt of the Prohibition Notice was tendered by consent as Prosecution Exhibit No. 10 at trial. Ms. Tokalau testified that Mr. Tawake had confirmed receipt of the Prohibition Notice during a telephone call with her in the first week of June 2018, shortly after the issuance of the Prohibition Notice on 1 June 2018.
30. Indeed correspondence between Mr. Dick Peng, a Director of **Freesoul Real Estate Development (Fiji) Pte Limited** and the named contact person for **Freesoul Real Estate Development (Fiji) Pte Limited**<sup>1</sup>, and the Department of Environment provides clear indication that **Freesoul Real Estate Development (Fiji) Pte Limited** had

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<sup>1</sup> See Prosecution Exhibit 2: EIA Screening Application dated

received the Prohibition Notice. That communication was tendered by consent as **Prosecution Exhibit No. 11** at trial.

31. Further Ms. Kelera Tokalau testified that when she visited the site on 1 June 2018, she had expected the site to be in the same pristine condition she had found it to be during her initial visit on 1 August 2017. She expected the site to be undeveloped because no Environmental Impact Report had been prepared for the site as at that date. However, when she got to the site she found that development works had commenced on the proposed development site.
32. She noticed a newly excavated channel, excavated soil dumped on both sides of the channel, and timber and concrete blocks on the foreshore, machineries and trucks, a newly constructed access road, staff quarters and signs of mangroves being disturbed as a result of materials being piled up against them. No Environmental Impact Report had been received from **Freesoul Real Estate Development (Fiji) Pte Limited** at this point.
33. Her evidence was that:

"Since we had not received the EIA report, we had expected that the site was still in its natural state. To be as it was during the August 1, 2017 visit."
34. It was not disputed at trial that despite Mr. Dick Peng's assurances on behalf of **Freesoul Real Estate Development (Fiji) Pte Limited** that they would comply with the terms of the Prohibition Notice, work continued in respect of an artificial channel that was dug along the foreshore facing Wacia and onto the dry land at Wacia.
35. All that was left was for the State to prove beyond reasonable doubt that **Freesoul Real Estate Development (Fiji) Pte Limited** had begun to engage in either the provision of a service, or in tourism or indeed any other activity for financial gain at the time the prohibition notice had been issued. That evidence was lacking.
36. **Freesoul Real Estate Development (Fiji) Pte Limited** intended to engage in tourism, that much was clear from the evidence before me. But that is not what the law requires for the allegation to be made out. The law requires that the State prove beyond reasonable doubt that **Freesoul Real Estate Development (Fiji) Pte Limited** had *begun* to engage in either the provision of a service, or in tourism or indeed any other

activity for financial gain at the time the prohibition notice had been issued. There was no evidence to satisfy me beyond reasonable doubt of these facts.

37 I am fortified in my position by a concession made by the Director of the Department of Environment during the course of an evidentiary hearing heard before me on 10 September 2020. When asked, the Director made clear that **Freesoul Real Estate Development (Fiji) Pte Limited** had not been considered a facility by the Department of Environment at the time the alleged unauthorized works had been discovered.

38. In its Legal Background to the Environment Screening Application Form made available to members of the public, the Ministry of Environment makes clear that:

*“Legal Background*

1. *A person who carries out any development activity or undertaking which is subject to the environmental impact assessment (EIA) process without an approved EIA report commits an offence and is liable on conviction to a maximum fine of \$750, 000 or to imprisonment not exceeding 10 years or both.*
2. *In addition, the Director may apply to the court for an order to stop the work.*
3. *A person who contravenes –*
  - (a) *Any requirement under Part 4 of the Act; or*
  - (b) *A condition for approval of a development proposal or an approved EIA report commits an offence and is liable on conviction to a maximum fine of \$250, 000 (0) or to imprisonment not exceeding 3 years or both.”*

*Emphasis added*

39. This legal background is uplifted directly from the provisions of section 43 of the **Environment Management Act 2005**. The provision at section 43 (2) of the **Environment Management Act 2005** is clear indication of Parliamentary intent that the Director apply to a court for an order to stop proponents who carry out a development activity or undertaking which is subject to the environmental impact assessment (EIA) process without an approved EIA report. Clearly, a prohibition notice is not envisaged at the Environment Impact Assessment, pre-development stage.

40. That element not being made out, I cannot say that I am satisfied beyond reasonable doubt that **Freesoul Real Estate Development (Fiji) Pte Limited** was indeed a facility upon which a prohibition order pursuant to section 21 (2) of the **Environment Management Act 2005** could apply. If the Prohibition Notice was invalidly issued, then it cannot be said that **Freesoul Real Estate Development (Fiji) Pte Limited** was obliged to comply with that Prohibition Notice and if they were not obliged in law to comply with that Prohibition Notice then they cannot be held liable in law for failure to comply with it.

41. In the result and for the reasons set out above, I find **Freesoul Real Estate Development (Fiji) Pte Limited** not guilty and I acquit **Freesoul Real Estate Development (Fiji) Pte Limited** of **FAILURE TO COMPLY WITH A PROHIBITION NOTICE**; contrary to section 21 (4) and 46 of the **ENVIRONMENT MANAGEMENT ACT 2005** as charged.

