

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. 180 of 2013

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

AND : **BAYLEYS REAL ESTATE (FIJI) LIMITED** having its registered office at Level 3, Aliz Building, Martintar, Nadi.
1st DEFENDANT

AND : **GRANT ROBERT GRAHAM** and **BRENDON JAMES GIBSON** of level 16, 45 Queen Street, Auckland, New Zealand in their capacity as Joint and Several Receivers and Managers of **AANUKA ISLAND RESORT LIMITED** trading as Amunuca Island Resort and Spa.
2nd DEFENDANTS

AND : **BANK OF SOUTH PACIFIC LIMITED** a company incorporated in Papua New Guinea which has established a place of business in Fiji within Suva and having branches throughout Fiji.
3rd DEFENDANT

Date of Hearing : Monday, 03rd December 2018

Date of Ruling : Friday, 14th December 2018

Counsel : (Ms) Natasha Feroz Khan for the Plaintiff
(Ms) Pulekeriya Maibatiki Low for the Second Defendants
(Ms) Shoma Singh Devan for the Third Defendant

RULING

(A) INTRODUCTION

- (i) On 19th October 2018, this Court delivered a Judgment whereby the Second and Third defendants were ordered to jointly and severally refund a sum of FJ\$900,000.00 to the plaintiff with interest and costs.
- (ii) The Second and Third defendants appealed against the Judgment to the Fiji Court of Appeal.
- (iii) This is an application by the Second and Third defendants for a stay of execution of the Judgment of this court delivered by this court on 19th October 2018 pending the determination of an appeal by the Second and Third defendants to the Fiji Court of Appeal.
- (iv) The application is made pursuant to Order 45, Rule 10 of the High Court Rules 1988 and under the inherent jurisdiction of this court.

(B) THE SUMMONS AND AFFIDAVITS

- (i) At the hearing of this application, the Second and Third defendants relied on the following:
 - ❖ Summons for stay pending appeal filed by the **Second defendant** on 05th November 2018.
 - ❖ Summons for stay pending appeal filed by the **Third defendant** on 08th November 2018.
 - ❖ The affidavit of **'Prithvi Kushal Chauhan'** (annexing the affidavit of 'Grant Robert Graham', sworn on 02nd November 2018 in support of Summons for stay pending appeal) sworn and filed on 02nd November 2018.
 - ❖ The affidavit of **'Grant Robert Graham'** (in support of Second defendants' summons for stay pending appeal) sworn on 02nd November 2018 and filed in Court on 20th November 2018.

- ❖ The affidavit of 'Florence Komal Kumar' (supporting and supplementing affidavit in support of 'Grant Robert Graham sworn on 02nd November 2018) sworn on 16th November 2018.
- ❖ The affidavit of 'Alvina Ali' (in support of Third defendants' Summons for stay pending appeal) sworn on 06th November 2018 and filed in court on 08th November 2018.

(ii) The Second and Third defendants application for stay pending appeal was vigorously opposed by the plaintiff. **It should be noted that the plaintiff did not file an answering affidavit**, a course which it was entitled to take.

(C) THE HEARING

- (i) As the stay of execution of the judgment was necessarily an urgent application the both parties presented oral submissions on Monday 03rd December 2018.
- (ii) In addition to oral submissions, both parties filed extensive written submissions for which I am grateful to Counsel.

(D) THE JURISDICTION

(i) The right of appeal is not a substantive right but one that is conferred by statute rather than common law.

See; * Attorney – General v Sillem
(1864) 2 H & C 581 at 608, 609

* Victoria Stevedoung and General Contracting Co. Pty Ltd v Digham (1931) HCA 34

- (ii) There is provision in the High Court Rules, 1988, a jurisdiction given to the High Court to stay execution of its judgments pending an appeal to the Court of Appeal.
- (iii) Order 45, rule 10 of the High Court Rules, 1988 provides;

Matters occurring after judgment: stay of execution, etc. (O.45, r.10)

10. Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.

