IN THE HIGH COURT OF FIJI

AT LABASA

CIVIL JURISDICTION Civil Action No. 18 of 2009

BETWEEN: Gary Scott Motil and Laurie J Motil

Plaintiff

AND: North (Fiji) Group Limited

First defendant

AND: Lawrence D Fish and Bonnie Sherlock Fish, Director and Secretary respectively of North (Fiji) Group Limited and in purpura persona

Second defendant

Appearances: Mr A. Sen for the plaintiffs

Mr G.O' Driscoll for the defendants

Dates of hearing: 10th and 11th September, 2012

JUDGMENT

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

2. ***The statement of claim***

2.1 The statement of claim states that the first plaintiff is a life guard, boat captain and surfer. The second plaintiff, a horticulturist and ocean enthusiastic .

2.2 Representations made by the defendants

2.2.1 The plaintiffs claim that they were induced by the representations made by the second defendants to enter into an agreement with the first defendant company

to purchase its land in Narewa, Vanua Levu as contained in part of Certificate of Title No. 36452 in DP no.9306 and 9305 and thereafter to complete the transaction. The manifold representations made by the defendants are stated as follows:

i. *they were undertaking a unique integrated resort development project, Narewa Club and Rest located in Vanua Levu,..*
ii. *the Resort aspect will be located on the water and will feature access to the Great Sea Reef from Narewa's private marina already underway. A channel and small boat basin has been completed and the company-owned islander 28 boat is docked there for day trips out to the reef.. construction has also been completed on a ..temporary structure to facilitate land sales*
iii. *(*they) *had exclusive rights to twin passage to the great sea reef that produced one of the best surf waves in the world.*
iv. (they)*were going to construct a world class golf course..*
v. *the plaintiffs would have an uninterrupted access to resort amenities including uniquely being able to surf world class waves .*
vi. *the resort would be up and operating (on/about December 2007).*
vii. *the plaintiffs villas on the purchased lot would be used as hotel accommodations and the plaintiffs receiving a portion of the revenue.*
viii. *the resort would have a mariner to which the plaintiff would have undisturbed access.*
ix. *the money received from sale of the land* (to) *the plaintiffs would be utilised for the purposes of development of the resort..*
x. (they)*would assist the plaintiffs in settling on their new home .*
xi. *the* (plaintiffs)*would be members of an exclusive club and would be able to make a comfortable living.*
xii. (they)*had ready and available funds and investors for completion of the project.*
xiii. *the first plaintiff would be engaged in operating and running a life guard and training local staff as life guard and surfers ;a nursery would be set up at the resort precincts and* (the second plaintiff) *would be engaged in training local staff in horticulture.*

2.2.2 The representations were made orally, were implied, on the web and the master plan given to the plaintiffs.

2.2.3 The representations were made fraudulently, knowing they were false, untrue or recklessly not caring whether they were true or false..

2.2.4 The defendants were obligated to take care in making the representations.

2.2 The statement of claim proceeds to state that the representations were misleading and in contravention of sections 54 and 55 of the Fair Trading Decree.

2.3 Upon discovering that the representations were untrue, the plaintiffs communicated with the defendants. The defendants refused and neglected to remedy their default. The plaintiffs were compelled to leave the premises, they constructed on the land.

2.4 The plaintiffs claim damages on the basis that the consideration of US $ 400,000 has "*wholly failed*" and their investment has become "*worthless*".

2.5 Secondly, there is a claim for failure to construct a road and provide electricity, water, telephone and storm water drainage system, as stipulated in the sale and purchase agreement.

2.6 Thirdly, a claim is made for special damages in a sum of FJ$ 1,366,622.00,as particularised, general and exemplary damages.

3 ***The amended statement of defence and counterclaim***

3.1 The defendants' deny making the alleged representations. The defendants rely on the sale and purchase agreement between the plaintiffs and the first defendant company, as the only legal basis upon which the transfer was effected.

3.2 *Development of the Narewa Club and Resort*

3.2.1 The defendants deny that the proceeds from the sale to the plaintiff was to be used for development of the resort.

3.2.2 The alleged representations are part of a website revision that "*didn't exist until 2008*".

3.2.3 The plaintiffs' decision to purchase Lot 1 on DP 9307 was not in any way related to membership in the Narewa Club, the construction of a golf course, access to the surf nor any amenities of a five star resort nor to provide employment to the plaintiffs.

3.2.4 The plaintiffs have wilfully confused and mislead membership in the Narewa Club with the sale and purchase agreement.

3.2.5 In order to finance the 55 million dollar project for the resort, the defendants were planning to integrate luxury villas in a 5 star resort development in the defendants' sub-division of land adjoining the sub-division containing the land purchased by the plaintiffs.

3.2.6 Membership in the Narewa Club allowed members access to their villas for a maximum 4 months, a year. A property management was made part of that sales contract.

3.2.7 If there was no upscale project, the plaintiffs said they would prefer a simple eco resort based on surfing to a five star resort, as suggested by the first defendant company. All utilities arranged for the first defendant company's lots would be made available for the plaintiffs.