**COUNT 2: UNAUTHORIZED DEVELOPMENT WORK AT QALILAWA (PART OF)**

42. I now turn my mind to Count 2 of the State's Charge.

43. The State must establish beyond reasonable doubt that **Freesoul Real Estate Development (Fiji) Pte Limited** had intentionally carried out a development activity which was subject to the Environmental Impact Assessment process, namely the clearing of mangroves along the foreshore facing Qalilawa and on the dry land at Qalilawa, without an approved Environmental Impact Assessment Report.

44. A "development activity or undertaking" means "any activity or undertaking likely to alter the physical nature of the land in any way, and includes the construction of buildings or works, the deposit of wastes or other material from outfalls, vessels or by other means, the removal of sand, coral, shells, natural vegetation, sea grass or other substances, dredging, filling, land reclamation, mining or drilling for minerals, but does not include fishing"; see section 2 of the **Environment Management Act 2005**.

45. **Freesoul Real Estate Development (Fiji) Pte Limited** does not dispute the fact that uprooting and clearing mangroves is a development activity or undertaking within the meaning of section 2 of the **Environment Management Act 2005**. The evidence adduced clearly indicated that clearing mangroves could result in the erosion of a coast,

coastline, beach or foreshore. According to Principal Environment Officer, Ms. Senivasa Waqairamasi:

“Mangrove is important for coastal bank protection through their aerial root system; they are good wind breakers that shelters the main land from strong wind and cyclone”: see **Prosecution Exhibit 7** and her evidence in chief at trial.

46. This evidence was undisputed at trial. In addition, it was not disputed at trial that the clearing of the mangroves was done in the context of preparing for the development of a tourist resort. According to Principal Environment Officer Ms. Senivasi Waqairamasi speaking to before and after pictures contrasting the state of the environment at Qalilawa over 11 August 2018 and 15 September 2018:

“What I try and portray there is you know visually seeing the impact, mangrove that was still...the remaining patches that was there on the 11<sup>th</sup> August 2018. However, a month later or around 15<sup>th</sup> of September 2018 going back to the same spot I noticed the patches of mangrove being removed and then at the, towards the back of that patches that remains were a wooden jetty that was starting some construction at that time.”

47. Each of these considerations on its own firmly put this activity or undertaking within the scope of section 27 and Schedule 2 of the **Environment Management Act 2005**. This was clearly a development activity or undertaking that was the subject of an Environmental Impact Assessment and the evidence adduced at trial by both the State and the Defence clearly established beyond reasonable doubt that no report had been approved prior to the commencement of that development activity or undertaking.

48. Indeed, it was agreed by both the State and the Defence that **Freesoul Real Estate Development (Fiji) Pte Ltd** had not received approval, *albeit* conditional approval, for its Environment Impact Assessment Report until 24 December 2018: see **Tab S of the Defence Bundle of Exhibits** tendered by consent at trial.

49. However, the evidence adduced at trial also clearly showed that the land at Qalilawa that was the subject of the State’s charge at Count 2 had been leased to **Dickson Investment Company Limited**, a limited liability company registered under the Companies Act and having its registered office at Lot 1 Cumming Street, Suva.

50. **Freesoul Real Estate Development (Fiji) Pte Limited** is a limited liability company registered under the Companies Act with a registered office at 7 Thompson Street, Suva at the time of the registration of the company, and with a registered office at 1 Vanua Arcade, Suva at the time of the signing of *iTaukei* Lease No. 34927. Clearly then, **Freesoul Real Estate Development (Fiji) Pte Limited** was a separate legal entity.
51. I note that the application for an Environmental Impact Assessment Screening was filed by **Freesoul Real Estate Development (Fiji) Pte Limited** as proponent. Mr. Dick Peng is listed as contact person for **Freesoul Real Estate Development (Fiji) Pte Limited**. Mr. Dick Peng was both Director of **Dickson Investment Company Limited** and **Freesoul Real Estate Development (Fiji) Pte Limited**. The fact that both companies shared a common director does not, in and of itself, prove that the two legal entities were one.
52. However, following the issuance of the Director's Prohibition Notice on 1 June 2018, Mr. Dick Peng then wrote a letter on behalf of **Freesoul Real Estate Development (Fiji) Pte Limited** and key excerpts from that letter is set out below:

"With reference to the above, I would like to acknowledge receiving your email concerning the work done by **Freesoul Real Estate Development (Fiji) Pte Limited**.

We would like to sincerely apologize for ... all that has transpired on the above land thus far, we have also received instructions to implement some measure that will rehabilitate the foreshore to conform to existing local environment to be safe for public access.

I believe that we might have to use silt curtains to contain free material locally to the dredging operation...

The expected result is to prevent the transport of sediment out of the work site and into the surrounding environment.

Furthermore, we will remove the two (2) mounds left on the sides of the dredged area and then construct vertical barriers positions within the water to contain fine material (sediment) introduced into the water column by dredging and other engineering construction activities that we had carried out.

Moreover, we would like to inform your kind office that we will remove all our blocks and timbers that have been offloaded onto the foreshore. We promise to



abide by all instructions from your office to enable us to resume construction work as per regulations.

