

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. 169 of 2013**

**BETWEEN** : **FUN WORLD CENTRE (FIJI) LIMITED** a duly  
incorporated limited company having its registered office  
at 7 Yasawa Street, Lautoka, Fiji

**PLAINTIFF**

**AND** : **BANK OF BARODA** a body corporate duly incorporated  
in India, having its Head Office at Mandvi, Baroda, India  
and duly registered in Fiji under Part X of the Companies  
Act and having its Head Office at 86-88 Marks Street,  
Suva, Fiji

**DEFENDANT**

**BEFORE** : **Hon. Justice Kamal Kumar**

**COUNSEL** : Mr Varunendra Prasad for the Plaintiff  
Mr Dorsami Naidu for the Defendant

**DATE OF HEARING** : 1 August 2013

**DATE OF RULING** : 4 October 2013

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**RULING**

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## 1.0 **INTRODUCTION**

1.1 On 17 June 2013 Plaintiff filed Notice of Motion seeking following Orders against the Defendant:-

**“1. ....**

**2. An injunction restraining the Defendant itself and/or by its servants or agents from taking possession, selling, transferring, assigning and/or disposing of the property by way of mortgagee sale and/or powers vested to it under the mortgage registered as mortgage number 723728 ‘A’ the property comprised in State Lease No. 17832 (more particularly described as Lot No. 6, 8, 9, 10 and on Plan No. ND 5112, ND 5112, ND 5112, ND 5112, ND 5154 respectively, Name of Land: Part of Nasou, Province: Ba, District or Town: Nadi, comprising of a total area of 20.0317 hectares) until further order of this Honourable Court and/or as this Honourable Court may deem fit, just and expedient.**

**3. A mandatory injunction directing the Defendant to grant its consent for the subdivision of the land upon which the hotel premises is situated to enable the Plaintiff to sell the same to pay off the mortgage debt to the Defendant.**

**4. Such further and/or other relief this Honourable may deem fit, just and expedient.”**

1.2 Parties filed following Affidavits in respect to Application for Interlocutory Injunction:-

### **Plaintiff**

- (i) Affidavit in Support of Mohammed Sahil sworn 13 June 2013;
- (ii) Affidavit in Reply of Mohammed Sahil sworn on 19 July 2013.

### **Defendant**

- (i) Affidavit of Usha Narayan in Opposition sworn on 9 July 2013;
- (ii) Affidavit of Usha Narayan in Response to Affidavit of Mohammed Sahil sworn on 24 July 2013

1.3 On 24 July 2013 Plaintiff filed Summons for Judgment in Default of Defense which was returnable on 12 August 2013.

- 1.4 On 1<sup>st</sup> August 2013 Counsel for the parties by Consent agreed to make submissions on prayers (a) and (b) of the Summons dated 24 July 2013 and Notice of Motion dated 17 June 2013.
- 1.5 On 12 July 2013 his Lordship Justice Balapatabendi granted interim injunction to keep the status quo in respect to sale of mortgage property and ordered filing of Affidavits by 19 July 2013 and Submission one day before hearing on 1<sup>st</sup> August 2013.
- 1.6 Plaintiff filed its Submission on 31 July 2013 whilst Defendant handed in skeleton Submissions at the hearing.
- 1.7 Counsel for the parties made submissions on 1<sup>st</sup> August 2013 when I directed the parties to file further submissions as to whether Director of Lands consent is required before I deal with the Application and whether Plaintiff can give undertaking as to damages in reliance upon the property subject to mortgagee sale.

## **2.0 BACKGROUND FACTS**

- 2.1 On 23 June 2008 Plaintiff entered a Mortgage in favour of the Defendant Bank (hereafter referred to as **“the Bank”**) over property comprised and described in Crown Lease No. 17832 to secure financial accommodation and interest provided or to be provided by the Bank to the Plaintiff (**“the Mortgage”**).
- 2.2 The Mortgage initially secured the sum of Fijian four million dollars as total debt plus interest at the rate of 8.0% per annum advanced or to be advanced by the Bank.
- 2.4 In terms of arrangement Plaintiff was required to repay the debt, interest and fees at the rate of \$65,000.00 per month.
- 2.5 Plaintiff defaulted in its loan repayment and on or about 15 February 2011, Bank issued instructions to its Solicitors to commence winding-up proceeding against the Plaintiff to recover the debt of \$3.940m and interest of \$32,422.99 as at 15 February 2011 together with further interest at the rate of \$870.63 per day owing by the Plaintiff to the Bank.
- 2.6 On 1<sup>st</sup> February 2011 Plaintiff wrote to the Bank seeking time to remedy the default.

- 2.7 On 4<sup>th</sup> February 2011 Plaintiff by its Director went to the Bank seeking restructure of its loan and additional \$1m for capital requirements which request was declined by the Bank.
- 2.8 On 18 February 2011 Bank by its Solicitors caused Letter of Demand to be sent to the Plaintiff demanding payment of \$3.940m and interest.
- 2.9 On 25 February 2011 Bank through its Solicitors caused Notice of Demand to be served on the Plaintiff pursuant to Section 221 of the Companies Act.
- 2.10 On 10 March 2011 Plaintiff through its then Solicitors Messrs Vijay Naidu & Associates wrote to the Bank requesting that legal proceedings be withheld pending determination of Plaintiff's application to refinance its debt with the Bank which process according to the said Solicitors was to take place within three weeks.
- 2.11 On Plaintiff's promise to pay the overdue loan repayments by 25 March 2011 Bank agreed to hold any legal proceedings until then.
- 2.12 On 1<sup>st</sup> August 2011 Bank instructed its Solicitors to proceed with legal proceedings due to failure by the Plaintiff to clear the overdue loan repayments.
- 2.13 On 23 August 2011 as per Plaintiff's undertaking Bank through its Solicitors caused Demand Notice under Mortgage No. 723728 "A" dated 22 August 2011 to be served on the Plaintiff demanding payment of the sum of \$4,163,445.89 together with interest.
- 2.14 On 6<sup>th</sup> September 2011 Plaintiff wrote to the Bank informing them that Plaintiff is planning to dismantle the entire complex and sell the steel and iron through auction to pay Bank's debt.
- 2.15 On 12 September 2011 Bank responded to Plaintiff's aforesaid letter and informed Plaintiff that Bank will obtain Injunction Order if Plaintiff intends to dismantle the complex.
- 2.16 On 10 October 2011 Plaintiff wrote to the Bank informing that it is willing to settle the whole debt as follows:-
- “(i) Down payment of FJD1.2 million by 14 October 2011;**
- (ii) Balance to be settled by 15 November 2011 in full and final settlement.”**
- 2.17 On 11 October 2011 Bank's Solicitors wrote to Plaintiff advising Plaintiff that

the Bank has agreed to accept Plaintiff's offer to pay Bank's debt by 15 November 2011 on following terms:-