3.3 The defendants assisted the plaintiffs to settle in on a goodwill basis and provided them with 6 months free accommodation.

3.4 Amenities

The monies spent by the defendants for infrastructure development far exceeds the consideration paid by the plaintiffs. The defendants continue to work on all phases of infrastructure for the entire development. The statement of defence proceeds to state that that the agreement to purchase is "*written in the future tense and clearly tied in to the rest of the development, not just a "stand alone" system.*"

3.5 The counterclaim

The defendants counterclaim for general and special damages on the ground that the first defendant company's land has diminished in value, as a direct result of the construction of substandard and unauthorised structures in contravention of the covenants in the Transfer document. The plaintiffs have abandoned the two houses they built, due to improperly constructed roofs that render them uninhabitable.

4.1 ***The reply to amended defence and defence to counter-claim***

The plaintiffs state that they were forced to abandon their houses, as the defendants refused to provide the amenities in terms of the memorandum of sale. The plaintiffs constructed the building, in accordance with approved plans and specifications, after obtaining consent from relevant authorities. The defendants were aware of this fact and did not raise any objection.

Finally, the plaintiffs reiterate that the defendants did not have the means nor access to funds to undertake the development.

4.2 ***The reply to statement of defence and counter-claim***

The defendants join issue with the plaintiffs on their defence to the counterclaim.

5. *The hearing*

5.1 *The first plaintiff*

5.1.1 The first plaintiff, a resident of Hawai, said that in July, 2006, he accessed a web page from the website of the first defendant company. This provided that the first defendant company was developing a five star resort with a world class golf course, exclusive surfing and boat rides in Narewa.

5.1.2 He contacted a mutual friend of the second defendants. In September, 2006, he came to Fiji. He visited the first defendant company's project site. The second defendants presented all the matters set out in the web page together with an engineering plan. He was told he could have access to the surf and marina, by purchasing a parcel of land. He decided to invest in the first defendant company's project, as the amenities to be provided in the resort suited his life style. His life passion was surfing. He was ranked as a semi professional surfer, in the US. It also suited the needs of his mother, who had a stroke the previous year. The defendants did not tell him that they did not have the funds to finance the project.

5.1.3 In January,2007, he entered into a sale and purchase agreement with the first defendant company, to purchase a lot of its land. The transfer was completed in February, that year. The total consideration was a sum of US $ 400,000. A sum of US$ 50,000 was paid as VAT.

5.1.4 The first plaintiff stated further that the defendants told him that he could help in boating operations, for which he would be paid. This was part of his profession. He was a maritime boat captain in California. The second plaintiff, a horticulturist was told she could work in a nursery project.

5.1.5 The land was in a remote area, an hour away from town. He would not have invested $ 450,000 on the purchase of this land, if not for the resort and the surf.

5.1.6 In May,2007, he came to Fiji with his wife, dog and two containers of personal items, with the third on route. He testified as to the expenses he incurred in transporting the containers, staying initially in Suva and Labasa and quarantining his dog. The personal items he brought were a boat,wave runner, two bikes and an "*off road vehicl*e"(golf cart).

5.1.7 When they arrived in Narewa, they found the block was not surveyed. After the defendants surveyed the land, the plaintiffs got the land cleaned and obtained a building permit. Then, they had a meeting with the defendants. The defendants had informed the plaintiffs that they had lost their financing for the project.

5.1.8 The plaintiffs spent a little over FJD $ 230,000 for building two houses and a garage. The construction took 12 months to complete. He discussed the style of the house with the first of the second defendants. The defendants raised no objections to the construction.

5.1.9 The first plaintiff said he had not discussed with the defendants, their failure to construct a road and supply electricity, water, telephone facilities and storm water drainage, as stipulated in the Transfer document. The defendants had dug a channel from the reef to his property. The plaintiffs found it impossible to live in the house. The only complaint the first of the second defendants had made to the buildings, was to the metal roof. A metal roof was required to collect water.

5.1.10 They did not live in the house at all. He incurred costs in getting his sick mother down from Hawai, which the defendants were aware of. His mother was to live in an adjoining house. He left Labasa in October,2008, and Fiji, in late August,2010.It was not possible to rent the houses, since there was no road access nor utilities.

5.1.11 The first plaintiff, concluded his evidence in chief, stating that the defendants did not have the finances to carry out the resort project, nor the desire to do so.

5.1.12 He admitted that the sale and purchase agreement did not provide that the purchaser would have access to the amenities of a five star resort and the surf; this arose in the conversation the plaintiffs had with the second defendants. He was unaware whether the defendants obtained approval for financing from Fiji Investment Corp Ltd.

5.1.13 It transpired that he was not aware he had to obtain consent to dealing in land as a non-resident ,in terms of the Land Sales Act. He said he had obtained all required permits for the construction, including a completion certificate. None were produced.

5.1.14 The first of the second defendants said that he would provide a large water tank, and made a *"supposed offer*" in 2009, to rent a property, when the plaintiffs faced these difficulties.