FREESOUL REAL ESTATE DEVELOPMENT also welcomes a monitoring team as a way forward to continually monitor our work. This is healthy as it would also benefit us in the long run to address areas that we might not be acquainted with, in regards to environmental issues.

Since there is an urgent need to expedite the work, we have now engaged our workers to construct the sediment curtains and have implemented a time line where a stakeholder's inspection could be carried out on the island.

I request for this inspection to be held on the island on Thursday 7<sup>th</sup> June 2018 at the least depending on a convenient time for everyone.

I respectfully submit an application for a permission to commence with this work as directed by your correspondence.

I respectfully submit this request for your kind consideration and hoping that *this letter suffices to serve your purposes and expedite the processing of my request.*

Respectfully submitted for your final endorsement.

Mr. Dick Peng

**DIRECTOR**

53. The letter is signed by Mr. Dick Peng and was tendered at trial by consent by both parties as part of the State and Defence Agreed Bundle of Documents.
54. That letter was sent not under the letterhead of **Freesoul Real Estate Development (Fiji) Pte Limited** but rather under the letterhead of **Dickson (Fiji) International Trading Co. Ltd.** The office listed on the letterhead for that entity was Lot 1 Vania Arcade, Suva, which was also the office premises of **Freesoul Real Estate Development (Fiji) Pte Limited** at the time of the signing of iTaukei Lease No. 34803 for the land at Wacia.
55. It is clear from a model of the development site attached under Tab 12 of the State and Defence Bundle of Agreed Documents, and from the position taken by the Defence throughout trial that the land under **ITaukei Land Trust Board** Lease No. 34827 for Qallawa had been part and parcel of the **Freesoul Real Estate Development (Fiji) Pte**

Limited integrated tourism project at least from the time **Freesoul Real Estate Development (Fiji) Pte Limited** had filed its Environment Impact Assessment Screening Application in 2017.

56. As part of its Bundle of Exhibits at trial, **Freesoul Real Estate Development (Fiji) Pte Limited** filed a meeting summary between Mr. Dick Peng and the *Turaga na Tui Lawa* Ratu Sevanaia Vatunitu. The meeting had been convened to pave the way for **ITaukei Land Trust Board** approval to lease 6.4 acres at Wacia to **Freesoul Real Estate Development (Fiji) Pte Limited** for the purposes of a Class 1 – Integrated Tourism Project. In that meeting Mr. Dick Peng attends in his capacity as Director of **Dickson International Trading Limited**, the legal entity that holds the lease to the land at Qalilawa that is the subject of the State's Charge at Count 2. **ITaukei Land Trust Board** Lease No. 34927 for the impugned land at Qalilawa was transferred to **Dickson International Trading Limited** on 21 April 2017.
57. According to Tab 12 of the State and Defence Bundle of Agreed Documents, **ITaukei Land Trust Board** Lease No. 34927 only awaited transfer from **Dickson International Trading Limited** to **Freesoul Real Estate Development (Fiji) Pte Limited**. There was also a parcel of land within the Wacia area (**ITaukei Land Trust Board** Reference No. 6/1140678) that **Freesoul Real Estate Development (Fiji) Pte Limited** had been working to acquire the lease of; see **Prosecution Exhibit 2 – Freesoul Resort Development EIA Report Findings** tendered by consent.
58. It was clear that this was a project with many moving parts. For the purposes of Count 2, I am satisfied beyond reasonable doubt that **Mr. Dick Peng** spoke for and acted on behalf of **Freesoul Real Estate Development (Fiji) Pte Limited**. He met with the *Tui Na Lawa* at the initial stages of the project in order to facilitate Lease approval for the land at Wacia and responded to the concerns of the Department of Environment in respect of work said to have been undertaken at the site.
59. It is not disputed that **Freesoul Real Estate Development (Fiji) Pte Limited** had filed an Environment Impact Assessment Screening Application with the Department of Environment in 2017 and that **Mr. Dick Peng** is listed as the contact person for the proponent **Freesoul Real Estate Development (Fiji) Pte Limited**. It was not disputed by the defence at trial that the work done at Qalilawa was done for and on behalf of

**Freesoul Real Estate Development (Fiji) Pte Limited** as part and parcel of its plans to get its Class I Integrated Tourism project off the ground.

60. Indeed, **Freesoul Real Estate Development (Fiji) Pte Limited** concedes, through counsel, that it had removed mangroves at Qallilawa in order to make room for a temporary boardwalk on the land at Qallilawa to allow them to showcase the project site to prospective investors and they accept that the building of that boardwalk was a development activity that was the subject of an Environment Impact Assessment process, and **Freesoul Real Estate Development (Fiji) Pte Limited** accepts, through counsel, that that development activity occurred without an approved Environmental Impact Assessment Report.<sup>7</sup>

61. Helen Sykes testified that when she arrived on Malolo Island to undertake her Damage Assessment over 3<sup>rd</sup> to 4<sup>th</sup> December 2018, she observed the following:

"from the outside of the reef slope to the small beach, I saw a large area of mangroves cut away in the middle of the forest running from the back of the forest to the very front with a wooden board walk and with a small channel large enough to get a fibre glass board in...