- (i) Bank will defer and/or hold mortgagee sale until 14 October 2011;**
  - (ii) If \$1.2m is paid by 14 October 2011 then Bank will defer or hold mortgage sale until 15 November 2011 when Plaintiff will be required to pay debt interest and charges and the legal cost;**
  - (iii) Failure to attend to any of the above will result in bank's proceeding with mortgage sale.**
- 2.18 On 12 October 2011 Plaintiff wrote to Bank's Solicitors accepting the conditions stated in Bank's letter of 11 October 2011.
- 2.19 On 14 October 2011 Plaintiff wrote to the Bank advising that payment has been processed.
- 2.20 On 17 October 2011 Westpac Bank gave written confirmation of transmission of FJD1,413,500.00 into Plaintiff's Account with the Bank.
- 2.21 On 7 November 2011 Bank's Solicitors wrote to Plaintiff reminding it of its obligation to pay balance debt of \$2,858,040.17 as at 15 November 2011 by this date.
- 2.22 On 10 November 2011 Plaintiff's then Solicitors Natasha Khan & Associates wrote to Bank's Solicitors informing them that they act on instructions of Anil Singh and Mohammed Naseeb ("Purchasers") and the Plaintiff, in following terms:-
- (i) Purchasers are in the process of finalising purchase of Fun World Plaza Hotel as well as area on which hotel site is located;**
  - (ii) They will need to carry out due diligence;**
  - (iii) In the meantime Purchasers have taken a lease of the Hotel till settlement of purchase at \$30,000.00 per month;**
  - (iv) Requesting that settlement of debt be extended until completion of sale and in the interim Purchasers will pay \$30,000.00 directly to the Bank.**

- 2.23 On the same day Bank's Solicitors responded to said letter informing Plaintiff's then Solicitors that Bank is not in a position to give any further time for settlement of the mortgage debt.
- 2.24 On 14 November 2011 Plaintiff's then Solicitors responded to Bank's Solicitors letter of 10 November 2011 expressing Plaintiff's dismay and threatening legal action and report to Commerce Commission.
- 2.25 On 15 November 2011 Bank's Solicitors responded to Plaintiff's then Solicitors letter informing that:-
- (i) **Bank will not give further time to Plaintiff to pay mortgage debt;**
  - (ii) **Bank was concerned that Plaintiff leased its premises without Bank's consent;**
  - (iii) **As per Plaintiff's undertaking balance mortgage debt of \$2,858,040.17 is to be cleared by 15 November 2011.**
- 2.26 On 22 November 2011 Plaintiff's then Solicitors wrote to Bank's Solicitors seeking restructure of loan by permitting Plaintiff to pay \$30,000.00 per month and :-
- (i) **Seeking Bank's consent for leasing of Hotel site to Hibiscus Pacific Resort Limited ("HPRL");**
  - (ii) **Advising that HPRL intends to purchase the Hotel and once MOU is signed they will seek Bank's consent to the sale.**
- 2.27 On 2<sup>nd</sup> December 2011 Bank's Solicitors wrote to Plaintiff expressing Bank's concern for failure by Plaintiff to pay balance debt and leasing of hotel without Bank's consent. By this letter the Bank's Solicitors gave Plaintiff seven days to make suitable arrangements failing which the mortgage property was to be re-advertised.
- 2.28 On 6 December 2011 Plaintiff through Mr Imtiyaz Hussein wrote to Bank's Solicitors informing them that Plaintiff was unable to pay balance debt by 15 November 2011 due to change in circumstances.
- 2.29 On 29 December 2011 Bank's Solicitors wrote to Plaintiff's then Solicitors informing them that:-

- (i) That due to several defaults by the Plaintiff the Bank had no option but to exercise his power of sale on mortgage No. 723728;**
- (ii) The sale and purchase agreement and the lease agreement are void for want of Director of Land's consent;**
- (iii) The Bank intends to proceed with completion of the mortgage sale after the legal vocation.**

2.30 On 5<sup>th</sup> January 2012, the Bank's Solicitors wrote to the Plaintiff expressing the Bank's concern in respect to leasing of the hotel premises without its consent and the Plaintiff's failure to pay the debt by 15 November 2011. By this letter the Bank informed the Plaintiff that the Bank will proceed with mortgage sale if the breaches and the default are not remedied within 14 days of receipt of the letter.

2.31 On 7<sup>th</sup> December 2012 the Bank caused Notice of Demand dated 4<sup>th</sup> December 2012 to be served on Plaintiff.

2.32 On 12 March 2013 the Bank advertised sale of the mortgaged property in the Fiji Times and as a result Bank received two offers for the purchase of the mortgage property from the Plaintiff and Autocare (Fiji) Limited for the sum of \$3.2m and \$4.3m respectively.

2.33 On 25<sup>th</sup> March 2013 the Bank wrote to the Plaintiff granting seven days for it to pay the mortgage debt before writing to the successful tenderer.

2.34 On 28<sup>th</sup> March 2013 Plaintiff through its then Solicitors Messrs Haniff Tuitoga wrote to the Bank advising that the Plaintiff intends to redeem the mortgage and has entered into a sale purchase agreement with Samson Construction Limited.