5.1.15 While he was building the houses, he had lived temporarily for five months in a shack. This had electricity and water. He disputed that the houses he built were shoddy.

5.1.16 He said that he had not taken up membership in Narewa Club. He purchased a residential property. He said it was not separate from the resort. He was referred to the second schedule in the Transfer document, which set out the type of house that could be built on the land.

5.1.17 He sold his property in Hawai for US $ 730,000, at fair market value. The first plaintiff said that the originals of the receipts, in respect of freight were in California. Counsel for the plaintiffs, Mr Sen, in re-examination, sought to produce photocopies of the freight charges, which I disallowed. It emerged in cross-examination, that he had sold several of the items he purchased, for one-third its value.

5.1.18 In re-examination, this witness said the defendants had not complained that the houses he constructed, are worthless.

5.1.19 He would not have completed the transaction, if he was aware that defendants did not have finances. The defendants did not give any indication that the coup would be detrimental to his purchase. On the contrary, they said the coup would be favourable for the project.

5.1.20 In answer to the clarification sought by Mr Sen, as to whether a "*little track*" was to be provided as a road, the first plaintiff said he expected a road suitable for a five star development. The utilities were to be provided within a 12 month period of the transfer of the land.

5.2 PW 2

5.2.1 Ashok Kumar Karen, a registered surveyor and civil contractor gave evidence. He said the land purchased by the plaintiffs was in Narewa,45 minutes away from Labasa, by road. The distance from the main road to the land is 1.5 km. He produced his quotation for upgrading of the access road to the plaintiff's lot. The road with grass surface, was motorable. He gave an affirmative

answer to the question posed by Mr Sen, whether the road was "*good for rural sub-division*".

5.2.2 A four wheel drive could ply on the road and a car, provided the road was dry. To rehabilitate the road, it had to be widened. The culvert was inadequate. The road had drainage in the middle, but not at the end. Vegetation had grown at the end of the road.

5.2.3 In cross-examination, he reiterated that there was a "*road*" to the plaintiff's land, which was motorable, albeit one-third was not maintained. A farm grade road would not have tar seal, but gravel.

5.2.4 In re-examination, he was asked whether a farm grade road is used in rural residential areas and whether he would recommend grass instead of metal. His response was in the negative.

5.3 *PW 3*

5.3.1 Arvind Kumar, an electrical contractor said that that it would cost $ 65,000 to supply the electricity cable to the plaintiffs' house. The existing pole is 1700 metres from the plaintiffs' house, on the shortest route. The total cost of supplying electricity would be $ 89,000, as set out in the quotation he produced.

5.3.2 In cross-examination, he said he took the shortest route to the plaintiffs' house, to calculate the length of the cable required. It was not possible to take electricity direct, as it would traverse across other lands. He stated solar power is viable, but would be more expensive. He had not observed that a solar system was installed.

5.3.3 In re-examination, he said that solar power would cost $ 100,000.

5.4 *PW 4*

5.4.1 P.Caginivalu, a registered property valuer and developer said the access road to the plaintiffs' house was overgrown. There was no metal on the road. Even in good weather, the road was not accessible. He used the other access, that goes round the other lots of land.

5.4.2 The workmanship of the two houses built on the plaintiffs' land was well structured. It was landscaped and well-maintained. The present cost of building these houses was $ 200,000.

5.4.3 The land belonging to the plaintiffs was a one and a half hour away from Labasa. It was a high class sub-division, but since he did not see any developments, he gave a comparative valuation. He produced his Valuation Report . The sub-division did not have electricity nor a generator. There was a rain fed water supply in the exterior of the premises. He did not see any developments of a five star resort or golf course. There was a bure in a derelict state .

5.4.4 In cross-examination, he said that he had valued the plaintiffs' land based on comparative recent sales to foreigners, not locals. There were no comparable recent sales. He said he was unaware of a comparable sale for US $ 250,000. The relevant certificate of title was not produced. The primary market targeted Americans. The attraction was the surf, the unique wave 7 miles off the shore, albeit this was not the only consideration. He said the current situation in Fiji and the fact that there was relatively low investment on this type of project were irrelevant for valuation purposes.

5.4.5 In re-examination, he was asked why a property in Taveuni Island,as referred to in his Valuation Report, had a higher valuation. He said the reason was that it comprised residential villa sites, a golf course, a well established marina and the like. He reiterated that in his appraisal of the plaintiffs' land, he took into account the access available for surfing.

5.5 *The first of the second defendants*

5.5.1 The first of the second defendants, in his evidence, stated that he had purchased five adjoining properties encompassing 150 acres from five brothers. He then sub-divided the property into DP 9306 and 9307 as depicted in the sketch he produced. The plaintiffs purchased a portion of DP 9307.

5.5.2 The building of the resort was scheduled to start in February/March 2007, after the coup of December,2006. A loan of FJD % 5 million was sought from Fiji Investment Corp Ltd to lay the infrastructure for the project, but this corporation had been disbanded.