So figure 7 there is a loop of the board walk but then just to the right of the loop of the board walk<sup>8</sup> is this back area through the mangroves which would have been an area of clearance but then I guess they had decided not to put the board walk there so they had come further over this way. So that was an initial clearance that wasn't used as part of the board walk...

...so there we have these two circles. This white area is what was a sandy island naturally before anything was done. But then over here there are blacker areas going off into the mangroves which I assume were just sort of tests of the bulldozer methodology. These are just areas where the trees have been pushed over but nothing had been done with those areas, so I'm assuming this is either where they were going to go into to make the boardwalk or they were just practicing...

...If you go on to the next figure, figure-9, what was there before was simply sandy area so all of these constructs were put on since the initial visit [in

<sup>7</sup> See Closing Submissions in Reply filed on 23 February 2021.

January) so this area behind have been cleared some more. This had been a sandy island. They had dredged these, they are like round islands, you can actually get a fibre glass long boat into the water around these islands and then you can see the walkway, there the actual board walk goes down and you can see water on either side of the board walkway where there were dredged channels again that could have got a fibre glass long boat up. And you can also see more detail of the trucks into the forest land to the right hand side of the board walk...

Page 13, there are 6 photographs on page 13 and I just took these as examples to actually show what that cut was. So in figure 13, you can see a detail of the cut through the mangroves. The board walk is off to the right at the top picture there. The board walk itself is about 2 meters wide but the entire cut is 18 to 20 meters wide with a channel that at high tide is deep enough to get a small fibre glass boat up. So they are showing that. Figure 14 is showing the mangrove trees with branches that have been left in that muddy area where it had been full mangrove before. The photograph to the right in figure 14, is seashells. The reason I put that in is just to show that there was life, animal life under that mud because if there's seashells there were live shells before they would be dug out of that sand and then figure 15 is at the end where the board walk makes a loop just showing the trucks in the sand and the bare sand where the seagrass has been removed and then dead mangrove trees that were being placed around the edge of the boardwalk for what reason I'm not entirely sure."

62. In closing submissions, **Freesoul Real Estate Development (Fiji) Pte Ltd**, through counsel initially submitted the following:

"We admit that mangroves were cut at the foreshore at Qalilawa as seen on Figures 7, 8, 9, 10, 11 and 12 of Helen Sykes Report of 6<sup>th</sup> December 2018 (see Prosecution Exhibit 27A). The mangroves were cut at the foreshore of Qalilawa so that a temporary boardwalk or access way (jetty) could be done.

The Helen Sykes Report of 6<sup>th</sup> December 2018 recommended that according to the damage of 2 hectares of mangroves (6000 – 8000 trees); it was recommended that "*restoration and replanting of the central mangroves around*

*the boardwalk is an immediate priority. No further clearance of cutting of mangrove trees forward of the agreed development zone should occur"* - (see Prosecution Exhibit 27A at page 22).

However, the State failed to establish whether the mangroves were cut by Freesoul staff or the Lessee of Qalilawa Lease which was Dickson Investment Company Limited. The boardwalk was also the access that Dickson Investment Company Limited had to his parcel of land in Qalilawa. Rusiate Nagatalu (DW 6) who was the security guard for Freesoul stated that:

"When I arrived in May in 2018 the Jetty was already there.

Yes, I'm sure it was already there

Yes ma'am the boardwalk was already there by the time the meeting had taken place."

63. In its closing submissions in reply, however, **Freesoul Real Estate Development (Fiji) Pte Ltd** then made the following concessions:

"The Defence has conceded to Count 2 of the Charge that the boardwalk was a development activity and the evidence of PW 4 (Helen Sykes) about the board walk is not disputed. Although, it was viewed by PW 4 as a temporary structure, the cutting of mangroves was indeed a development activity and had no part to play for the geo-tech survey not did it aid in the projects in Solevu Village.

PW 4 in her evidence stated that the reason Freesoul built the boardwalk was to introduce business people to the island. That is correct and the evidence by PW4 is consistent with the instructions and intentions of Freesoul...

### **IN CONCLUSION**

We respectfully submit to Your Worship that:

(1)...

(2) Freesoul is guilty of Count 2 of the Charge as they had removed mangroves to build the temporary boardwalk on Qalilawa."

