

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 458 of 1993

BETWEEN : **RESOLUTION TRUST CORPORATION** a Receiver for American Federal Savings Loan Association of Colorado and American Savings of Colorado
1st PLAINTIFF

: **THE CADLE COMPANY** of 100 North Center Street, Newton Falls, Ohio, United States
2nd PLAINTIFF

AND : **LEINANI K. BORTHLES & LARRY LYNEL BORTLES** both of Qeleya Street, Lami
1st DEFENDANT

: **A. MITCHELL GAY** of 108 Denver Trail, Azlea, Texas, United States, Radiologist, for 'Fiji Marina Partners'
2nd DEFENDANT

: **ALAN C. BEALL** of Honolulu, Hawaii, Real Estate Developer and Consultant, for 'Fiji Pacific Partners'
3rd DEFENDANT

RULING

BEFORE : **Acting Master Thushara Rajasinghe**

COUNSEL : **Mr. Clerk** for the Plaintiff
Ms. S. Shameem with D. Gandhi for the 1st Defendant
Mr. Nagin for the 2nd and 3rd Defendant

Date of Hearing : **29th January, 2014**

Date of Ruling : **2nd June, 2014**

A. INTRODUCTION

1. This is the Summons filed by the first and second named first Defendants (hereafter referred as the first Defendants) pursuant to Order 14 rule 11 of the High Court rules, seeking following orders inter alia;
 - i. *That there be stay of execution of the summary judgment entered against the first Defendants on 31st of March 2009,*
 - ii. *That the summary judgment so entered in this matter be set aside and the first Defendants be given unconditional leave to defend the within action,*
 - iii. *That cost of the application be costs in the cause,*

2. Larry Lynel Bortles, the second named first Defendant filed his affidavit in support for the Summons together with the affidavits of Karen Y Hurt, Marilyn B Wykoff, Robert C Hastings, and William E McCoy Jnr. Subsequently Denise Harkless, an account officer of the second Plaintiff filed his affidavit in opposition to this Summons. Mr. Bortles then filed a reply affidavit on 21st of January 2014 which was followed by an affidavit of Mr. Harkless filed on 11th of February 2014. The learned counsel for the second and third Defendants informed the court that they will not file any affidavits, but will make their submissions during the hearing of the Summons. Subsequent to the filing of respective affidavits of the parties, this Summons was set down for hearing on 29th of January 2014. Dr. Shameem, the counsel for the First Defendants, Mr. Nagin, the counsel for the second and third Defendants and Mr. Clerk, the counsel for the Plaintiff made their oral arguments and submissions during the cause of the hearing. Beside of their oral submissions, the counsel for the first Defendants and the Plaintiff submitted their written submissions. Having considered the respective affidavits, written and oral submissions of the parties, I now proceed to pronounce my ruling as follows.

B. BACKGROUND.

3. The Plaintiff instituted this action by way of a writ of summons dated 25th of August 1993 against the first Defendants seeking following orders inter alia that;
 - i. *Damages in the amount of US \$ 2,878,910.65 and interest at the rate of 7.02% per annum from 4th May 1991 and late charge in the amount of US \$ 742,002.39 and cost, and*
 - ii. *Damages in the amount of US \$ 954,375.00 and \$ 18,213.00 representing cost and attorney's fees and interest at the rate of 3.41% from 26th of August 1992; and,*
 - iii. *An order that the Defendants and each of them:*
 - (a) *be restrained and an Injunction be granted restraining them and each of them until further order whether by themselves their servants or agents or otherwise howsoever from transferring, dealing with, charging ,mortgaging, assigning, disposing of (otherwise than to the Plaintiff or with prior written consent of the Plaintiff's solicitors)or removing from the jurisdiction any of their or each of their property or monies or asset including property held by third party entities over which the Defendants or each of them have ownership and or control within the jurisdiction of this Honorable Court including but not limited to the property being described as Certificate of Title 6684 and Native Lease 8720; and*
 - (b) *forthwith disclose and within fourteen days after the service of this order upon them make and serve on the Plaintiff's Solicitors and Affidavit disclosing the full value of all of their and each of their assets within the jurisdiction of this Court identifying with full particularity the nature and whereabouts of all such assets and whether the same be held in their own name, jointly or by one or more, by one or the other or by nominees or companies or otherwise held on their or on*

each of their behalf and without prejudice to the generality of the foregoing specifying:

- a. the identity of all bank, financial institution or other accounts held in their name or names; or jointly ,or by nominees or otherwise on or for their or each of their behalf, and the balance of each of such accounts and the name and address off the branch at which it is held;*
 - b. any and all other assets money or goods owned by them or each of them and the whereabouts of the same and the names and address of all persons who have or may have the possession custody or control of such assets moneys goods at the date of service of this order; or*
- iv. Such further orders in aid of same as to this Honorable Court seems just;*
 - v. An order that the Plaintiff may retain Caveats on the title of the properties of the Defendants and each of them including properties held by entities over which the Defendants and each of them have sole ownership and or control being CT 6684 being Lot 1 on DP 1277 and Native Lease 8720 being Lot 5 Qeleya subdivision pending the final determination of the Plaintiff's claim; and*
 - vi. The costs of and incidental to this action on an Attorney/Client basis;*
 - vii. Such further and other relief as this Honorable Court deems just.*
4. The Plaintiff's claim is founded on two Judgments dated 3rd of May 1991 and 25th of August 1992 respectively delivered by the United State District Court for the District of Colorado against the First Defendants. The Plaintiffs claim that they were dully assigned to the said Judgments on the 29th of September 1995 and 18th of November 1999 respectively. Further the Plaintiff stated that the first Defendant have not honored the said judgment sum so far.

5. The first Defendants served their acknowledgement of service through their solicitors on the 7th of September 1993 and served their statement of defence on 22nd of September 1993. Subsequently Munro Leys, counsel for the first Defendants made an application pursuant to Order 67 r 6 to withdraw as counsel for the first Defendants as the First Defendants wanted to terminate their service and appoint a new counsel for them. The court granted orders accordingly on the 11th of August 2006. However, the First Defendants had not appointed any counsel to represent them until sometimes in 2009. In the meantime, the Plaintiff filed an amended statement of claim dated 12th of September 2006 and added the second plaintiff and three more Defendants to the action. The amended statement of claim was served on the first Defendants on their last known address in the Philippines with the leave of the court. Second and third Defendants served their statement of defence and counter claim on the 22nd of September 2006 and the Plaintiff served their defence to the counter claim on 27th of October 2006.

6. The Plaintiff then filed a Summons pursuant to Order 14 r 1 dated 13th of September 2006 seeking a summary judgment against the first Defendant on the following terms;
 - a. *Damages in the amount of US \$ 2,878,910.65 and interest at the rate of 7.02% per annum from 4 May 1991 and late charges in the amount of US \$ 742,002.39 and costs, and*
 - b. *Damages in the amount of US \$ 954,375.00 and \$ 18,213.00 representing costs and Attorney's fees and interests at the rate of 3.41% from 26 August 1992, and*
 - c. *An order that the Plaintiff retain caveats on the title of the properties of the First Defendants and each of them including properties held by entities over which the first Defendant and each of them have sole ownership and or control being CT 6684 being Lot 1 on DP 1277 pending realization of the judgment debt,*
 - d. *The cost of and incidental to this action on an Attorney / client basis,*
 - e. *Such further and other relief as this honorable court deems just,*

7. The Plaintiff again had to serve the Summons for Summary Judgment together with the affidavit in support on the first Defendant at their last known address in the Philippines with the leave of the court as the first Defendant had not been appointed any solicitor since the withdrawal of their previous counsel in August 2006.

8. Upon being satisfied with the affidavit of service, the court entered the Summary Judgment against the First Defendants in their absence on the 31st of March 2009 on the following terms;
 - a. *Damages in the amount of US \$ 2,878,910.65 and interest at the rate of 7.02% per annum from 4 May 1991 and late charges in the amount of Us \$ 742,002.39 and costs ; and*
 - b. *Damages in the amount of US \$ 954,375.00 and \$ 18,213.00 representing costs and Attorney's fees and interest at the rate of 3.41% from 26 August 1992; and*
 - c. *An order that the Plaintiff retain caveats on the title of the properties of the first Defendants and each of them have sole ownership and control being CT 6684 being Lot 1 on DP 1277 pending realization of the judgment debt; and*
 - d. *The costs of and incidental to this action on an Attorney/client basis,*