(E) THE PRINCIPLES TO BE APPLIED

- a. The Court of Appeal of Fiji in Native Land Trust Board v Shanti Lal [CBV0009.11, January 2012] had set out the law on stay pending appeal. His Lordship Chief Justice Gates in the said Court of Appeal case stated that a Court considering a stay should take into account the following questions:

“

- a) Whether, if no stay is granted, the applicant’s right of appeal will be rendered nugatory.
- b) Whether the successful party will be injuriously affected by the stay.
- c) The bona fides of the applicants as to the prosecution of the appeal.
- d) The effect on third parties.
- e) The novelty and importance of questions involved.
- f) The Public interests in the proceeding.
- g) The overall balance of convenience and the status quo.”

- b. The principles laid out by the Court of Appeal in the above case is used and cited in various cases for stay application in the Fiji Court. The Fiji Court of Appeal in “Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd (FAC Civil Appeal No. ABU 0011 of 2004S)” held thus;

“The principles to be applied on an application for Stay pending appeal are conveniently summarized in the New Zealand text, McGechan on Procedure (2005): “On a stay application the Court’s task is “carefully to weight all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful.” Duncan v Osborne Building Ltd (1992) 6 PRNZ 85 (CA), at p.87.

(F) **THE CONSIDERATION AND THE DETERMINATION**

(i) As I understand the law, generally a successful party is entitled to the fruits of the judgment which has been obtained in the court. For the court to interfere with that right the onus is on the appellant to establish that there are sufficient grounds to show that a stay should be granted.

(ii) **Two factors need to be considered** by a Judge in deciding whether to grant an application for a stay pending appeal.

They are;

- ❖ Whether the appeal will be rendered nugatory if the stay is not granted.

AND

- ❖ Whether the balance of convenience and the competing rights of the parties point to the granting of a stay.

With those considerations in my mind, let me now turn to the application before me. The plaintiff opposes the two applications for stay on two grounds. Firstly, **there is no proper appeal before the Court and Secondly, on the merits of the application.** I turn to First ground of objection. If one looks at the chronology of events set out in the plaintiff's written submissions and as Counsel for the plaintiff made clear; and is not challenged by counsel for the defendants;

- the Third defendant has filed two appeals against the judgment of this Court.
- the Second defendant has amended its appeal without obtaining the leave of the Court of Appeal.

(iii) **Chronology of events**

- | | | | |
|-------|----------|---|---|
| (i) | 19/10/18 | - | Judgment delivered in favour of the Plaintiff |
| (ii) | 2/11/18 | - | Appeal filed on behalf of the 2 nd and 3 rd Defendant by Howards Lawyers being ABU 123 of 2018. |
| (iii) | 2/11/18 | - | Stay application filed by 2 nd and 3 rd Defendant in the High Court by Howards Lawyers. |
| (iv) | 5/11/18 | - | Another appeal filed by the 3 rd Defendant (when the |

- first one was still on foot) by Neel Shivam Lawyers being ABU 126 of 2018.
- (v) 8/11/18 - Another Stay application by the 3rd Defendant on a different appeal by Neel Shivam Lawyers.
 - (vi) 8/11/18 - Amended Notice and Grounds of Appeal filed by Howard Lawyers and this time only on behalf of the 2nd Defendant with the only difference not naming the 3rd Defendant an Appellant.
 - (vii) 21/11/18 - Both Stay applications called for hearing and vacated due to Howards Lawyers not appearing and/or giving their agents adequate instructions for conducting the hearing.
 - (viii) 3/12/18 - Hearing on both applications for Stay.

Counsel for the plaintiff therefore says, as her primary submission in this case, that the Court has no proper appeal before it, to determine the stay application.

I pause there for a moment. That would mean, or might be taken to mean, it is necessary for the proper appeal papers to have been filed at the time the application for a stay is made before the Judge in the High Court.

With respect, I cannot for a moment assent to this argument.

The point to be stressed here is that Order 45, Rule 10 of the High Court Rules, 1988 does not provide a condition precedent for the exercise of the discretion.

Order 45, Rule 10 is as follows;

Matters occurring after judgment: stay of execution, etc. (O.45, r.10)

10. Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.