2.35 On 3<sup>rd</sup> April 2013 Bank's solicitors responded to Plaintiff's Solicitors letter as follows:

- (i) That the Plaintiff has a history of default in payment of instalments towards the mortgage debt;**
- (ii) Despite various promises no payments were forthcoming and they had no option but to advertise the property for mortgagee sale;**
- (iii) Even though the mortgaged property was leased no payments had been made to the Bank;**

- (iv) **That once again the plaintiff has entered into a sales agreement in the last hour and expressed concern in respect to the purchaser being a one shareholder/director company;**
- (v) **Granted the Plaintiff time until 3rd April 2013 to redeem the mortgage.**

2.36 On 4<sup>th</sup> April 2013 Plaintiff's then Solicitors wrote to the Bank's Solicitors advising that:-

- (i) **The previous sale did not proceed due to the floods that hit Nadi;**
- (ii) **The Plaintiff has decided to sell its hotel for NZ\$5m.**

2.37 On 5<sup>th</sup> April 2013 the Bank's Solicitors wrote to plaintiffs then Solicitors advising that the Bank has reluctantly agreed to give further time to the Plaintiff to redeem the mortgage upon following conditions:-

- (i) **Plaintiff to clear all arrears of instalments which at that date stood at \$675,991.00 on or before 15<sup>th</sup> April 2013;**
- (ii) **The sum of 500,00.00 being 10% deposit of the purchase price be paid to Plaintiff's Solicitors trust account within 30 days of arrears being cleared;**
- (iii) **Settlement to take place within 25 days unless otherwise agreed between the parties;**
- (iv) **Should the Plaintiff not be in a position to comply with those conditions the Bank will accept the tender without further notice.**

2.38 On 19<sup>th</sup> April 2013 Plaintiff's then Solicitors wrote to Bank's Solicitors advising that the money is held in their trust account on account of Plaintiff to clear part of the arrears and once it is cleared it will be paid into Bank's Solicitors trust account and thanking the Bank for indulgence given thus far to the Plaintiff to redeem the mortgage.

2.39 On 6<sup>th</sup> May 2013 the Plaintiff's then Solicitors wrote to Bank's Solicitors advising that Plaintiff has initial funding and as the settlement date is fast approaching the buyers are agitating Plaintiff to complete the subdivision. By this email they also sought the Bank's consent for the sale.



**3.0 WHETHER DIRECTOR OF LAND'S CONSENT IS REQUIRED IN RESPECT TO APPLICATION FOR INTERLOCUTORY INJUNCTION AND ACTION FOR REDEMPTION OF MORTGAGE**

3.1 Section 13 of the Crown Land Act provides as follows:-

***“13(1) whenever in any lease under this Act there has been inserted the following clause:-***

***“This lease is a protected lease under the provisions of the Crown Lands Act” (hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process or any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.***

***Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.”***

3.2 It is well established that the Director of Land's (DOL) consent can be obtained in respect of an action dealing with protected crown lease at any time before the Court pronounces an Order and or judgment in respect to the lease.

**Bolailai v. Narayan** [2007] FJHC 142 (referred to in Further Submission to the Plaintiff)

**Australia and New Zealand Banking Group Ltd v. Chand** [1992] 38 FLR61 (17 March 1992)

**Mohammed Rasul v. Jeet Singh & Anor.** [1964] 10 FLR 16

3.3 In fact in **Rasul's** case his Lordship Acting Chief Justice Hammet (as he then was) stated that he could see ***“no reason why judgment of the court dealing with the land could not properly be made” subject to the consent of***

***Director of Lands with liberty to apply for further order should consent not be granted”.***

- 3.4 In ***Bolalailai’s*** case Purchaser was seeking specific performance of Sale and Purchase Agreement of a crown lease.
- 3.5 In ***ANZ Bank’s*** case the Bank instituted proceedings to evict the lessee/mortgagor from the mortgaged property without first obtaining DOL’s consent when his Lordship Justice Byrne (as then he was) adopted the principle that consent of DOL’s can be obtained prior to order or judgment being pronounced.
- 3.6 Even ***Rasul’s*** case was instituted by the mortgagor to restrain mortgagee’s power of sale the Court after dealing with the preliminary issue as to at what stage DOL’s consent is required did not deal with the issue raised in this action as stated in paragraph 1.7 hereof.
- 3.7 Application for Interlocutory Injunction is in fact seeking an Order restraining the mortgagee from exercising its power of sale granted to it by the mortgage document and the provision of Property Law Act Cap 130 which is an incidence of contract between the mortgagor and mortgagee and does not relate to the lease.
- 3.8 In dealing with such an Application Court is no way dealing with the alienation of lease or otherwise with any incidence of the lease. If fact it is dealing with the provision of the mortgage entered into by the mortgagor and the mortgagee which relates to incidence mortgage transaction and not the lease. In other words here Court is not dealing with lease but the powers of mortgagee and mortgagor’s right to redeem the mortgage.
- 3.9 Some instance where DOL’s consent will be required are where a beneficiary is seeking restraining orders against trustee of an estate or purchaser is seeking to enforce contract of sale by way of specific performance and mortgagee/lessee is seeking vacant possession of property comprised in the Crown Lease as in these instances Court will deal directly with the lease.
- 3.10 I therefore hold that DOL’s consent is not required where a mortgagor is seeking to restrain mortgagee from exercising power of sale granted by the mortgage document or provision of Property Law Act and this also applies equally to an action for redemption of mortgage when mortgagor is attempting to redeem the mortgage which is not dealing with the incidence of the lease itself but is the exercise of contractual and statutory right of the mortgagor.

#### 4.0 **WHETHER PLAINTIFF IS ENTITLED TO REDEEM THE MORTGAGE**

4.1 Section 72(1) of the Property Law Act Cap 130 provides:-

***“A mortgagor is entitled to redeem the mortgaged property at any time before the same has been actually sold by the mortgagee under his power of sale, on payment of all moneys due and owing under the mortgage at the time of payment.”***

4.2 This provision has been extensively dealt with by Fiji Court of Appeal in **Vere v. NBF Asset Management Bank** [2004] FJCA 50; ABU 0069 2003S (11 November 2004).

4.3 The Court of Appeal in **Vere’s** case after analysing the authorities dealing with s72 of Property Law Act Cap 130 and case authorities dealing with equity of redemptions concluded that mortgagor’s right to redeem the mortgage is extinguished when mortgagee entered into a contract of sale with the third party in exercise of mortgagee’s Power of Sale irrespective of whether the contract for sale is conditional or unconditional.