9. The first Defendants are now trying to set aside the said Summary judgment entered against them on 31st of March 2009. This application to set aside the Summary Judgment is founded on two main contentions. The first is that the Summary judgment has entered irregularly, wherefore it should be set aside unconditionally. The second contention is the merit of the Defence. The first contention of irregularity constitute with two main components, which are ;
 - i. Non service of the Amended Statement of Claim and the Summons for Summary Judgment,
 - ii. Irregularities in the Summary Judgment,

C. THE LAW

10. I now wish to discuss the applicable laws on the Summary Judgment and the setting aside of Summary Judgment entered against a party who does not appear at the hearing.

11. Order 14 rule 1 (1) states that ;

“Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the Plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such claim, or has no defence to such claim or part except as to the amount of any damages claimed, apply to the court for judgment against that defendant”.

12. Sir Nicolas Browne Wilkinson V.C. in Express Newspapers Plc v News (UK) Ltd and others (1990) 3 ALL E.R.376 outlined the basic principle governing Summary Judgment, where his lordship held that

“Summary judgment under Order 14 is a judgment given in the clearest cases before an ordinary trial has taken place. Summary Judgment is only given where it is clear that there is no arguable defence to the claim. If there is an arguable issue to be tried, in particular where there are matters of facts to be resolved which can only be resolved at trial, the court gives leave to defend and the case goes to trial to be heard out. Summary judgment is a mean of short circuiting that system in the clear case where it is shown that, even if it went to trial, the defence could not succeed”.

13. In view of Sir Wilkinson V.C’s observation in Express Newspapers Plc (supra) the applicant is required to satisfy the court that the defendant has no arguable defence to the claim in order to obtain a summary judgment pursuant to order 14 r1. . The

Summary Judgment can only be set aside on the application of the affected party who did not appear at the hearing of the application for Summary Judgment. Order 14 rule 11 deals with such situation where it stipulates that ;

“Any judgment given against a party who does not appear at the hearing of an application under rule 1 or rule 5 may be set aside or varied by the court on such terms as it thinks just”.

14. I now turn to discuss the laws applicable to the setting aside of the Summary Judgment under Order 14 r11. The incongruity over the effect of a summary judgment was removed in Spira v Spira (1939) 3 All E.R.924 where it was held that default proceedings ought not to interfere with the performance of justice and adopted the principles laid down by Lord Atkin in Evans v Bartlam (1937) A.C. 437 where his lordship held that *“ the principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure”*. The dictum of Lord Atkin and the decision of Spira(supra) have cleared the uncertainty and confirmed that the principles applicable to setting aside of a default judgment are applicable to set aside a summary judgment entered in the absence of the affected party.

15. The Default judgments are being divided into two spheres as regular and irregular judgments. Fry L.J in Anlaby and others v Peatorius (1888) Q.B.D. 765, held that *“There is a strong distinction between setting aside a judgment for irregularity in which case the Court has no discretion to refuse to set it aside, and setting it aside where the judgment though regular, has been obtained through some slip or error on the part of the defendant in which case the Court has a discretion to impose terms as a condition of granting the defendant relief.*

16. In respect of the regular default judgments, Justice Byrne in Automart Ltd v Reddy (1992) FJHC 40; HBC 0369j.91s (23 September 1992) held that “*the discretion to set aside the judgment is unrestricted and unconditional. Order 14 rule 11 of the High Court rules states that any judgment given against a party who does not appear may be set aside or varied by the court on such terms as it thinks just. The test is not whether a defendant has a good defence on the merits, but whether he is able to show a defence which discloses an arguable or triable issue*”.