The following passages of Hon. Justice Calanchini in 'Comsol (Fiji) Limited v Horizon Storm (Pty) Limited' (High Court Suva, Civil Action No.: HBC 238 of 2010; date of ruling 11-03-2011) is illuminating;

"An issue has arisen as to whether an application for stay can be made if the appeal has not yet been filed.

At the outset it should be noted that Rule 34 states to whom such an application for stay may be made. It does not specify when such an application should be made. Similarly, Order 45 Rule 10 does not specify when an application for a stay may be made. It provides a condition precedent for the exercise of the discretion.

*Under these circumstances it is necessary to consider whether any guidance can be obtained from the case law authority. In Tuck v Southern Counties Deposit Bank (1889) 42 Ch D 471 Kay J delivered an *ex tempore* judgment on 8 May 1889 and made certain orders in relation to the Plaintiff's claim. On 17 May 1889 Counsel for the Defendants moved for stay of execution pending an appeal. In response to the application Kay J at page 478 said:*

"Where such an application as this is made at the moment of giving judgment, and when the Court has all the facts before it, the Court may see reason for granting it; but when the application is made some time afterwards, when the Judge cannot be expected to remember the facts, how can it be reasonable to ask the Court to make an order that the judgment be suspended, when no special circumstances for suspending it are shown."

It is apparent from this decision that a party may make an application for a stay at any time after judgment has been handed down. It follows that it is not necessary for the appeal papers to have been filed at the time the application for a stay is made before the judge in the High Court."

Being guided by those words, I reject the argument advanced by Counsel for the plaintiff as devoid of merits.

WILL THE APPEAL BE RENDERED NUGATORY? (This is not determinative)

- (iv) So far as the first factor is concerned, the Second defendants deposed; (reference is made to para 8(a) of the affidavit of 'Grant Robert Graham' sworn on 02nd November 2018, filed in support of Summons for stay pending appeal)

- (a) *Our appeal will be rendered nugatory if stay is not granted on the basis that once the Judgment sum and interests is paid out to the Plaintiff, the Plaintiff may not have the money to reimburse the 3rd Defendant, should we succeed on our Appeal. It is clear from the Sale Agreement Transaction between the Plaintiff and the 2nd Defendant that the Plaintiff did not attempt to obtain the NLTB Consent because they do not have the means to progress the transaction to settlement. The Plaintiff is a foreign based Company and its directors and officers reside outside of Fiji, out of the jurisdiction of this Honorable Court.*
- (v) So far as the First factor is concerned, the Third defendant deposed; (reference is made to para (7) (i), (ii) and (iii) of the affidavit of 'Alvina Ali' sworn on 6th November 2018, filed in support of Summons for stay pending appeal).
- (i) *the Plaintiff during the course of the sale and purchase agreement faced issues raising the balance purchase price under the sale and purchase agreement and had sought funding from the Third defendant.*
- (ii) *we have reasons to believe that the Plaintiff was not able to raise the balance purchase price and as a result it did not obtain consent to transfer as a result of which the parties could not settle,*
- (iii) *the plaintiff is a foreign entity and does not have any assets in Fiji. If the Judgment sum is paid out to the Plaintiff, there is little or no chance of the Third Defendant recovering the Judgment sum plus interest and costs if it succeeds on appeal. There is a real risk that the Third Defendant's appeal will be rendered nugatory in the circumstances.*
- (vi) What concerns the Court is that there is no '**answering affidavit**' filed by the Plaintiff, a course which it is entitled to take.
- (vii) It is true, as Counsel for the Second and Third defendants argued that the plaintiff is a foreign entity.

The fact that the plaintiff is a foreign entity is not a special circumstance for granting a stay. It must be recalled that there is '**Reciprocal Enforcement of Judgments**' [The Reciprocal Enforcement of Judgment Rules 1922 as amended by Reciprocal Enforcement of Judgments (Amendment) Rules 1968 (LN 189 of 1968), 3 March 1969; Revised Edition of the Laws (Consequential Amendments) Regulations 2016 (LN 99 of 2016), 1 December 2016] **between Australia and Fiji.**

Moreover, it is reasonable to infer that the plaintiff has an established place of business in Australia and is easily locatable.