4.4 The Court of Appeal in **Vere’s** case referring to his Lordship Justice Dankwerts’ judgment referring to **Property and Bloodstock Limited v. Emerton** [1968] 1 Ch 94 at page 4 stated as follows:-

***“The contention in that case, that the borrower’s equity of redemption was still operative, because, until the condition to which the contract was subject was performed, the contract was not complete and binding, did not meet with favour. It was noted that the parties to the contract were still in agreement to complete the purchase. Further, it was noted, similarly to s.79 of the Property Law Act (Fiji) that the mortgagee’s power of sale included a power to sell “subject to such conditions respecting title, or evidence of title, or other matter as the mortgagee thinks fit.” Section 79 of the Property Law Act extends the express reference to conditions, to include conditions as to “the time, or method of payment of the purchase money.”***

***It was, however, observed by Sachs L.J. that there was common ground between the parties that, upon the mortgagee entering into the contract, under the power of sale, “the mortgagor’s right of redemption is suspended, not cancelled - for it would revive if the contract went off.”***

- 4.5 In **Khan v. Fiji Development Bank** [2000] FJHC 260, his Lordship Justice Fatiaki (as then he was) held that a mortgagor can redeem the mortgage ***“until such time as a transfer of the mortgaged land has been registered by the mortgagee.”***
- 4.6 **Vere** even though not overruling the principle that mortgagor’s right to redeem mortgage exists until Transfer of mortgage property is registered has distinguished **Khan’s** case.
- 4.7 However, subsequent cases held that Plaintiff’s right to redeem mortgage is extinguished once mortgagee enters into a contract of sale with the Purchaser (Tender).
- 4.8 In **Nakuta v. Housing Authority** [2012] ABU0036.2011 (8 June 2011) the Fiji Court of Appeal adopted and applied the principle in **Vere’s** case that a mortgagor’s right to redeem the mortgage is extinguished once contract of sale has been entered into by the mortgagee.
- 4.9 In Halsbury’s Laws of England (Vol. 4, 4<sup>th</sup> edition para. 1132) where it is said, citing **Wimshurst v. Deeley** [1845] EngR 1219; (1845) 2 CB 253; **Thorn v. Public Works Commissioners** (1863) 32 Beav 490 and **Tancred, Arrel & Co v. Steel Co. of Scotland** (1890) 15 App Cas 125 that:

***“The unconditional acceptance of a tender gives rise to a contract.”***

- 4.10 It seems when the learned author made that observation on the basis of the cases decided in 1800 and related to building contracts. The tender process in respect to mortgagee sale is not the same as that of building contracts.
- 4.11 In practice the tender is treated as it traditionally was and that is it is an invitation to treat.
- 4.12 After the tenders are received then mortgagee by means adopted by it assesses the tender and makes an offer to the successful tenderer with terms and conditions that would not be in the invitation for tender.

It is then up to the tenderer whether to accept the offer or not or to accept with variation (counter-offer).

Only when the mortgagee and successful tenderer agree to all terms and conditions of sale then contract of sale is entered into.

- 4.13 I will adopt the principle in **Vere** and **Nakuta's** case in the respect to point at which mortgagors right of redemption is extinguished.
- 4.14 In this instance Bank has not yet entered into a Contract of Sale with the intending Purchaser.
- 4.15 At paragraph 35 of Usha Narayan's Affidavit sworn on 9 July 2013 she states as follows:-

**“35. THAT the Defendant has already accepted an offer for sale of the Property for \$4,300,000.00 (Four million three hundred thousand dollars). (Annexed herein and marked “UN15” is the Defendant’s letter of acceptance).”**

- 4.16 In fact the Annexure “UN15” is not an acceptance by the Bank (Defendant) but an offer by Autocare (Fiji) Ltd for purchase of the mortgaged property on terms and conditions stated therein.
- 4.17 There is no evidence before this Court that Bank has accepted the offer.
- 4.18 Therefore Plaintiff can still redeem the mortgage by paying the secured money under the mortgage prior to Bank entering into a contract of sale with the successful tenderer.
- 4.19 Plaintiff by its Counsel submitted that the Bank's refusal to grant consent to sale of the mortgaged property to Samson Construction Limited is a clog on equity of redemption.
- 4.20 Plaintiff relied on case of **Sun North Investments Pty Ltd as Trustee v. Dale & Anor.** [2013 QSC 44 (28 February 2013) and **Golobadona No 35 Ltd v. Bank of South Pacific Ltd** [2002] PSNC 36; NZ309 (11 November 2002) in support of its submission that Bank's action in not granting its consent for sale of mortgaged property to Samson Constructions Ltd is a clog in equity of redemption.
- 4.21 In Sun North's case his Lordship Justice Henry stated as follows:-

**“[77] The equity of redemption is an inherent incident of the mortgage transaction. In Team Dynamik Racing Pty Ltd v. Longhurst Racing Pty Ltd & Ors, Muir J explained:**

**“The equity of redemption is not a right or concept attached to or inherent in the secured property itself: it is an incident of the mortgage transaction.**

*... As a general proposition, conduct which has the effect of hampering redemption after the contractual date for redemption has passed is not permitted and equity will grant relief by allowing redemption. The remedy, which operates in personam, has as its foundation the prevention of unconscionable conduct. In cases such as this, unconscionability is to be found in the lender's exercising rights which constituted, in substance, a penalty or a forfeiture”.*

*[78] The principle is thus founded upon the unconscionability inherent in the transaction otherwise allowing the lender to exercise rights amounting to a penalty or forfeiture. It is the nature of the transaction, if allowed, which is unconscionable.”*

4.22 In **Sun North** case the mortgagee took the following securities from the mortgagor:-

- “1. a loan agreement for a loan of \$500,00 plus interest with capital and all interest payable 1 September 2009;*
- 2. a personal guarantee from Managing Director in respect of the loan;*
- 3. a fixed charged granted by Sun North Investments Pty Ltd over its shares in Sugarworld Pty Ltd;*
- 4. a form of authority to facilitate execution of documents;*
- 5. a form of transfer to be executed by Sun North and held in case of default or possibly in case of exercise of the option;*
- 6. an option deed granting Mr Dale the right to purchase the shares for \$2 million and apply any monies owed under the loan agreement towards part payment of the purchase price;*
- 7. a form of contract for the sale of shares to be annexed to the option agreement, “specifically catering for the fact that the contract will be entered into pursuant to the exercise of the option, that David may not actually be the buyer but a nominee may be the buyer and yet the amount payable to David under the loan agreement is still to be offset against the purchase price at completion”; and*

**8. a personal guarantee by Managing Director of obligations under the option agreement and the contract.”**

The loan was to be repaid by the Plaintiff by 29 September 2009 and an option to acquire shares was to be only exercised if there is default and it is not remedied by 31 March 2010.