5.5.3 This witness said that there was a road to the property of the plaintiffs. It needed to be maintained. The infrastructure was to be provided within a year. The first plaintiff had installed solar system and a catchment system for water. This witness said he offered to purchase a bigger tank and a solar system from

US, as it was costly to supply electricity. Telephone lines could not be drawn. There was a storm drainage system.

5.5.4 The first plaintiff had not sought the defendants' approval to construct the building, as required under the terms of the Transfer document, nor submit plans for approval to the relevant authorities. The plaintiffs had built cheap and shoddy houses, in contravention of the Transfer document.

5.5.5 He denied that representations in their website induced the plaintiffs to purchase the land. The sale and purchase agreement did not contain any such representations. He said the development was going ahead and funding was available. The surf was accessible from the adjoining sub-division owned by the first defendant company.

5.5.6 In cross-examination, it emerged that the total costs of the two sub-divisions of land as purchased by the first defendant company in 2004, was $ 290,000.It was put to him that the sketch he produced was not given to the plaintiffs, at the first meeting with them. He said that the sketch was not in existence. Albeit, he was the managing director of the first defendant company, he said he was not aware of the assets of the company. He holds 98% of the shares. When asked as to how the consideration received of US $ 400,000 was accounted for in the balance sheet of the company, his response was that this did not have a bearing on the transfer.

5.5.7 He said he had obtained funds from a financial institution for the project. A plan was passed for the construction of 28 villas in the resort, but he did not bring the plan to court.

5.5.8 He admitted that electricity, water and telephone facilities were not made available to the plaintiffs. Electricity was not available in the sub-division. He disputed the cost of solar power claimed. He attempted to dig a well for water. A bore well would cost $ 14000. He did not know that storm water drainage was required.

5.5.9 It transpired in cross-examination, that when the house was being constructed, the first of the second defendants had been in the veranda of the house. He denied he did the drawings for the house. It emerged that he did not have any documentary evidence to establish that that he had informed the plaintiffs, that the two houses were not built according to specifications. This matter was first

taken up in the statement of defence and counterclaim filed in these proceedings.

5.5.10 The witness said that the first defendant company was in debt of US $ 420,000.

5.5.11 Mr Sen referred the witness to a web page from the first defendant's website as accessed by the plaintiffs, in 2008.In conclusion, the question was posed why the plaintiffs were charged US $ 450,000 for a land that does not have the benefits of the resort nor access to the surf. His response was that neither the e-mails nor the web pages relied on by the plaintiffs, provided for these features. There were different sales contracts for the sub-division of land containing the plaintiffs' land as against the sub-division on which the resort was to be built.

5.5.12 In re-examination, counsel for the defendants, Mr O' Driscoll clarified from this witness that the defendants did not possess any documents pertaining to the financing of the resort project. The first of the second defendants said the accounts of the first defendant company were not handled by him. He concluded that the plaintiffs were willing buyers and, no pressure was put on them.

6 ***The determination***

6.1 Misrepresentation

6.1.1. The critical question to be determined in this case is whether the plaintiffs were induced to purchase the land by fraudulent representations made by the second defendants, that they would have access to the amenities of the Narewa Club and Resort and the surf, as well as obtain employment in the resort.

6.1.2. The statement of claim also contends that representations were made negligently. The evidence of the first plaintiff was directed to the fraudulent conduct on the part of the plaintiffs, as was the closing submissions. An action on fraud and negligent misrepresentation cannot co-exist.

6.1.3. In September, 2006, the plaintiffs had come to Fiji and visited the first defendant company's site with the idea of investing in the development of its project. At this meeting, the second defendants had presented all the matters set

out in the web pages accessed by the plaintiffs on 1 July, 2006, and made other representations by "*by word of mouth*".

6.1.4. At this point, I would look at the web pages accessed by the plaintiffs on 1 July, 2006, in so far as it is relevant to the alleged fraudulent misrepresentation. The home page provides that the first defendant company *"is developing an integrated luxury resort and villa community at Narewa*". The first link page titled *"Resort*" provides that *"Narewa Club and Resort will be a luxury resort destination offering world class surf, golf,. and..wellness activities. The property will include..water sports activities..boat fleet"*.The second link page titled *"Surf"* replete with graphic images states that the *"discovery potential and surf spots accessible from Narewa are amazing*".

6.1.5. That takes me to what transpired at the meeting in September, 2006.The first plaintiff said that the second defendants had told him, that he could have access to the surf, by purchasing a parcel of land from the first defendant company. The Narewa Club and Resort was to be developed in the adjoining sub-division of land belonging to the first defendant company. He was shown the spot where the marina was to be built. The plaintiffs were offered employment at the resort. His life passion was surfing. He was ranked a semi professional surfer, in the US. It suited the needs of his ailing mother.

6.1.6. On 25th January,2007,the plaintiffs entered into a sale and purchase agreement with the first defendant company, to purchase its land comprising 4 acres in extent. On 20 February,2007,the transfer was executed .The total consideration was a sum of US $ 400,000. A sum of US$ 50,000 was paid as VAT.