Despite an unsubstantiated and bald remark in the affidavit of 'Alvina Ali' and Grant Robert Graham' that (i) *the Plaintiff during the course of the sale and purchase agreement faced issues raising the balance purchase price under the sale and purchase agreement and had sought funding from the Third defendant.* (ii) *we have reasons to believe that the Plaintiff was not able to raise the balance purchase price and as a result it did not obtain consent to transfer as a result of which the parties could not settle,* (iii) *the plaintiff is a foreign entity and does not have any assets in Fiji. If the Judgment sum is paid out to the Plaintiff, there is little or no chance of the Third Defendant recovering the Judgment sum plus interest and costs if it succeeds on appeal. There is a real risk that the Third Defendant's appeal will be rendered nugatory in the circumstances.* (iv) *Our appeal will be rendered nugatory if stay is not granted on the basis that once the Judgment sum and interests is paid out to the Plaintiff, the Plaintiff may not have the money to reimburse the 3rd Defendant, should we succeed on our Appeal. It is clear from the Sale Agreement Transaction between the Plaintiff and the 2nd Defendant that the Plaintiff did not attempt to obtain the NLTB Consent because they do not have the means to progress the transaction to settlement. The Plaintiff is a foreign based Company and its directors and officers reside outside of Fiji, out of the jurisdiction of this Honorable Court, **there is no evidence before this Court in either affidavit form from the Solicitor on the record, or any other persons to support such an allegation.** This is a matter for the Solicitor on the record for the defendants to depose to in an Affidavit together with providing details in support as to the basis upon which they make such a claim. In that context, I should say, there is no any substance in the remark in the Affidavit of 'Alvina Ali' and 'Grant Robert Graham'.*

Besides, the correct test is whether there will be any '**reasonable probability**' of recovering the money and **I am not satisfied that in this case there would be no such reasonable probability.**

There is virtually no evidence in affidavit form to support the argument that the plaintiff would not be financially capable of returning the Judgment money paid to it if the appeal is successful.

(Ms) Devan says that the Third defendant is a substantial financial institution and is in a position to satisfy the Judgment sum in the event of the appeal failing. I cannot form any view one way or the other on that. I have no information before me which enables me to arrive at any conclusion.

PREJUDICE?

- (viii) What is troubling is that the plaintiff did not file an answering affidavit raising the issue of prejudice. There is a large sum of money involved in this case and the money judgment did carry interest. The court notes that as at 14th December 2018, the plaintiff has been “out of pocket” for some (08) years and (09) months. Of course, I do not deny for a moment that any delay in obtaining the fruits of judgment is prejudicial. The plaintiff may be out of pocket if a stay is granted.

The law on granting a stay of execution is well settled and the principles governing this application are fully set out in the notes to Order 59 Rule 13/1 of the Supreme Court Practice 1985, Volume 1, P.842 where it is said, inter alia, that “the Court does not make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled pending an appeal (The Annot Lyle [1886] 11 P.D.114 at p.116).

However, on the other hand, it is correct for the defendants to submit that; *“the plaintiff does not stand to be prejudiced if the judgment sum is not paid. There is post judgment interest which the plaintiff will be entitled to in the event the Third defendant fails in its appeal. Such interest will compensate the plaintiff for any prejudices that it may stand to suffer.”*

In the circumstance, the court finds that the factor of the degree of prejudice to the plaintiff **does not** count against the defendants’ application for stay. I can think of no other basis for the plaintiff to claim that there would be unfair prejudice in the event that a stay was granted.

This is a compelling reason for me to consider granting a stay in this case.

AUTHORITY?