64. According to Mr. Saula Sovanaivalu, it was intended that **Dickson Investment Company Limited** would transfer the lease at Qalilawa to **Freesoul Real Estate Development (Fiji) Pte Limited** in time. In addition, his testimony was that **Freesoul Real Estate Development (Fiji) Pte Limited** had updated all three leases that had been acquired by it or its partner company **Dickson Investment Company Limited**. In addition, **Freesoul Real Estate Development (Fiji) Pte Limited** paid Marine Ecology Consulting, the company for which Ms. Helen Sykes was Principal for the Damage Assessment she conducted for the land under **Dickson Investment Company Limited** lease in Qalilawa and for the land under **Freesoul Real Estate Development (Fiji) Pte Limited** lease on Wacia; see **Defence Exhibit No. 17** and the Defence position at trial.
65. And when Scope Pacific Limited file their Environmental Impact Assessment Report in June 2018, they do so on behalf of **Freesoul Real Estate Development (Fiji) Pte Ltd** for **TLTB Lease No. 4/11/40961** for the 6.4 acres of land at Wacia (part of) owned by the Matakali Narukusara of Solevu Village leased to **Freesoul Real Estate Development (Fiji) Pte Ltd** on 12 July 2017 and for **TLTB Lease No. 4/11/40515** for the 20 acres of land at Qalilawa owned by the Agnate Descendants of Paulini Lewala leased to **Dickson Investment Company Limited** on 21 April 2017.
66. As part of that Environmental Impact Assessment Report, Mr. Dick Peng in his capacity as Director/Shareholder of **Freesoul Real Estate Development (Fiji) Pte Ltd**, signed the Statement of Responsibility for the Environmental Impact Assessment Report on 19 June 2018. That Statement of Responsibility is signed and dated by the developer's representative and as is clearly established at p. 170 of the Report:
- "The signatory will assume full responsibility for the contents and mitigation methods of contained in (the) EIA."
67. The Statement of Responsibility is written under the letterhead of **Freesoul Real Estate Development Limited** and is sealed with the common seal of **Freesoul Real Estate Development (Fiji) Pte Ltd**. The Statement of Responsibility is addressed to the Director of the Department of Environment and reads:
- "I, Mr. Dick Peng, in the position of Director/shareholder, being duly authorized to represent Freesoul Real Estate (Fiji) PTE Ltd, hereby confirm that Freesoul Real Estate (Fiji) PTE Ltd takes full responsibility for the Environmental Impact

Assessment (EIA) Report and agrees to implement the findings in this Report, in order to reduce and/or avoid environmental or social impacts likely to be caused by the proposed development.”

68. At p. 171 of the Report, Scope Global makes clear that:

“The Environmental Impact Assessment Report was prepared for Freesoul Real Estate Development (Fiji) PTE Limited for the new resort development in Malolo and is based on SCOPE’s understanding of the scope of works to be carried out for this project and the information provided to us by Freesoul Real Estate Development (Fiji) PTE Ltd at the time of reporting...

SCOPE Pacific has prepared this report exclusively for Freesoul Real Estate Development (Fiji) PTE Ltd for specific application to the new resort project, development works and associated locations/areas identified in this report...”

69. As part of the Environmental Impact Assessment Report, SCOPE Pacific annex the leases for **TLTB Lease No. 4/11/40961** for the 6.4 acres of land at Wacia (part of) owned by the Mataqali Narukusara of Solevu Village leased to **Freesoul Real Estate Development (Fiji) Pte Ltd** on 12 July 2017 and for **TLTB Lease No. 4/11/40515** for the 20 acres of land at Qalilawa owned by the Agnate Descendants of Paulini Lewaia leased to **Dickson Investment Company Limited** on 21 April 2017: see Appendix B, Appendix C, Appendix D, and Appendix E of **Prosecution Exhibit 17** tendered by consent.

70. Finally, Scope Global annexes a letter dated 31<sup>st</sup> May 2018 addressed to the Manager, Tourism Department TLTB prepared under the letterhead of **Dickson (Fiji) International Trading Co. Ltd** but signed by Mr. Dick Peng in his capacity as Director – Freesoul Real Estate Development. In that letter Mr. Dick Peng writes the following:

“I **Dick Peng**, am the title holder of lease number subdivision of part of Lot 50 SO 5406 Qalilawa, Malolo Levu, in Nadroga and part of Lot 49 NLC 672 SO 5046<sup>2</sup>.

....

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<sup>2</sup> The other acknowledged reference for the land at Qalilawa TLTB Lease No. 4/11/40515

My company (FREESOUL REAL ESTATE DEVELOPMENT LIMITED) has been offloading our digger and heavy machinery and materials to our land whilst waiting for approval from relevant authorities to allow us to start with the hotel development. We have not started with building the hotel.

This is to allow us to carry out geotechnical field work at our land further up hill (part of Lot 50 SO 5406.

The geotechnical field work required the usage of this heavy machinery to clear up portion of land to make way up to our Lot 50 SO 5406...

...

SCOPE has been engaged to carry out our Environmental Impact Assessment (EIA), which according to the Senior Planner would be submitted next week...

Furthermore it is **not FREESOULS intention to bring disrepute** to the Government's efforts of COP23 and mitigating climate change factors...<sup>4</sup>

71. This was clear indication that **Dickson (Fiji) International Trading Co Ltd** and **Freesoul Real Estate Development (Fiji) Pte Limited** were working hand in glove in respect of the proposed **Freesoul Real Estate Development (Fiji) Pte Limited** new resort development project at Malolo Island.

72. I daresay no one who had the benefit of observing each witness testifying in turn would contradict my finding that Rusiate Nagatalevu was an incredible and unreliable witness. For one thing, he could not recall the name of a single other security guard he was supposed to have worked alongside on Malolo and for another, he presented in an evasive and uncertain manner that did not lend itself to belief in the testimony he offered at trial.