17. Conversely, the Fiji Court of Appeal in Wearsmart Textiles Limited v General Machinery Hire Limited & Another (Civil Appeal ABU No 0030/1997S) move further from the issue of arguable or triable defence by adopting the principles laid down in Alpine Bulk Transport Co, Inc v Saudi Eagle Shipping Co . inc (1986) 2 Lloyd’s Rep 221, where it held that;

“ dealing with the discretionary powers of the court under English Order 13 r 9 sub rule 14, the Supreme Court Practice 1997 (the white book) (vol.1 p 145) cites the court of appeal’s judgment in Alpine Bulk Transport Co. inc v Saudi Eagle Shipping Co . inc (1986) 2 Lloyd’s Rep 221 as authority for following prepositions ;

- a. *It is not sufficient to show merely “arguable” defence that would justify leave to defend under order 14; it must both have “a real prospect of success” and “carry some degree of conviction”. Thus the court must form a provisional view of the probable outcome of the action.*
- b. *If proceedings are deliberately ignored this conduct, although not amounting to an estoppels at law, must be considered “ in justice” before exercising the court’s discretion to set aside,*

Notwithstanding the court of appeal’s later decision in Allen v Taylor (1992) P.I.Q.R. 255, which purports to dilute the principles emerging from Saudi Eagle, we subscribe to the White Book’s preferred view that “ unless potentially credible affidavit

evidence demonstrates a real likelihood that a defendant will succeed on fact, no “real prospect of success” is shown and relief should be refused”.

18. Accordingly, the main consideration for setting aside a summary judgment is the existence of a defence which has a real prospect of success and carries some degree of conviction. That is the onus of the Defendant to satisfy in an application of this nature.

19. Justice Fatiaki in **FNPF v Shiri Dutt (1988) 34 FLR 67** has listed the grounds to be considered for the set aside a default judgment, where his lordship held that “ *there judicially recognized “tests” may be conveniently listed as follows ;*

- (a) Whether the defendant has a substantial ground of defence to the action,*
- (b) Whether the defendant has satisfactory explanation for his failure to enter an appearance to the writ; and*
- (c) Whether the plaintiff will suffer irreparable harm if the judgment is set aside,*

20. Apart from these grounds, the issue of delay could be considered as a peripheral ground which does not have much impact alone, however that could be a strong ground to satisfy the issue of prejudice to the Plaintiff. Justice Fatiaki observed in **FNFP v Shiri Dutt (supra)** that “*in this regard in my view it is proper for the court to consider any delay on the defendant’s part in seeking to set aside the default judgment and how far the plaintiff has gone in the execution of its summary judgment and whether or not the same has been stayed”.*

D. Non Service of the Amended Statement of Claim and Summons for Summary Judgment;

D.1 Defendants’ Submissions,

21. The learned counsel for the first Defendants submitted that the service is a nullity and the order made subsequently must be set aside. Mr. Bortles deposed in his affidavit that he was not in the Philippines during the time of service of the amended statement of claim and the summons for summary judgment on the address in the Philippines. He categorically denied the giving an authority to any one at that address to receive any document on his behalf. He further denied of receiving any documents from anyone at the address. The Defendants strongly contended that the Summons was never served on them. The learned counsel while citing several leading authorities on the issue of defective service submitted that the attention or the knowledge of the parties is not a proper service and requirements of the service must be strictly adhered, otherwise the process of service is defective and the orders made subsequently are null and void.
22. The Learned counsel for the 2nd and 3rd Defendants submitted that the service was not a proper one. He emphasized the proper service would be a personal service on the Defendants.

D.2 Plaintiffs' Submissions,

23. The learned counsel for the Plaintiffs submitted that the Defendants made no attempt to appoint a new counsel subsequent to the withdrawal of their previous solicitors. Hence, the Plaintiff had no address of the Defendants to serve documents as required by O 12 r 2 (1). Accordingly the Plaintiffs had to serve the documents at the last known address or the usual address of the Defendants which they served accordingly. Denise Harkless in his affidavit in opposition deposed that the address in the Philippines was provided by the Defendants' previous solicitors as their last known address.