- (ix) The para (01) of the supporting affidavit of ‘Grant Robert Graham’ sworn on 02nd November 2018 states;

1. *I am a joint Receiver of Aanuka and as such am familiar with issues surrounding this proceeding. Hence I depose this affidavit based on matters within my personal knowledge and documents in my custody and possession. Further, I am duly authorized by Brendon James Gibson, the Joint-Receiver and Manager to make this affidavit on behalf of the Second Defendants.*

(Emphasis Added)

Where is the letter of authority? I spent considerable time trying to understand the basis upon which 'Grant Robert Graham' deposing an affidavit on behalf of 'Brendon James Gibson'. It remains a puzzle and a mystery to me.

GROUNDINGS OF APPEAL

- (x) The plaintiffs' principal objection to the granting of a stay pending appeal was that the appeal has no merits whatsoever. This Court is required to consider the bona fides of the defendants in the prosecution of the appeal and whether the appeal involves a novel question of some importance. It would be wrong for this Court, on this application, to say anything that indicates any view as to the merits of the appeal, because the judgment is the subject of appeal to the Court of Appeal, and will have to be heard and dealt with.

It is usually sufficient if an appellant has an arguable case.

- (xi) With those considerations in mind, let me turn to the supporting affidavit. '**Grant Robert Graham**' deposed that;

- (5) *THAT I have been informed by my Solicitors and verily believe that our grounds of appeal are meritorious and stand a good chance of success in the appeal. The proposed Notice of Appeal and Grounds of Appeal are hereto annexed and marked "B".*

(para (5) of the supporting affidavit sworn on 02nd November 2018).

'**Alvina Ali**' deposed that;

- (6) *We believe that the grounds of appeal are meritorious and stand a good chance of success in the appeal which are grounded upon the following matters:*
- (i) *The Learned Judge made an error in misinterpreting the management arrangements and its legal effect. HE failed to consider that the Plaintiff was merely given 'access' to operate and manage the resort.*
- (ii) *There were clauses that restricted Plaintiff's right to carryout repairs and refurbishment without "owners" consent. The Plaintiff's responsibility to pay ground rates was excluded. The Plaintiff could not assign its rights under the management arrangement to any third party. A termination of the*

management arrangement did not amount to a termination of the 'land agreement', i.e. the sale and purchase agreement.

- (iii) The mere access to manage or run the business of Amanuca Island Resort did not amount to a "dealing". Conducting or managing a business does not affect the land, estate or an interest in the land.*
- (iv) The Learned Judge also failed to understand the reasoning or rational behind why parties entered into management arrangements. There was no evidence on this issue before the Court and it appears that the Judge made improper inferences on the management arrangements to conclude that the 'owner/vendor' was parting with possession of the land/property that was being sold.*
- (v) The Learned Judge also fell into grave error when he held that the responsibility to obtain consent was the Vendor's. His conclusion was contrary to the terms and conditions of the sale and purchase agreement.*
- (vi) The Learned Judge in ordering restitution of the deposit monies stated that there was a total failure of consideration from the vendor i.e. title was not delivered to the plaintiff. However the Judge made a grave error in failing to consider that purported failure of consideration was solely due to the default/action of the Plaintiff and not the Vendor. Evidence before the Court was the Vendor was able and willing to settle if consent had been secured by the Plaintiff.*
- (vii) Owing to the default/conduct of the Plaintiff, the Plaintiff should not have recovered the deposit paid as it was deemed to be in 'pari delicto' meaning (guilty).*
- (viii) We believe that there are serious questions of law that requires determination by the Appellate Court particularly with respect to whether the operating of the resort under the management agreement amounted to a "dealing" and constituted an infringement of section 12 of the Native Land Trust Act.*
- (ix) As a result of the errors of law made by the Learned Trial Judge, the Third defendant has unfairly suffered a large Judgment of \$90,000.00 plus interest and costs. The Third Defendant for the*

above stated reasons seeks a review of the Court's decision by way of an appeal.

(para (6) of the supporting affidavit sworn on 06th November 2018).

In relation to the 'remark' in the supporting affidavit on '**arguable appeal or merits of the appeal**', in my view, that is a matter for the Solicitor on record for the defendants to depose in an affidavit. It is within the particular knowledge of the legal practitioner with the carriage of the matter. No person other than the practitioner should depose to such matter in an affidavit.