6.1.7. The meeting between the plaintiffs and defendants on 23 September, 2006, is undisputed. Revising the first plaintiff's evidence as a whole, I accept that representations were made to the plaintiffs by the second defendants, in so far as it accords with the link pages referred to in paragraph 6.1.4 above. In so far as his evidence extends to matters concerning the employment of both plaintiffs at the proposed resort, it is less persuasive and unacceptable.

6.1.8. Before I proceed to the next point, I would dispel a source of confusion in this case. Mr O'Driscoll, in his closing submissions, states that the web pages relied on and accessed by the plaintiffs on 1 July,2006 ,do not contain any allusion to the sale of land, contrary to the contention in the closing submissions filed on

behalf of the plaintiffs. Mr Sen's argument was that the "*web page .was the most compelling factor for the plaintiffs to enter into the sale and purchase agreement*", but then he goes on to submit that "*the web page claimed that there were 41 lots..for sale*". Mr O'Driscoll quite correctly points out that the reference to "*41 titles(2 already sold)*" is contained in a web page accessed by the plaintiffs on 7 September, 2008, as referred to by Mr Sen, in the cross-examination of the first of the second defendants. The words " *titles (2 already sold)*" refers to the lots purchased by the plaintiffs. Indeed the transfer to the plaintiffs was completed on 20th February,2007.

6.1.9. It is clear from the pleadings that the plaintiffs' case is premised on the web page of the first defendant as well as oral and implied representations, and reiterated in the first plaintiff's evidence. I would add that a web page is an invitation to treat to the world at large, as opposed to an offer.

6.1.10. Next, I need to ascertain if the representations made were false or made in the absence of genuine belief that it is true.

6.1.11. The mainstay of the case for the plaintiffs case is that the defendants made the representations fraudulently, recklessly and knowing that they were false and untrue. The statement of claim provides that:

> *a) The development did not remotely resemble that graphically portrayed by the defendants, in its website.*
> *b) The resort plan together with the golf course, mariner and surfing paradise were fictitious and not a legitimate business scheme and/or the defendants did not have any desire or intention to undertake such development.*
> *c) The defendants did not have the know-how, expertise, financial resources nor access to any financial institute, to undertake the development .*

6.1.12. The first of the second defendants, in his evidence in chief, asserted that the development of the resort was stalled, due to the disbanding of the Fiji Investment Corp Ltd, after the coup of December, 2006. The Fiji Investment Corp Ltd was to provide the financing for the infrastructure of the project. The

first plaintiff stated that when they came to Fiji, in May,2007, the second defendants had informed them, that they had lost their financing. In my view, this was not a promising start.

6.1.13. Mr Sen, in his closing submissions submits no cogent evidence was produced in the form of a proposal, an approved plan, an application for a loan or commitment from a financial institution, in order to establish that the defendants had the intention of developing a resort. I find these submissions compelling.

6.1.14. PW 4, in his Valuation Report of 6 April, 2012, has stated that there "*isn't a glimpse of the proposal*(for the construction of a resort)..*no basic infrastructure*".

6.1.15. The only documentary evidence produced by the first of the second defendants was a snippet in an e-mail of 28 March, 2007, addressed to an unidentified *"Jack*" by the second of the second defendants stating "*..the coup disbanded FIC who was about to fund our project so we are stalled until the coup is over. Meanwhile we may start a no star surf camp.."*

6.1.16. The case advanced by the defendants, in their statement of defence and counterclaim, was that the plaintiffs' purchase was not related to membership in the Narewa Club and Resort, as evident in the sale and purchase agreement produced. The defendants go on to state that members were required to build specified types of luxury villas, which the first defendant company intended to integrate into a five star development in the sub-division of land adjoining the plaintiffs' land. Neither the building plan nor the "*different sales contracts*" in respect of the villas were produced .

6.1.17. Lord Herschell in the celebrated case of ***Derry v Peek***,(1889***)*** 14 App Cas 337 at pages 375 -376 said :

> *The ground upon which an alleged belief was founded is a most important rest of its reality.* ***I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one.*** *So, too... if I thought that a person making a false statement had*

> *shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.* (emphasis added)

6.1.18. Mr Sen relies on the case of ***Edgington v Fitzmaurice,***(1885)29 Ch D 459 as an illustration of his submission that the intention to develop a resort was not true and a clear misrepresentation of an existing fact**.** ***Edgington v Fitzmaurice*** was a case where the company had issued a prospectus inviting subscriptions for debentures, stating that the money would be utilised for the improvement of the buildings and developing the trade of the company**.** The object of the loan was to enable the directors to pay off pressing liabilities. I would quote the famous aphorism of Bowen LJ :

> *There must be misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.* ***A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact.*** (emphasis added)

6.1.19. Returning to the present case, I find the defendants did not have the will or the ability to put their intention into effect, at the time the statements were made. I conclude that the second defendants made false representations, as agents of the first defendant company, in the ***Derry v Peek*** sense, and this induced the plaintiffs to purchase the land.