E. THE LAW & ANALYSIS

24. Having considered the oral arguments and the submissions of the counsel, it would be appropriate to examine the proper procedure for service of the amended statement of claim and the summons for summary judgment out of the jurisdiction.
25. Order 10 deals with the procedure for service of writ, originating Summons (other than ex parte originating summons or an originating summons under order 113), notice of an originating motion and a petition (O 10 r 5 (1) (2)). These originating documents must be served personally pursuant to O 10 r 1. However rule 2 has provided an optional alternative mode of service if the defendant resides within the jurisdiction.
26. The procedure for service of the other documents, which are not required to be served on any person personally, has dealt in Order 65. Order 65 r 5 deals with the ways of ordinary service of documents.
27. Order 11 has enunciated the applicable procedure to serve a writ out of the jurisdiction. The main requirement for such a service is the prior leave of the court. Order 11 rule 3 has provided the ways of effective service of a writ out of the jurisdictions as it states that ;
- “ subject to the following provisions of this rule, Order 10 rule 1 (1), (4), (5), and (6) and Order 65, rule 4 shall apply in relation to the service of a writ, notwithstanding that the writ is to be served out of the jurisdiction”.*
28. Order 11 r 6 (1) has extended the procedure which has provided for the service of writ out of the jurisdiction to the service of other originating documents out of the jurisdictions. Order 11 rule 6 (1) states that ;

“Subject to Order 73, rule 4, rule 1 of this Order shall apply to the service out of the jurisdiction of an originating summons, notice of motion or petition as it applies to service of a writ”.

29. Having reviewed the procedure for service of originating documents and other documents, I now draw my attention to examine what is the proper procedure for service of this summons for summary judgment and the amended statement of claim on the defendants.
30. The Plaintiffs filed their amended statement of claim before the pleadings were deemed to be closed. Wherefore, the Plaintiff was required to serve the amended pleadings on the Defendants pursuant to Order 20 rule 3.
31. The manner of making a summary judgment has stipulated under Order 14 . According to O 14 r 3 the summons together with the copy of the affidavit in support and of any exhibits referred therein should be served on the Defendant not less than 10 clear days before the return day. Order 14 rules 2 and Order 20 rule 3 have not expressly required the documents to be served personally.
32. Summons mentioned under O 14 r 3 and Amended Pleadings referred under O 20 r3 obviously do not come within the meaning of the documents stipulated under Order 10 as originating documents, neither do they come under the scope of Order 11 rule 1 and 6 (1). Wherefore, these amended statement of claim and the summons for summary judgment undoubtedly come within scope of “documents” defined under Order 65.
33. Order 65 rule 5 has provided the ordinary manner of the effective service of the documents defined under Order 65 rule 1, where it states that ;

- i. *Service of any document, not being a document which by virtue of any provision of these rules is required to be served personally or a document to which Order 10, rule 1 applies, may be affected –*
 - a. *By leaving the document at the proper address of the person to be served, or*
 - b. *By registered post, or*
 - c. *In such other manner as the court may direct.*
- ii. *For the purpose of this rule the proper address of any person on whom a document is to be served in accordance with this rule shall be the address for service of that person, but if at the time when service is effected that person has no address for service his proper address for the purpose of aforesaid shall be –*
 - a. *In any case, the business address of the barrister and solicitor (if any) who is acting for him in the proceedings in connection with which service of the document in question is to be effected, or*
 - b. *In the case of an individual, his usual or last known address, or*

34. Having satisfied that this summons for Summary Judgment and the amended statement of claim are not required to be served personally and could be served pursuant to Order 65 r 5, I now draw my attention to discuss what are the other procedural requirements to serve these documents out of the jurisdiction.

35. As I mentioned above, the procedure laid down by Order 11 to serve a document out of the jurisdiction is only applicable to writs, originating summons and notice of motion or petitions. However, Order 11 rule 6 (2) has stipulated that service out of the jurisdiction of any Summons, notice or order issued , given or made in any proceedings is permissible with the leave of the court. Order 11 rule 6(2) states that;

“ Subject to Order 73 rule 4, service out of the jurisdiction of any summons, notice or order issued, given or made in any proceedings is permissible with the leave of the court, but leave shall not be required for such service in any proceedings in which the writ,

originating summons, motion or petition may by these rules or under any Act be served out of the jurisdiction without leave”