73. All in all, I find myself satisfied beyond reasonable doubt based on the evidence adduced before me and based on the position taken by **Freesoul Real Estate Development (Fiji) Pte Limited** at trial, that **Freesoul Real Estate Development (Fiji) Pte Limited** had indeed intentionally carried out a development activity that was subject to the Environmental Impact Assessment process, namely the clearing of



mangroves along the foreshore facing Qalilawa and on the dry land on Qalilawa without an approved Environmental Impact Assessment Report.

74. That being so, I have no hesitation in finding **Freesoul Real Estate Development (Fiji) Pte Limited** guilty and convicting it of **UNDERTAKING UNAUTHORIZED DEVELOPMENT**; contrary to section 43 (1) of the **ENVIRONMENT MANAGEMENT ACT 2005** per Count 2 as charged.

**COUNT 1: UNAUTHORIZED DEVELOPMENT AT WACIA (PART OF)**

75. I now turn my mind to Count 1 of the State's Charge against **Freesoul Real Estate Development (Fiji) Pte Limited**.

76. It is not disputed that **Freesoul Real Estate Development (Fiji) Pte Limited** had filed an Environment Impact Assessment Screening Application with the Department of Environment on or about 8 June 2017. Mr. Dick Peng signed the Environment Impact Assessment Screening Application Cover Letter in his capacity as Director. According to the body of the letter addressed to the Environment Impact Assessment Administrator:

"Please find for your kind perusal the EIA Screening applications and the relevant documents for the **Freesoul Real Estate Development (Fiji) PTE Ltd.**"

77. As part of its Screening Application **Freesoul Real Estate Development (Fiji) PTE Ltd** attached **TLTB Lease No. 4/11/40961** for the 6.4 acres of land at Wacia (part of) owned by the Mataqali Narukusara of Solevu Village leased to **Freesoul Real Estate Development (Fiji) Pte Ltd** on 12 July 2017.

78. The Screening Application form bears the crest of the Ministry of Environment and the seal of the Government of Fiji. At the very beginning of the document filled out and signed by Mr. Dick Peng, the following legal background is set out:

*"Legal Background*

4. *A person who carries out any development activity or undertaking which is subject to the environmental impact assessment (EIA) process without an*

*approved EIA report commits an offence and is liable on conviction to a maximum fine of \$750, 000 or to imprisonment not exceeding 10 years or both.*

5. *In addition, the Director may apply to the court for an order to stop the work.*

6. *A person who contravenes –*

*(c) Any requirement under Part 4 of the Act; or*

*(d) A condition for approval of a development proposal or an approved EIA report commits an offence and is liable on conviction to a maximum fine of \$250, 000.00 or to imprisonment not exceeding 3 years or both."*

19. The Ministry of Environment issued its Terms of Reference for the Proposed Integrated Tourism Development at Malolo Levu for Freesoul Real Estate Development (Fiji) Pte Ltd on 11 October 2017. The Terms of Reference make the following clear:

#### **"BACKGROUND**

This Terms of Reference is prepared for Freesoul Real Estate Development (Fiji) Pte Ltd for the Class 1 – integrated tourism development on Wacia (Part of) Malolo Levu Island. The development will feature residential lots, mountain villages, public systems, forest villa, water villas, pier and recreation areas.

Development will also include excavations, dredging of the foreshore and mangrove removal.

#### **PURPOSE OF THE TERMS OF REFERENCE**

- a) To determine the environmental baseline condition at the site
- b) Assess the environmental impact of the construction and operation of the development and
- c) Identify practicable mitigating measures.

#### **THE COMPONENTS OF THE ENVIRONMENT IMPACT ASSESSMENT (EIA) SHOULD INCLUDE:**

- a) Background and need for the project (site description and project description)
- b) Potential significant environmental impacts

- c) Details of the mitigating measures including roles and responsibilities
- d) A Construction Environmental Management Plan (CEMP) and Operation Environment Management Plan (OEMP) with contextual information
- e) Monitoring Plan and Reporting Requirements

#### **RESPONSIBILITY**

The Report should be signed and dated by the developer or his representative at the beginning of the report. The signatory will assume full responsibility for the contents of the EIA and its implementation."

80. The rest of the Terms of Reference sets out the format of the report and provides clear guidance for the content of the Environment Impact Report the Ministry of Environment expected **Freesoul Real Estate Development (Fiji) PTE Ltd** to submit.

81. Essentially, the Environment Impact Assessment Process involves a five step process governed by Part 4 of the **Environment Management Act 2005** and the **Environment Management (EIA Process) Regulations 2007**.

82. Pursuant to Regulation 27 (4) of the **Environment Management (EIA Process) Regulations 2007**:

"(4) An EIA report that is not submitted to the processing authority within 12 months of the TOR being finalised will be invalid and a new application for EIA processing of the proposal will need to be made, unless the proponent has obtained a written extension of time from the processing authority."

83. Following the issuing of the Terms of Reference, it was thereafter incumbent upon **Freesoul Real Estate Development (Fiji) Pte Limited** to then undertake an Environmental Impact Assessment Study pursuant to regulations 22 and 23 of the **Environment Management (EIA Process) Regulations 2007**; prepare its Environment Impact Assessment Report pursuant to regulations 24 – 27 of the **Environment Management (EIA Process) Regulations 2007** and then await the decision of the Ministry of Environment.