When the Plaintiff obtained the loan and signed all the documents it was in desperate need of finance.

The repayment date and option exercise date by request was extended to 31 October 2009 and 17 May 2010 respectively.

Plaintiff by its director sought further extension of time for exercise of option to 13 May 2010.

On 13 May 2010 Plaintiff wrote to mortgagee's Solicitors advising that debt will be paid by 19 May 2010 and on 18 May 2010 paid \$514,055.17 in satisfaction of its debt which according to the mortgagee was \$10,472.13 less than what it claimed was owed to it. On 13 May 2013 mortgagee exercised its option to purchase the shares and did not accept the payment made by the Plaintiff.

- 4.23 In **Sun North** case the Court found that the mortgagee's (Defendant) conduct was unconscionable on the basis that the mortgagee had already tendered the loan amount and the Defendant under Option Agreement would have acquired shares worth \$5m for \$2m.
- 4.24 In **Golobadana's** case the mortgagee (Bank) in exercise of powers given under the mortgage given by Port Moresby Rugby League (POMRL) entered into a Lease and Management Agreement with the Plaintiff in respect to the mortgage property. Mortgagee upon entering into a Deed of Release with the POMRC terminated the Lease and Management Agreement.

The Plaintiff then sought injunctive orders against the mortgagee which was initially granted.

Subsequently interlocutory injunction was discharged and Court held that upon execution of the Deed of Release the mortgage has been redeemed and mortgagor retains the property and has rights superior to that of the Plaintiff.

In **Golobadana** his Honour Justice Kandakasi after reviewing the line of authorities on clog of equity of redemption stated as follows:-

***“These are numerous authorities dealing with alleged clogs or fetters on the equity of redemption. A quick perusal of these authorities reveal a number of principles. Firstly, a mortgage cannot be made irredeemable, and equity will not permit any devise or contrivance being part of the mortgage transaction or contemporaneous with it calculated to prevent or impede redemption: Fairclough v. Swan Brewery Co. Ltd [1912] A.C. 565, at. pp. 570.....***

***Secondly, the right to redeem cannot be rendered nugatory or illusory. In Fairclough v. Swan Brewery Co. Ltd (Supra) the Privy Counsel held a provision for redemption and the mortgage before it was nugatory and that the mortgagor was entitled to redeem in advance of the final payment....***

***The third principle is in the area of “collateral advantages”, the authorities do allow for collateral advantages to be given by a mortgagor to a mortgagee in consideration for a loan to him or her. Such collaterals could be upheld only if they are “not either (1) unfair and unconscionable, or (2) in the nature of the penalty clogging the equity of redemption or (3) inconsistent with or repugnant to the contractual and equitable right to redeem,” per Lord Parker Waddington in Kreglinger v. New Patagonia Meat & Cold Storage Co. Ltd (Supra at p.61).***

***Finally there are cases that could be classified as miscellaneous areas. In these areas some authorities have shown a reluctance to uphold a covenant that seeks to clog or unnecessarily fetter a mortgagor’s right of redemption. These include covenants for a repayment of a greater amount than that advanced: Booth v. The Salvation Army Building Association (Limited) (1897) 14 T.L.R. 3. Similar positions have been taken in cases containing covenants requiring a payment of a higher rate of interest upon default which may be seen as a penalty: Wanner v. Caruana [1974] 2 N.S.W.L.R. 301, at pp. 306, per Street CJ. Other cases have indicated a preparedness to strike down covenants in mortgages that seemed to impose unreasonable time periods for late redemption: Fitzgerald’s Trustee v. Mellersh [1892] 1 Ch. 385 at pp. 389-390. Furthermore, some authorities have indicated a preparedness to strike down covenants which seek to prevent a mortgagor from redeeming his property on the contractual date for repayment: Crickmore v. Freestone [1870] 40 L.J. Ch. 137, and as earlier noted after the contractual date***



***for repayment.”***

- 4.25 In the instant case there was no collateral contract or option taken by Bank at time of mortgage transaction nor is there any tangible evidence of any unconscionable conduct on the part of the Bank.
- 4.26 The conditions imposed by Bank as stated in paragraph 2.37 hereof is not unreasonable given the fact that Plaintiff has reneged on its earlier undertaking and promises to redeem the mortgage and does not meet the test for it to be clog on equity of redemption.
- 4.27 Furthermore Plaintiff by its then Solicitors wrote to Bank on 19 April 2013 advising that monies had is held in their Trust Account will be paid once it is cleared. No such payments have been made.
- 4.28 I repeat the comments made at paragraphs 4.14 to 4.18 of this Ruling.

## **5.0 APPLICATION FOR INTERLOCUTORY INJUNCTION**

- 5.1 The principles relating to Application for Interlocutory Injunction has been well settled in that for the Court to grant Interlocutory Injunction Court must be satisfied that:-

- (i) **There is a serious question to be tried;**
- (ii) **Balance of Convenience favour granting of the interlocutory injunction:**

**American Cyanamid v. Ethicon Co. Ltd** [1975] 1AllER 504;  
**Mohammed v. ANZ Banking Group Ltd** [1984] 30FLR 136;  
**Roxy Motor Parts v. Habib Bank Ltd** [2005] FJCA 49,  
ABU0060J 2004S (15 July 2005)

- 5.2 In **Strategic Nominees Ltd (In Receivership) v. Gulf Investments (Fiji) Ltd** [2011] FJCA 23; ABU 0039 2009 (10 March 2011) his Lordship Justice Marshall (as then he was) cast some doubt as to applicability of the principle in ***American Cyanamid*** case in respect to Interlocutory Injunction Application to restrain mortgage sale.
- 5.3 His Lordship Justice Marshall (as then he was) quoted the following comments of the trial Judge, his Honour Justice Walsh and High Court Judge his Lordship Chief Justice Barwick from **Inglis v. Commonwealth Trade Bank of Australia** [1971-1972] 126 CLR 161.