(xii) The grounds of appeal upon which the Second defendant relies are set out in the notice of appeal. They are;

1. *THAT the Learned Judge erred in law in holding that the Management Agreement was caught by Section 12 of the Native Land Trust Act (Now iTaukei Land Trust Act).*
2. *THAT the Learned Judge erred in law in declaring that the First Respondent as purchaser obtained a "proprietary interest (sic)" in the land and possession of the land upon execution and operation of the Management Agreement.*
3. *THAT the Learned Judge erred in law by declaring that the Appellants is not entitled to retain the deposit of FJ\$9000,000.00 because the transaction and the agreement which constitutes the transaction is null and void ab initio and unenforceable, because it is tainted with illegality.*
4. *THAT the Learned Judge erred in law and/or in fact to conclude that the Appellants and the Second Respondent would be unjustly enriched if the Deposit was not returned to the First Respondent.*
5. *THAT in the alternative to grounds 1 and 2 above, the Learned Judge erred in law by holding that the First Respondent is not in pari delicto with the Appellants and Second Respondent and the First Respondent's position is not tainted by the illegality of the transaction.*

(xiii) The grounds of appeal upon which the Third defendant relied are;

1. ***THE** Learned Trial Judge erred and/or misdirected himself in law and in fact in holding that the part payment of the purchase price under the sale and purchase agreement made in March 2010 and the management of Amanuca Island Resort and Spa by the First Respondent constituted a*

performance of the sale and purchase agreement executed on or about March 2010 and therefore infringed Section 12 of the Native Land Trust Act (now "iTaukei Land Trust Board Act").

2. *THE Learned Trial Judge erred and/or misdirection himself in law and in fact in holding that the operation of the business of Amanuca Island Resort and Spa by the First Respondent created "proprietary privileges" or "proprietary interest" in the land on the date of execution of the sale and purchase agreement executed on or about March 2010.*
3. *THE Learned Trial Judge erred and/or misdirected himself in law and in fact in holding that the Management Agreement constituted an "alienation" of the land.*
4. *THE Learned Trial Judge erred and/or misdirected himself in law and in fact when he failed to consider that under the sale and purchase agreement, the First Respondent was only granted an access to enable the First Respondent to operate Amanuca Island Resort and Spa from the date of access to the settlement date.*
5. *THE Learned Trial Judge erred and/or misdirected himself in law and in fact in misconstruing the Management Agreement and failing to consider that the Second Respondent was required to keep the Amanuca Island Resort and Spa open for business as per the requirements of the Native Lease dated 7th October 2009, NLTB reference no. 50020028 affecting all that land described as Matanibeto (part of) Lots 1 on SO 5890 (formally Lot 1 on SO 5063 and Lots 1 & 2 on SO 5889 in Malolo, Nadroga and having an area of 16.5958 hectares.*
6. *THE Learned Trial Judge erred and/or misdirected himself in law and in fact in holding that the sale and purchase agreement executed on or about March 2010 did not contain any express provision which stated that the sale and purchase agreement was not binding unless and until the NLTB (now iTaukei Land Trust Board's) consent is first had and obtained when the obtaining of the consent as per clause 4.1 was a condition of sale stipulated in the sale and purchase agreement.*
7. *THE Learned Trial Judge erred and/or misdirected himself in law and in fact in holding that the Appellant and the second Respondent had the primary responsibility for applying for the Native Land Trust Board's consent which was contrary to the terms and conditions of the sale and purchase agreement executed on or about March 2010.*