36. Accordingly, the proper procedure of serving the amended statement of claim and the Summons for Summary Judgment out of the jurisdiction is to obtain the leave of the court pursuant to Order 11 r 6(2) and then serve them pursuant to Order 65 r 5.
37. The amended statement of claim was filed on 12th of September 2006 and the court has granted leave to serve the same on the first Defendants out of the jurisdiction on the 7th of November 2006. The Amended Statement of Claim was delivered to the address at 70 A Bonifacio Street, Fort Bonifacio AFPR 1-4, Taguig City. An employee of the first Defendants Mr. Rayan Puriran received the documents and undertook to deliver them to the Defendants, once they return. Mr. Pururan had further confirmed the address of the first Defendants. An affidavit of service of Virgilio A Garcia Jr was filed in that effect on 28th of April 2008. In the meantime, Francisco A Santos Jr posted the amended Statement of Claim together with other relevant documents to 70 A Bonifacio Street, Fort Bonifacio AFPR 1-4, Taguig City by registered mail and confirmed that the mail has not been returned undelivered. An affidavit of service of Mr. Santos Jr was filed in that effect on the 28th of April 2008.
38. The Plaintiffs filed the summons for summary Judgment on 13th of August 2008 and the leave was granted to serve the same out of the jurisdiction on the 26th of September 2008. Accordingly, the Summons was left with the caretaker of the Defendants Mr. Jose Angelo Abarentos at 70 A Bonifacio Street, Fort Bonifacio AFPR 1-4, Taguig City. Mr. Adrian P Dimacali and Francisco A Santos Jr filed a joint affidavit of service in this regard. Moreover, Mr. Francisco A Santos Jr has posted the Summons with other relevant documents to the address as 70 A Bonifacio Street, Fort Bonifacio AFPR 1-4, Taguig City by registered mail and confirmed that the mail has not been returned undelivered. An affidavit of service of Mr. Santos Jr was filed in this effect.

39. The Plaintiffs contended that the address of 70 A Bonifacio Street, Fort Bonifacio AFPR 1-4, Taguig City in the Philippines is the last known address of the Defendants. The Defendants filed their acknowledgment of service of writ of summons on the 7th of September 1993, through their then solicitors Munro Leys and stated the address for service as 3rd Level, Pacific House, Butt Street, Suva. It is a mandatory procedural requirement pursuant to order 12 rule 2 (a) and (b) to provide an address within the jurisdiction for the purpose of service of documents. However, Munro Leys Solicitors withdrew as counsel for the Defendants on the instruction of Mr. Bortel, on 11th of May 2009. The Defendants did not appoint any counsel subsequently, neither did provide an address for service as required by the Order 12 r 2 (a) if he elected to appear in person. It should be noted that the Defendants have not given any reasonable explanation for not appointing a counsel subsequent to Munro Leys. Under such circumstances, the Plaintiff is entitled to serve the document to the usual or last known address of the Defendants pursuant to O 65 r 5 (1) & (2) (b).

40. It was held in **Austin Rover Group Ltd v Crouch Butler Savage Associates (1986) 3 All E R 50** that “

“Last known’ address cannot, she submitted, mean simply last known to the plaintiff: it must mean last ascertainable address or last address known generally. Just as the ‘usual address’ involves an objective test, so also must the last-known address.”

41. In view of the reasons discussed above I am satisfied that the Address in the Philippines given by Munro Leys in their affidavit in support for the Summons for withdraw as counsel was the last known and ascertainable address of the Defendants pursuant to Order 65 r 5 (2) (b). The Plaintiffs confirmed the service of the amended statement of claim and the summons for summary judgment by registered mail and leaving the

documents at the last known address of the Defendants pursuant to Order 65 r 5 which I hold as a proper service of documents.

42. Having determined that the amended statement of claim and the Summons for Summary Judgment was properly served on the Defendants pursuant to O 11 r 6 (2) and O 65 r 5, I now draw my attention to the second component of the Defendants' argument of irregular judgment.

43. The learned counsel for the Defendant contended that there is a disjunction between the orders sought in the Summons for Summary judgment and the third order granted in the Summary Judgment. However, I wish to first deal with the issue of the existence of defence with a real prospect of success and with some degree of conviction. The issue of inconsistency of the orders sought in the summons and the orders granted in the judgment could be discuss within the issue of the meritorious defence.

44. As I discussed in paragraph 14 above, It is the onus of the Defendants to satisfy the court with affidavit evidence that they have a defence with a real prospect of success or with some degree of conviction to set aside the Summary judgment.