His Lordship Justice Walsh:

***“But the proprietary rights as owner which the plaintiffs have are rights which are subject to and qualified by the rights over the property given to the defendant by the mortgage. If the defendant exercises the latter rights or threatens to do so that is not, as such, an act or a threatened act in contravention or infringement of the plaintiffs’ proprietary rights”. (page 166)***

***“In my opinion the principles on which the Court has always acted do not permit the Court to intervene because of the existence of those claims, and I am of the opinion that I should not grant the application.” (pages 167-168)***

His Lordship Chief Justice Barwick:

***“The case falls fairly, in my opinion, within the general rule applicable when it is sought to restrain the exercise by a mortgagee of his rights under the mortgage instrument. Failing payment into court of the amount sworn by the mortgagee as due and owing under the mortgage, no restraint should be placed by order upon the exercise of the respondent mortgagee’s rights under the mortgage.” (page 169)***

- 5.4 His Lordship Justice Marshall (as then he was) in referring to **Mobil Oil Co. Ltd. v. Rawlinson** [1981] 43 P & CR 221; **Citibank Trust Ltd v. Aviyor** [1987] 3 All ER 241 and **National Westminster Bank Plc. v. Skelton** [1993] 1 All ER 2&2 cases delivered after **American Cyanamid** and **Inglis** stated as follows:-

***“37. Because there are no relevant proprietary interests or other legal interests in place and because the policy of the law is ‘no restraint’ none of these cases even mention American Cyanamid and the quia timet interim injunction principles. But in Fiji the only case ever cited in the Samuel Keller line is Inglis. The later cases in the line were not before the Fiji courts in any of the cases discussed above such as Naigulevu. This has lead to the introduction of, in a wholly inappropriate context, American Cyanamid principles. At least in the earlier Fiji cases Inglis has been, after much irrelevant discussion followed. I believe the decision in this case is the first occasion what in any common law jurisdiction that the***

***Samuel Keller/Mobil Oil principle has not been applied in a case that falls four square within the factual matrix of cases such as Samuel Keller, Inglis and Skelton. It is not in the interest of the common law jurisdiction in Fiji for this to happen.”***

- 5.5 His Lordship expresses in the view that **American Cyanamid** principle only applies to restrain the Defendant from committing a wrong.
- 5.6 However the courts in Fiji has over the years applied both principles in dealing with Application for Interlocutory Injunction to restrain mortgagee sale as the principles in **Inglis** and **American Cyanamid** does not contradict but supplement each other.

**Roxy Motor Parts** (Supra) and **Mohammed v. ANZ Banking Group Ltd** [1984] 30FLR 136 (2<sup>nd</sup> August 1984)

- 5.7 In **Mohammed v. ANZ Banking Group Ltd** (1984) 30 FLR 136 (2 August 1984) his Lordship Justice Kermode (as then he was) stated as follows:-

***“In 1972 in the case of Inglis & Another v. Commonwealth Trading Bank of Australia 126 C.L.R. 161 the High Court of Australia in a very short judgment delivered by Barwick C.J. dismissed an appeal from Walsh J’s decision dismissing an application for an interim injunction seeking to restrain a mortgagee exercising powers conferred by a mortgage. The learned Chief Justice said:***

***‘I have not heard anything, nor been referred to any authority, which causes me in the least to doubt the correctness of the refusal of Walsh J. to grant the interlocutory injunction sought by the appellant or the reasons which he gave for that refusal. I find no need to discuss the arguments offered, and the authorities referred to, by the appellant. Such of them as were relevant are sufficiently answered in his Honour’s reasons.***

***The case falls fairly, in my opining, within the general rule applicable when it is sought to restrain the exercise by a mortgagee of his rights under the mortgage instrument. Failing payment into court of***

***the amount sworn by the mortgagee as due and owing under the mortgage, no restraint should be placed by order upon the exercise of the respondent mortgagee's rights under the mortgage.'***

***Mr Koya argues that the granting of an interlocutory (interim) injunction is still governed by equitable principles. There is no doubt that in an appropriate case the Court is empowered to restrain a mortgagee exercising power of sale. Mr Koya relies on the case of American Cyanamid Co. v. Ethicon Ltd. [1975] UKL 1; 1975, A.C. 396 and has put forward several propositions supported by a number of authorities.***

***Those authorities support certain principles enunciated in the Cyanamid case I would consider on the balance of convenience that damages would be an adequate remedy to the plaintiff."***

5.8 His Lordship further went on to say that:-

***"If I had to consider the principles enunciated in the Cyanamid case I would consider on the balance of convenience that damages would be an adequate remedy to the plaintiff."***

5.9 In conclusion his Lordship stated as follows:-

***"I do not consider however, I can or should interfere with the Bank's exercise of powers conferred on it by the said mortgage. It has a statutory power to sell under the mortgage and this case is in any event a case where an interim injunction would not be granted because in my view damages would be an adequate remedy if the plaintiff were to succeed on any of her claims against the Bank."***

5.10 In **Propst v. ANZ National Bank Limited** [2012] NZHC 1012 (11 May 2012) his Lordship Justice Gilbert in dealing with Application to restrain mortgagee's power of sale under the heading Legal Principles stated as follows:-

***"The Plaintiff must show that there is a serious question to be tried. The Court must consider where the balance of convenience lies and whether overall justice is best served by granting or withholding the injunction in all of the circumstances of the particular case.***

***Unless the validity of a mortgagee's power of sale has been impeached, the normal rule is that an injunction restraining the exercise of that power will not be granted unless the mortgagor pays the amount secured by the mortgage to the court.***

***In such cases, the court will consider what sum, if any, should be paid to the court to protect the mortgagee."***

- 5.11 His Lordship cited ***American Cyanamid*** and ***Parry v. Grace*** [1981] 2 NZLR 273 (HC) as authority for above principles.
- 5.12 In light of the decisions in ***Mohammed v. ANZ Banking Group Ltd; Roxy Motor Parts Ltd; Strategic Nominees; Westpac Banking Corporation v. Adi Mahesh Prasad*** it is apparent that depending on particular circumstances of the case both principles are equally applicable to Application for Interlocutory Injunction to restrain exercise of mortgagee's power under the mortgage.
- 5.13 In any event the grant of injunction is a discretionary remedy and as such the Court should be able to exercise its discretion to do justice between the parties within the confines of established legal principles and law.
- 5.14 The Plaintiff in this case has not challenged the validity of the mortgage or Bank's power of sale granted pursuant to the mortgage but has challenged the manner in which the tender process was handled and conduct of the Bank in not granting further time to Plaintiff to redeem the mortgage.
- 5.15 Under the circumstances the Plaintiff is required to deposit the balance debt owing to the Bank with court to enable the Court to restrain exercise of Bank's power of sale under the mortgage. ***Inglis v. Commonwealth (Supra)***.
- 5.16 Since the Plaintiff has not paid the mortgage debt in Court it is not entitled to the Interlocutory restraining Orders it is seeking in this matter.
- 5.17 However in the interest of justice I would consider as to whether the Plaintiff is entitled to interlocutory injunction relief under the principles of ***American Cyanamid***.