6.1.20. Mr O' Driscoll, in his closing submissions, contends as a subsidiary argument, that any liability for misrepresentation is precluded by a clause in the Memorandum of Terms of Sale attached to the sale and purchase agreement, which acknowledges that the purchaser "*has caused the property to be inspected*

and that the same is being purchased solely in reliance upon his own judgment and not due to any representation or warranty made by the Vendor".

6.1.21. I would read this clause as having an exclusionary effect on statements of existent facts relating to the property purchased. I would add that the clause would not apply to a case of fraud, such as the present. As the Earl of Halsbury stated in ***Perason & Son Ltd v. Dublin Corpn,***(1904-7) All ER 255 at page 258:

> *The action is based on the allegation of fraud, and no subtlety of language, no craft or machinery in the form of contract, can estop a person who complains that he has been defrauded from having that question of fact submitted to a jury.*

6.1.22. The plaintiffs' case on deceit succeeds.

6.1.23. *A fortiori,* I detect a promise flowing from the first defendant company to the plaintiffs for the development of the resort, in the counterclaim filed by the defendants. This reads:

> *The 1st defendant had clearly told the plaintiffs and other buyers for (lot 2) in the sub-division that* ***if there was no upscale project, then the 1st defendant would prefer a simple eco resort (still based on surfing)*** *and the plaintiffs and the purchasers of lot 2 both agreed they might actually like that to the five star resort. The arrangement was that whatever utilities were arranged for the 1st defendant's lots, a similar arrangement would be made for the plaintiffs.* (emphasis added).

6.1.24. The first plaintiff refuted the suggestion made to him, in cross-examination, that the plaintiffs had agreed to an eco resort**.**

6.1.25. The first defendants' promise to develop the resort is supported by valuable consideration. Consideration has moved from the plaintiffs, as promisee to the

first defendant promisor.I have found that the plaintiffs have suffered detriment. In my judgment, there exists an enforceable agreement.

6.1.26. As ***Chitty on Contracts,*** Vol 1, (2004) at paras 3-093 to 3-094 states:

> *.the promise or representation must in some way have influenced the conduct of the party to whom it was made..it must..be some inducement..*(and)*the promisee must have suffered "detriment" by acting in reliance on the promise.*(emphasis added, footnotes omitted)

6.1.27. PW 4, the valuer called by the plaintiffs, in his evidence, stated that property is valued on the basis of comparable sales. As regards the plaintiffs' property, there were no recent comparable sales. There were no "*surf type buyers*". Responding to a question posed to him in cross-examination, he said that the current situation in Fiji, and the fact that there was relatively low investment on this type of project were irrelevant for valuation purposes.

6.1.28. The Valuation Report of April,2012, as produced by PW4, provides as follows:

> *..The prices of comparable properties within Savusavu ranges well above the $ 480,000-780,000.00,however not even a single comparable improved sale was recorded from Macuata since 2009. Therefore with such comparability indices* ***the subject property lacks these essential services and specifically there is an absence of integrated Tourism development to support the interest of property buyers and create induced demand*** *which will always create market demand...we believe that* ***the subject matter lacks the anticipated market value appreciation the lot owners anticipated to***

> ***realise as the integrated tourism development within the proposed subdivision wasn't effected. The proposed Tourism development was portrayed thru glossy marketing that it will ensure an established and a fully fledged integrated Resort development.***
>
> ...
>
> *..the lots can't be compared with well established resort integrated in greater Savusavu and Taveuni...**These developments are drastically missing in the property valued which has resulted in the Narewa estate being depressed and retarded due to the undeveloped status of the subject Estate***". (emphasis added)

6.1.29. The report and evidence of PW 4 were not rebutted by the defence.

6.1.30. Mr Sen has cited ***Halsbury, Laws of England,***(3rd Ed), Vol 2,page 402 as referred to by the Fiji Court of Appeal in ***Ammar v Deoki,*** (1969) FLR 29 to support his contention that parole evidence is admissible, to support or give effect to the terms of the transfer of the land. The excerpt from ***Halsbury*** reads:

> *Parole evidence is also admissible.. to show the true consideration or the existence of consideration or of consideration in addition to that stated: to show the nature of the transaction or the true relationship of the parties.*

6.1.31. The Supreme Court in ***Tota Ram Sharma v Akhil Projects Ltd***,(Civil Appeal No. CBV0004 of 2010*)* cited with approval these authorities.

6.1.32. In the present case, the evidence of PW 4 depicts that the true consideration paid by the plaintiffs for the land included " *the integrated tourist development* (that) *wasn't effected*".

6.1.33. In my judgment, the plaintiffs are entitled to damages for the loss they have suffered arising from the fraudulent representations made to them, by the second defendants.