84. Pursuant to section 43 of the **Environment Management Act 2005**:

“43 (1) A person who carries out any development activity or undertaking which is subject to the EIA process without an approved EIA report, commits an offence and is liable upon conviction to a fine not exceeding \$750, 000 or to a term of imprisonment not exceeding 10 years or both.”

85. It is a crime to undertake a development activity or undertaking which is subject to the EIA process without an approved EIA report. That being so, no person may undertake a development activity or undertaking subject to an EIA process without an approved EIA report.

86. Schedule 2 to the **Environment Management Act 2005** sets out the development proposals that require approval by the EIA administrator. They include:

- (a) a proposal that could result in erosion of any coast, coastline, beach or foreshore;
- (b) a proposal that could result in the pollution of any marine water, ground water, freshwater body or other water resources;
- (c) ...
- (d) ...
- (e) a proposal for the construction of a hotel or tourist resort;
- (f) ...
- (g) ...
- (h) ...
- (i) ...
- (j) a proposal that could alter tidal action, wave action, currents or other natural processes of the sea, including but not limited to reclamation of the sea, mangrove areas, foreshore, rivers or creeks or construction of a jetty, dock, wharf, pier or bridge;
- (k) ...
- (l) a proposal that could jeopardise the continued existence of any protected area, rare, threatened or endangered species or its critical habitat or nesting grounds;
- (m) ...

- (m) a proposal that could harm or destroy designated or proposed protected areas including, but not limited to, ... fishing grounds (including reef fisheries), fish aggregation and spawning sites, fishing or gleaning areas, fish nursery areas, ....
- (n) a proposal that could destroy or damage an ecosystem of national importance, including but not limited to, a beach, coral reef, ... sand deposit, island, ... sea-grass bed, mangrove swamp, natural pass or channel, natural lake or pond, a pelagic (open ocean) ecosystem or an estuary;
- (p) ...
- (q) ...
- (r) ...
- (s) a proposal that is controversial from an environmental standpoint, or is not supported for environmental or resource management reasons by a significant number of representatives from the local community, local government, churches, villages and other group;
- (t) ....
- (u) ...
- (v) ...
- (w) ...
- (x) ..
- (y) ...<sup>9</sup>

87. **Freesoul Real Estate Development (Fiji) Pte Limited** foreshadowed that it planned to do some dredging along the foreshore and signalled its plan to build construction over water. The dredging of the foreshore to create that artificial channel along the foreshore facing and onto the dry land at Wacia involved a development proposal that could alter tidal action, wave action, currents or other natural processes of the sea; proposal that could harm or destroy designated or proposed protected areas including, but not limited to fishing grounds (including reef fisheries), fish aggregation and spawning sites, fishing or gleaning areas, fish nursery areas; and a proposal that could destroy or damage an ecosystem of national importance, including but not limited to, a beach, coral reef, sand deposit, island, sea-grass bed, mangrove swamp, or a pelagic (open ocean) ecosystem.

88. I am satisfied beyond reasonable doubt that this was a development activity or undertaking that was subject to the environmental impact assessment (EIA) process. Kelera Tokalau testified that when she conducted a site visit at Wacia on 1 August 2017, the area had been in its natural state. When she visited the proposed development site at Wacia on 1 June 2018, she noticed a newly excavated channel had been built with the excavated soil dumped on both sides of the channel. She further testified, a fact not challenged by the Defence at trial, that as at 1 June 2018, the Department had not as yet received an Environment Impact Assessment Report from or on behalf of **Freesoul Real Estate Development (Fiji) Pte Limited**. When she returned to the proposed development site on 26 June 2018, she noticed that the boat channel had extended further inland to the foreshore.

89. The Defence accepted at trial that the channel had been "dredged at the foreshore at Wacia in early 2018 by Freesoul."<sup>4</sup> Moreover, on 31 May 2018 **Mr. Dick Peng** in his capacity as Director of **Freesoul Real Estate Development** accepted that **Freesoul Real Estate Development (Fiji) Pte Limited** had dredged the reef to "allow for large barges to offload heavy earthmoving machinery to gain access to our land."<sup>5</sup> **Freesoul Real Estate Development (Fiji) Pte Limited** subsequently adduced evidence at trial to show that the channel had been dredged in order to drop off material destined for Solevu Village. Whatever its reasons, the evidence showed beyond reasonable doubt that **Freesoul Real Estate Development** had intentionally dredged the channel.

90. The Defense argue that the State had failed to prove beyond reasonable doubt that **Mr. Dick Peng** had been the directing mind behind the activities of **Freesoul Real Estate Development (Fiji) Pte Limited**. These submissions are not supported by the evidence.

91. I am satisfied beyond reasonable doubt that **Mr. Dick Peng** spoke for and acted on behalf of **Freesoul Real Estate Development (Fiji) Pte Limited**. He met with the **Tui Na Lawa** at the initial stages of the project in order to facilitate Lease approval for the land at Wacia and responded to the concerns of the Department of Environment in respect of work said to have been undertaken at the site.

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<sup>4</sup> See Closing Submissions filed on behalf of **Freesoul Real Estate Development (Fiji) Pte Limited** on 26 January 2021.

<sup>5</sup> See Prosecution Exhibit 17 at Appendix I.