**Whether there is a serious question to be tried?**

- 5.18 Plaintiff has challenged the manner in which the Bank had conducted the tender process.
- 5.19 It is well established that when exercising power of sale under its mortgage

Bank as mortgagee is not acting as trustee of the mortgagor.

- 5.20 In **Warner v. Jacob** [1882] 20 Ch D 220 his Lordships Justice Kay stated as follows:-

***“The result seems to be that a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud.”***

- 5.21 This principle has been cited and adopted in many cases dealing with mortgagee’s exercise of power of sale.

**Tubunavere v. Colonial National Bank** [2007] FJHC 129; Civil Action No. 486 of 2000 (2 March 2007)

**Myong Chung Kim v. Fiji National Provident Fund** [1998] FJHC 172: HBC 568j of 1998 (14 December 1998).

- 5.22 The Plaintiff alleged that the tender price of the mortgaged property is undervalued.

- 5.23 In **Myong Chung Kim’s** case his Lordship Justice Byrne (as then he was) quoted the following comments of his Lordship Justice Scott (as then he was) from **Islam Ali v. Westpac Banking Corporation** HBC 0475 of 1997S:-

***“As to the allegation of undervalue, while I accept that a mortgagee owes a mortgagor a duty of care when exercising its powers of sale, first, there is no Action pending before this Court alleging a breach of such duty and secondly, it is perfectly clear that a Court will only interfere to restrain completion of a conveyance in such circumstances (a) if the moneys due under the mortgage are tendered by the mortgagor and (b) if the Court is satisfied that the mortgagee has not acted in good faith (see Property and Bloodstock Ltd v. Emerton (1968) Ch. 94).”***

- 5.24 Plaintiff relies on the Valuation Report dated 1<sup>st</sup> December 2008 from Pacific Valuations Ltd and marked as Annexure “MS-11” to Affidavit of Mohammed Sahil sworn on 13 June 2013.

5.25 It is noted that the valuation report is qualified in two aspects. First one being at paragraph 2 of 1<sup>st</sup> page of the report where it is stated:-

**“The basis of our valuation is the open market value of the property upon satisfactory completion of the Shopping Mall and the Hotel project.”**

Secondly under heading Valuation Approach on page 15 it is stated:-

**“In the absence of any comparable sale, the market value of the property has been arrived at by Summation Method of valuation i.e. new replacement cost of the improvements plus the value of other improvements and lessees and interest and with the final figure checked with the Income Approach based on projected Cash Flow provided to us.”**

5.26 Court also takes note of the fact the mortgaged property and/or area surrounding the mortgaged property was subject to massive flooding in 2009 and natural disaster after that.

5.27 There is also no evidence before the Court as to what the value of the mortgage property would be now given that project is not fully completed and the mortgaged property and/or its surrounding area have been subject to natural disaster after the report.

5.28 The tender/offer received by the Bank, was after several advertisements calling for sale of the mortgaged property.

5.29 At paragraph 47 to 49 of the Mohammed Sahil’s Affidavit in Support sworn on 13 June 2013 he states as follows:

***“47. THAT from late December 2012 until mid-March 2013, the Defendant published in the local papers advertisements inviting tenders for the purchase of the mortgaged property. I annex hereto marked as Annexure “MS-28” a true copy of an advertisement titled ‘Mortgagee Sale’ published in the Fiji Times on Saturday 2<sup>nd</sup> March 2013. In so far as the Plaintiff is aware the same annexed advertisement was only published on the various occasions.***

***48. THAT the Defendant in the advertisements published by it in the local papers namely the Fiji Times and Fiji Sun***

***sought tenders for the purchase of the entire mortgaged property as well as tenders for the purchase of the hotel site only.***

***49. THAT I verily believe that the Defendant did not engage any experts to advice on the sale and marketing of the property so as to ensure that the substantial and specialised property of the Plaintiff obtained the best price that can be reasonably obtained for it and that the Defendant did not utilise any other methods apart from advertising itself the mortgaged property for sale in the local papers.”***

5.30 It is therefore apparent that the Bank advertised the mortgagee sale on various occasions for three months before receiving the tender.

5.31 During the period and soon after service of initial demand the Bank had allowed Plaintiff various opportunities to redeem the mortgage.

5.32 I find that the Bank at all times acted in uttermost good faith towards the Plaintiff and in contrast Plaintiff despite several undertakings failed to keep its side of the bargain.

5.33 I therefore find that there is no serious question to be tried.

#### **Balance of Convenience**

5.34 One aspect of balance of convenience is that whether damages would be an adequate remedy.

5.35 The mortgaged property is a Hotel/Commercial Development lease and as such damages (if any) suffered by the Plaintiff as a result of sale of the mortgaged property is ascertainable and Bank's ability to pay any damages assessed by the Court is not doubted.