6.1.34. Lord Denning MR in ***Doyle v Olby Ltd,*** (1969) 2 QB 158 at page 167 stated:

> ***The object of damages is to compensate the plaintiff for all the loss he has suffered, so far, again, as money can do it.*** *In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited.* ***The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement.*** (emphasis added)

6.1.35. In applying the principle of *restitutio in integrum*, the damages the plaintiffs are entitled to, is the difference between the consideration paid of US $ 400,000 and the current market value of the land of $ 97,000, as stated in PW4's valuation report, and is as follows:

Purchase price of US $ 400,000 (@ avg rate of 0.59 US$ to a FJ $ as at 20/2/2007)	FJ $ 677966.10
LESS current market value of land	97,000.00
	580966.10

6.1.36. The plaintiffs' claim for damages is premised on the basis that the consideration of US $ 400,000 has "*wholly failed*" and their investment has become "*worthless*", as pleaded in their statement of claim. The plaintiffs have not sought to set aside the transfer. Accordingly, the claim for costs of improvements does not arise for consideration. No evidence was provided by the plaintiffs, as to the amounts that would have been payable as vat and solicitor's fees, on the market value of the land, as appraised by PW 4.

6.2 . ***Breach of agreement***

6.2.1. The gravamen of the plaintiffs in the second issue which falls to be determined by this court, is that the defendants failed to provide a road and make provision for utility services, as stipulated in the Memorandum of Terms of Sale attached to the sale and purchase agreement. The relevant clause reads:

> *Lots 1 through 8 on DP 9307* ***will be served by a road*** *to be constructed by Vendor as developer.* ***The subdivision will have provisions for electricity supply, water supply, telephone and other utility services serving or connected to the subdivision and the storm water drainage system installed in the subdivision.*** *As there is no sewerage connection* ***it shall be the responsibility of the Purchaser to install a septic tank*** *or other suitable sewerage disposal system to the said property. The Vendor reserves the right to have restrictive covenant in transfers with respect to the use and construction of dwelling premises on the said property.* (emphasis added)

6.2.2. PW 2, in his evidence, said there was an "*existing access road .formed and motorable road with grass surface"*, as also stated in the "*Quotation for Upgrading of Access Road"*. The estimate was for upgrading the existing road. He said the road was "*good for rural sub-division*". A four wheel drive could ply on the road and a car when the road was dry.

6.2.3. PW 4, the property valuer said that that there were two accesses, albeit one was overgrown and the other went round other lots of land. Moreover, the first of the second defendants also accepted that there was a road, which was overgrown.

6.2.4. The word "*road*" in my view, embraces a grass surface road. I agree entirely with Mr O' Driscoll's submission, that the plaintiffs cannot dictate the quality

of road. This is not stipulated in the clause under review. In my judgment, the evidence establishes that the access available qualifies as a road .

6.2.5. There remains the question whether the first defendant made provision for electricity, water, telephone and storm drainage.

6.2.6. The contention in the statement of defence and reiterated in the closing submissions that the relevant clause is "*written in the future tense*" is hardly of conviction. The evidence of the first plaintiff and the defence was that these utilities were to be provided within a year of the transfer.

6.2.7. The second argument that the provision of these services was "*clearly tied in to the rest of the development, not just a "stand alone" system*" supports the plaintiffs case on misrepresentation.

6.2.8. The first of the second defendants, in his evidence, admitted that the defendants failed to provide electricity, water, telephone and storm water drainage.

6.2.9. I hold there was breach of the relevant covenant of the sale and purchase agreement. The plaintiffs were bereft of power and water, which the first defendant company was required to provide.

6.2.10. The costs of supplying electricity was estimated as $ 89,000 by PW2, in his quotation. It transpired in the cross-examination of PW2 ,that he had taken the shortest route to lay the cable. This evidence was not rebutted.

6.2.11. The first of the second defendants, in his evidence, stated that the cost of digging a bore well for water was $ 14000.

6.2.12. No evidence was led by the plaintiffs as to the cost of installing a telephone and providing storm water drainage.

6.2.13. Mr O' Driscoll, valiantly argues in his closing submissions, that the plaintiffs made no request for power and water, as admitted by the first plaintiff, in his evidence. In my judgment, this does not deprive the plaintiffs of their right to claim damages .

6.2.14. Under this heading, I award the plaintiffs a sum of **$103,000**, being costs of obtaining electricity($ 89000) and digging a bore well for water($ 14000).

6.3. ***Special damages***

6.3.1 The plaintiffs claim special damages in a sum of FJD 1,366,622.00. The first item particularised in the statement of claim, is their move from Hawai and Canada. The move was the voluntary act of the plaintiffs. Still less can the first defendant company be responsible for freight for transport of containers and expenses incurred for rented accommodation. Nor can they be called upon to pay for their return journey.

6.3.2 As Winn LJ said in ***Doyle v Olby Ltd,*** (*op.cit* at page 168) the starting point for any court called upon to consider what damages are recoverable by a defrauded person is "*to compare his position before the representation was made to him with his position after it, brought about by that representation, always bearing in mind that* ***no element in the consequential position can be regarded as attributable if it be too remote a consequence***". (emphasis added)

6.3.3 The conduct of the plaintiffs in obtaining solar power and collecting rain water, is quite consistent with their intention to find a way out of the predicament they faced. The costs claimed for solar power in a sum of $ 60,000 and the cost of a water tank given by the plaintiffs as $ 840 is disputed. I decline this claim, as no receipts in support were produced.