8. *THE Learned Trial Judge erred and/or misdirected himself in law and in fact in failing to consider that the First Respondent had failed to invoke clause 4.5 of the sale and purchase agreement in cancelling the sale and purchase agreement for lack of consent from Native Land Trust Board.*
9. *THE Learned Trial Judge erred and/or misdirected himself in law and in fact in holding that there was a total failure of consideration under the sale and purchase agreement and failed to consider that the failure of consideration was due to the default of the First Respondent to obtain the requisite consent on transfer under the sale and purchase agreement.*
10. *THE learned Trial Judge erred and/or misdirected himself in law and in failing to hold that the First Respondent was in pari delicto therefore not entitled to recover a sum of F\$900,000.00 paid as deposit under the sale and purchase agreement.*
11. *THE Learned Trial Judge erred and/or misdirected himself in law in failing to consider the principles of 'pari delicto' as expounded in the case of Gary Scott Motil & Another v North (Fiji) Group Limited, Supreme Court Civil Appeal No. 0005 of 2017.*
12. *THE Learned Trial Judge erred and/or misdirected himself in law and in fact in holding that the Appellant would be unjustly enriched if the deposit sum of F\$900,000.00 was not returned.*
13. *THE Learned Trial Judge erred and/or misdirected himself in law and in fact in holding that the failure of consideration (viz no document of title being delivered to the First Respondent) and not the illegality of the contract enabled the deposit sum of F\$900,000.00 to be returned to the First Respondent.*
14. *THE Learned Trial Judge erred and/or misdirected himself in law and in fact in holding that the First Respondent's action was for money had and received when the First Respondent's action for reimbursement of the deposit of F\$900,000.00 was wholly premised on the sale and purchase agreement executed on or about March 2010.*
15. *THE Learned Trial Judge erred and/or misdirected himself in law and in fact in holding that the First Respondent was entitled on a claim for unjust enrichment and restitution when such of cause(s) of action had not been pleaded by the First Respondent.*

16. *THE Learned Trial Judge's decision is wrong and erroneous and tantamounts to a wrongful exercise of discretion having regard to all the facts and circumstances of the case and evidence on the whole.*

NOVEL QUESTION OF SOME IMPORTANCE

- (xiv) The real question which arises in appeal, as I see it, is the interpretation of the "management agreement". The question that arises for consideration is whether the management agreement constituted an alienation of Native land. In my view this is a serious question of law. There have not been cases concerned the question as to whether a management agreement constitutes an alienation of native land and probably is appropriate to be considered by Court of Appeal.

In that context I should say, that the appeal involves a novel question of some importance. The point of law involved in the appeal is not only novel but also of general public importance. This is a more compelling reason for me to consider granting a stay in this case.

DISCRETION

- (xv) The principle which stands out above all others in these applications for stay is that the Court has an **absolute and unfettered** discretion as to the granting or refusing a stay, and as to the **terms on** which it will be granted. See; **A.G. v. Amerson (1889) 24 A.B.D 56, C.A.**

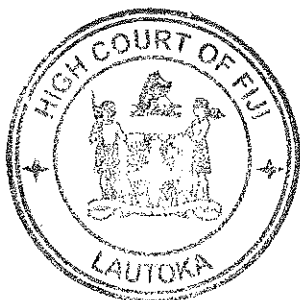
CONCLUSION


- (xvi) I am prepared to grant a stay of execution pending the hearing of the appeal, and that such **stay of execution shall be conditional** – subject to this;
- The Second and Third defendants shall pay to the plaintiff the sum of \$1000.00 (jointly) costs in this proceedings within seven (07) days from the date of this Ruling. In default of this Order, the Order granting the stay is lifted forthwith.
 - The stay of execution is subject to pending the hearing of the appeal or further order; so that, if by chance (and one hopes it does not occur) the plaintiff should have reason to believe that there is any **undue delay on the**

part of the defendants in prosecuting their appeal before the Court of Appeal, the plaintiff could make an application in respect of the stay of execution and it would be for this Court to then consider whether it is an appropriate case for further order.

(G) ORDERS

- (i) There shall be a stay of execution of the judgment of this court delivered on 19th October 2018 pending the hearing of the appeal or further order of this Court.
- (ii) The Second and Third defendants shall pay to the plaintiff the sum of \$1000.00 (Jointly) costs in this proceedings within seven (07) days from the date of this Ruling. In default of this Order, the Order granting the stay is lifted forthwith.




.....th/12/2018
Jude Nanayakkara
Judge

At Lautoka,
Friday, 14th December 2018