5.36 Other facts which tips the balance of convenience in favour of the Banks are as follows:-

- (i) Bank commenced mortgagee sale/legal action in February 2011;
- (ii) Plaintiff through its solicitor and itself undertook to redeem the mortgage on several occasions but failed to do as appears from paragraphs 2.10 and 2.16 of this Ruling;



- (iii) Plaintiff had used various methods, techniques and threats to delay the inevitable as appears in paragraphs 2.10, 2.14, 2.16, 2.22 and 2.24 of this Ruling;
- (iv) The Sale and Purchase Agreement and subsequent Lease Agreement with Anil Singh and Mohammed Naseeb substituted by Hibiscus Pacific Resort Limited on the face of it turned out to be a sham as since commencement of the so-called lease agreement; no rental has been paid by the tenant as appears in paragraph 38 of Mohammed Sahil's Affidavit sworn on 13 June 2013 where he states as follows:-

***“38. THAT the lessees, Hibiscus Pacific Resorts Limited of the hotel who were in possession of the premises since January 2012 defaulted in its payment as required under the agreement. Subsequently the Plaintiff discovered that chattels belonging to the Plaintiff had been removed from the hotel premises. On 15 May 2012, the Plaintiff demanded from the lessee payment of the monies due and owing. I annex hereto marked as Annexure “MS-23” a true copy of letter dated 15 May 2012 from the Plaintiff to the lessee, Hibiscus Pacific Resorts Limited.”***

- 5.37 Plaintiff has on or about 29 March 2013 entered into a Sale and Purchase Agreement with one Samson Construction Ltd (**“Samson”**), a newly formed company and registered in New Zealand for sale of part of the mortgage property which requires subdivisions of the mortgage property.
- 5.38 Despite Bank's request Plaintiff has not provided any evidence to show that funding is available to the purchaser to purchase the property.
- 5.39 In fact Bank through its Solicitor's letter dated 5 April 2013 gave its consent for sale of the mortgaged property to **Samson** on conditions appearing in paragraph 2.37 hereof.
- 5.40 Despite Plaintiff's then Solicitor's advice Bank's Solicitors that funds are held in their account and will be paid to Bank's Solicitor's trust account once funds are cleared no such payment has been made.
- 5.41 It is also well known fact that process of subdivision of properties in Fiji takes about twelve to eighteen months and as such Bank as mortgagee cannot be asked to wait for that long to recover its debt once mortgagor has defaulted

under the mortgage.

- 5.42 Whist the Court can sympathise with the Plaintiff for investments made into the venture at the same time the court cannot deprive the Bank as mortgagee of its contractual and legal right to exercise its power of sale granted by the mortgage and Property Law Act Cap 130.
- 5.43 At this point I wish to echo the following comments made in **Strategic Nominees** case:-

***“Securisation of loans together with guarantees of debts have now for a very long time been at the centre of commercial lending by banks and other financial institutions. They are important legal mechanisms essential to the flow of lending required in a market economy.***

***Because of their importance equity and common law courts have always insisted that the mortgagees remedies upon default including power of sale remain unrestrained by the courts.***

***This is shown by a succession of recent cases since 1970. What they all have in common is an attempt by the mortgagor to set up a claim for breach of contract, wilful default or even defamation against the mortgagee. Then an attempt is made to restrain the sale of the mortgaged property until the court can adjudicate upon the set up claim. The mortgagor hopes that these usually artificial and thin claims will somehow win the day and the mortgage will be wholly or partially discharged and the companies will be able to keep its property. If the mortgagor finally loses his set up claim he will have delayed the day of payment. That is also his objective.***

***It is not in the interest of Fiji for the law to be changed in this way because Fiji needs bank and financial institutions whether from Fiji or from overseas to be able to make loans secured on property. In many cases such loans are instrumental and successful in saving businesses on the edge of collapse or of ensuring profitable development where otherwise there would be a shortage of capital and finance. Some of the time the business plan of the debtor and mortgagor fails. In that situation the mortgage security must fall into the bank or financial institution within the law quickly and without being clogged and delayed by court actions that are not within the framework of law applicable to such securities.”***

- 5.44 The Lord Cottenham when dealing with application to set aside mortgagee sale **Jones v. Matthie** 11 Jur. 504 made the following comments which is quoted in

**Warner v. Jacob (Supra):**

***“Such a power as this may, no doubt, be used for purposes of oppression, but when conferred it must be remembered that is so by a bargain between one party and the other, and it is for the party who borrows to consider whether he is not giving too large a power to him with whom he is dealing. If the power is exercised for fraudulent purposes this Court will interfere, and as in other cases, if the party actually deposits in Court the amount due, it will not allow the power to be exercised at all.”***

- 5.45 It is apparent that the Plaintiff not long after obtaining credit facilities from the Bank was facing difficulty in meeting its obligations to the Bank which left the Bank with no option but to recall its debt by exercising its powers under the mortgage and there is no evidence of any fraud on part of the Bank.
- 5.46 I therefore find that balance of convenience favours the Bank.
- 5.47 I must clarify at this point that even if balance of convenience favoured the Plaintiff it will not have any bearing on this Ruling on the ground that Plaintiff has failed to pay the mortgage debt in Court as conditions for granting of injunction in the absence of challenge to validity of the mortgage or lawfulness of the exercise of Bank’s power of sale.

***Inglis v. Commonwealth; Strategic Nominees; Mohammed v. ANZ Banking Group Ltd (Supra)***

**Undertaking as to Damages**

- 5.48 I directed parties to file further submissions on the issue as to whether the very property which is subject to mortgagee sale can be relied in support of Undertaking as to Damages.
- 5.49 Both parties have not filed any meaningful submission on this issue.
- 5.50 In view of my ruling on Application on ***Inglis*** and ***Cyanamid*** principles, I do not make any determination on this issue in this case.

**6.0 CONCLUSION**

- 6.1 In view of what has been said above I do not think that the Bank should be

stopped from exercising its power of sale any further.

6.2 As stated earlier if the Bank has not entered into a contract with the successful tenderer as no such evidence was put before the Court the Plaintiff is at liberty to redeem the mortgage prior to Bank entering into a conditional or unconditional contract of sale of the mortgaged property. However, if contract of sale has been or will be entered to prior to Plaintiff redeeming the mortgage then as aforesaid Plaintiff's right to redeem mortgage has been or will be extinguished.

7.0 Accordingly I make the following Orders:-

- (i) Order made on 12 July 2013 for Defendant not to formalise the sale and purchase agreement until the hearing of the application for injunction and that the status quo to be maintained is hereby discharged.
- (ii) Plaintiff's Application for Interlocutory Injunction by Notice of Motion dated 17 June 2013 and Summons for Judgment in Default of Defense filed on 24 July 2013 are dismissed and struck out.
- (iii) Plaintiff is to pay Defendant's costs of the Applications assessed in the sum of \$2,000.00.
- (iv) Defendants to file and serve its Statement of Defense within fourteen (14) days from date of this Ruling.
- (v) Substantive matter is to take its normal course.

**KAMAL KUMAR**  
**JUDGE**

**At Suva**

**4<sup>th</sup> October 2013**