92. I note that the application for an Environmental Impact Assessment Screening was filed by **Freesoul Real Estate Development (Fiji) Pte Limited** as proponent. Mr. Dick Peng is listed as contact person for **Freesoul Real Estate Development (Fiji) Pte Limited**.
93. When key stakeholders visit the proposed development site on 11 August 2018, it is Mr. Dick Peng who accompanied the delegation as representative of **Freesoul Real Estate Development (Fiji) Pte Limited**.
94. When Scope Pacific Limited file their Environmental Impact Assessment Report in June 2018, they do so on behalf of **Freesoul Real Estate Development (Fiji) Pte Ltd**.
95. As part of that Environmental Impact Assessment Report, it is Mr. Dick Peng in his capacity as Director/Shareholder of **Freesoul Real Estate Development (Fiji) Pte Ltd**, who signs the Statement of Responsibility for the Environmental Impact Assessment Report on 19 June 2018. That Statement of Responsibility is signed and dated by the developer's representative and as is clearly established at p. 170 of the Report:

"The signatory will assume full responsibility for the contents and mitigation methods of contained in (the) EIA."

96. The Statement of Responsibility is written under the letterhead of **Freesoul Real Estate Development Limited** and is sealed with the common seal of **Freesoul Real Estate Development (Fiji) Pte Ltd**. The Statement of Responsibility is addressed to the Director of the Department of Environment and reads:

"I Mr. Dick Peng, in the position of Director/shareholder, being duly authorized to represent Freesoul Real Estate (Fiji) PTE Ltd, hereby confirm that Freesoul Real Estate (Fiji) PTE Ltd takes full responsibility for the Environmental Impact Assessment (EIA) Report and agrees to implement the findings in this Report, in order to reduce and/or avoid environmental or social impacts likely to be caused by the proposed development."

97. The Defence assert that the digging of the channel was authorised by virtue of the Director of Environment's approval of Geotechnical Field Works at Lot 50 NLC 671 SO5406, the land at Qalilawa. However, I find myself satisfied beyond reasonable

doubt based on the contents of that letter that the approval had been given on the basis that the **Freesoul Real Estate Development (Fiji) Pte Limited** conduct all works as outlined in the Environment Management Plan submitted by it. That Environment Management Plan was also tendered into evidence by consent and it did not reference any type of work or activity that would necessitate the digging of that artificial channel.

98. In addition, **Freesoul Real Estate Development (Fiji) Pte Limited** argued that it had obtained a waiver approval from the *qoliqoli* owners for the foreshore and land at Wacia and that because of this, they should have obtained a foreshore lease which would in turn have enabled them to dig that channel regardless. **Freesoul Real Estate Development (Fiji) Pte Limited** also argued that the digging of the channel was legally justified because their Geotech expert had not realised that it needed EIA approval prior to digging that channel. In addition, it argued that the digging of the channel was legally justified because it enabled them to meet their obligations to the landowners of the land at Wacia.

99. All these arguments are misconceived. The law is clear. Section 6 of the **Environment Management Act 2005** makes clear that the **Environment Management Act 2005**:

“61. (1) ... applies notwithstanding anything to the contrary contained in any contract or agreement.

(2) A contract or agreement that purports to exclude or limit the application of this Act or to exclude or limit the rights or entitlements of a person under this Act is, to that extent, void.”

100. The law in this country, pursuant to section 43 (1) of the **Environment Management Act 2005**, is that no person is allowed to carry out any development activity or undertaking which is subject to the EIA process without an EIA report.

101. In the result and for the reasons set out above, I find myself satisfied on the evidence beyond reasonable doubt that **Freesoul Real Estate (Fiji) Pte Limited** had intentionally carried out a development activity or undertaking, namely the digging of an artificial underwater channel, which was subject the EIA process without an approved EIA Report.



102. That being so I have no hesitation in finding **Freesoul Real Estate (Fiji) Pte Limited** guilty and convicting it of **UNDERTAKING UNAUTHORIZED DEVELOPMENTS**; contrary to section 43 (1) of the **ENVIRONMENT MANAGEMENT ACT 2005** in relation to the unauthorized development it undertook when it dug that artificial channel along the foreshore toward Wacia.

### **CONCLUSION**


103. All told and for the reasons set out above, I make the following findings in respect of each count:

**COUNT 1: UNDERTAKING UNAUTHORISED DEVELOPMENT** contrary to section 43 (1) of the **ENVIRONMENT MANAGEMENT ACT 2005** guilty and I convict it of this crime accordingly.

**COUNT 2: UNDERTAKING UNAUTHORISED DEVELOPMENT** contrary to section 43 (1) of the **ENVIRONMENT MANAGEMENT ACT 2005** guilty and I convict it of this crime accordingly.

**COUNT 3: FAILURE TO FAILURE TO COMPLY WITH A PROHIBITION NOTICE**; contrary to section 21 (4) and 46 of the **ENVIRONMENT MANAGEMENT ACT 2005** not guilty and I acquit it of this crime accordingly.

104. Please present your plea in mitigation.

  
Seini K Puamau  
**RESIDENT MAGISTRATE**



Dated at Suva this 9<sup>th</sup> day of April 2021.