6.3.4. It emerged in the cross-examination of the first plaintiff, that several items claimed to have been purchased by him such as a boat, wave runner, two bikes and an "*off road vehicl*e" were sold by him at one-third its value. Neither the receipts of purchase nor re-sale were produced. Then, there is an attempt to claim the cost of a generator used by the plaintiffs, as a back up, when building the houses. PW4,stated in evidence in chief, that there was no generator on the property. There follows a claim for a septic tank, when the plaintiffs were required to purchase this item under the sale and purchase agreement, as Mr O Driscoll pointed out in the course of cross-examination of the plaintiff.

6.3.5 In my view, the plaintiffs' claim for special damages reveals telling inconsistencies and gaps.

6.3.6 I decline the claim for special damages.

6.4 The plaintiffs did not pursue their claims for exemplary damages for breach of contract and damages for contravention of sections 53 and 54 of the Fair Trading Decree. The *"object of exemplary damages is to punish and deter"*- Lord Devlin in ***Rookes v Barnard,***(1964) AC 1129 at page 1221.The Fair Trading Decree was repealed by the Commerce Commission Decree of 2011.

6.5 ***The claim against the second defendants***

6.5.1 This action is also filed against the second defendants, as representatives of the first defendant company and in their personal capacity. This seems to me to be a very strange situation. The statement of claim contains no allegation of breach of duty by the second defendants, nor was there evidence of breach by them.

6.5.2 The evidence reveals that the second defendants signed the sale and purchase agreement, as managing director and secretary of the first defendant company. The transfer was in favour of the first defendant company. The representations were made by the second defendants, as agents of the first defendant company, a distinct legal personality.

6.5.3 The first plaintiff asserted that the second defendants are in effect, the first defendant company. I would dismiss this straw in the wind contention.

6.6 ***The counterclaim***

6.6.1 Passing now from the plaintiffs' case, I come to the counterclaim. The defendants counterclaim for general and special damages on the ground that the first defendant company's land has diminished in value, as a direct result of the construction of substandard and unauthorised structures, in contravention of the covenants in the Transfer document. It is further stated the plaintiffs have abandoned the two houses they built, because they were improperly constructed and are uninhabitable.

6.6.2 Clause 3 of the second schedule to the Transfer document required the plaintiffs to comply with the following:

> ***Not to build, erect construct.. any building*** *or structure...* ***unless and until detailed plans and***

> ***specifications therefore and the proposed type of construction and the proposed location of the building or structure*** *and the driveways and automobile parking areas upon the said lot* ***shall have been submitted to the transferor and shall have been approved of by the transferor in writing****....*
>
> ***Not to build on the said lot, any private residence or dwelling-house with an interior floor area or less than 1400 square feet****.* (emphasis added)

6.6.3 The plaintiffs failed to establish that they had obtained the approval of the first defendant company to construct the houses, as required under the above clauses. It would appear at first blush, that the plaintiffs were in breach. It transpired however, in the cross-examination of the first of the second defendants, that the defendants had not expressed any objection to the plaintiffs, in this regard. It follows that the defendants had accepted the breach. The first plaintiff, in his evidence in chief, said that the only reaction of the first of the second defendants was to the metal roof erected by the plaintiffs. The first plaintiff explained that a metal roof was necessary to collect rain water, since the plaintiffs were not supplied with water.

6.6.4 The question to be determined is whether the plaintiffs built substandard and uninhabitable houses, and consequently, the first defendant company's land diminished in value. The assertion of the first of the second defendants, in this regard, is unsubstantiated. On the contrary, PW 4, the valuer said that the houses were well structured and the workmanship was good.

6.6.5 In my judgment, the counterclaim is unfounded .

7. The first defendant company shall pay the plaintiffs as damages, an aggregate sum of **$ 683966.10**, comprising of the sums of $ 580966.10 and $ 103,000.00. In the exercise of my discretion under the Law Reform (Miscellaneous Provisions)(Death and Interest) Act(cap 27), I award interest at the rate of 3 % per annum on the aggregate sum of $ 683966.10 from date of writ, 28 July, 2011,till date of judgment.

8. Orders

I hold as follows:

a) The first defendant shall pay the plaintiffs by way of damages, the sum of $ 683966.10 together with interest at the rate of 3 % per annum on that sum from date of writ, 28 July, 2011,till date of judgment.

b) The plaintiffs' claim for special damages is declined.

c) The claim against the second defendants is dismissed.

d) The claim for exemplary damages is declined.

e) The counterclaim is declined.

f) The first defendant shall pay the plaintiffs costs summarily assessed in a sum of $ 5000.

A.L.B.Brito-Mutunayagam

JUDGE

27 August, 2013