45. The Summary judgment entered on 31st of March 2009 constitute with four orders, they are that;

- a. *Damages in the amount of US \$ 2,878,910.65 and interest at the rate of 7.02% per annum from 4 May 1991 and late charges in the amount of Us \$ 742,002.39 and costs ; and*
- b. *Damages in the amount of US \$ 954,375.00 and \$ 18,213.00 representing costs and Attorney's fees and interest at the rate of 3.41% from 26 August 1992; and*

- c. *An order that the Plaintiff retain caveats on the title of the properties of the first Defendants and each of them have sole ownership and control being CT 6684 being Lot 1 on DP 1277 pending realization of the judgment debt; and*
- d. *The costs of and incidental to this action on an Attorney/client basis,*

46. The Defendants have not provided any affidavit evidence to satisfy the court that they have a defence with a real prospect of success or with some degree of conviction in respect of the first two orders granted in the Summary Judgment. Moreover, the contention of inconsistency between the Summons and the Judgment is also founded on the third order granted in the judgment and not in respect of the first two orders. Hence, I am satisfied that the first two orders made in the Summary Judgment has entered regularly and the Defendants have failed to satisfy the court that they have a Defence with a real prospect of success or with some degree of conviction. I accordingly refuse to grant orders to set aside the first and second orders granted in the Summary Judgment dated 31st of March 2009.

47. I now turn to the issue of meritorious defence in respect of the third order granted in summary Judgment.

48. The Defendants vehemently contended that the property comprise in CT 6684 being Lot 1 on DP 1277 is not own by them and it is a property owned by Fiji Marina Partners, a Hawaii Limited Partnership. Mr. Bortles deposed in his affidavit that he is only a general partner in this partnership and own no interest or benefits from this property. He further deposed that upon being advised by his lawyers in Fiji, that the Fiji Marina Partnership is not allowed to purchase any property in Fiji under the laws of Fiji, he then had to purchase this property under his name as the registered owner.

49. The Defendants tendered affidavits of the beneficiaries of the Fiji Marina Partnerships in order to substantiate his contention. Moreover, the Defendants tendered copies of the

tax return submitted in the United States by the Fiji Marina Partnership as annexure to his affidavit in support.

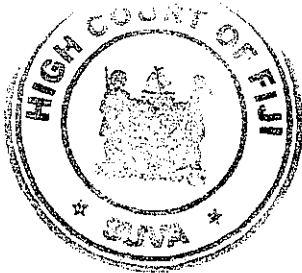
50. I find that Justice Fatiaki has observed in respect of this property in **Resolution Trust Coperation v Bortles (1994) FJHC 116; Hbc0458d.93s (14 September 1994)** that “ *even the written ‘ Sale and Purchase agreement’ referred to in the transfer nowhere mentions the limited partnership on whose behalf the land was being acquired other than the deletion of the partnership’s name and the insertion of the second Defendant’s name as the purchaser*”. Though, Justice Fatiaki did not determine the ownership of the property, in fact, this observation has noted the deletion of the partnership’s name which somewhat conjunctive with the contention of Mr. Bortles that he was advised by his lawyers to purchase the property under his name. Indeed this issue needs to be determined in a proper trial giving the parties an opportunity to examine and cross examine their respective witnesses. In view of these findings, I am satisfied that the Defendants have successful established that they have a defence with a real prospect of success or with some degree of conviction in respect of the third order granted in the Summary Judgment.
51. In accordance with the Justice Fatiaki’s observation in **FNFP v Shri Datt (supra)**, the court is required to consider the issue of prejudice to the Plaintiff if the judgment is set aside. Indeed there is no proper and reasonable explanation from the Defendants for delaying this application to set aside the judgment. Nevertheless, the matter is still pending between the Plaintiffs and the second and third defendants on the issue of the ownership of this particular land together with some other properties which the second and third Defendants claim in their counterclaim. The hearing of the counterclaim is yet to be set down before a judge which is apparently founded on the same issue that the Defendants are now contending. Under such circumstances, I do not find the existence of any sort of irreparable prejudice to the Plaintiffs and the delay caused by the Defendants could be compensated with a reasonable cost.

not find the existence of any sort of irreparable prejudice to the Plaintiffs and the delay caused by the Defendants could be compensated with a reasonable cost.

52. In conclusion, having considered the reasons set out above, I make following orders, that;

- i. The First Defendants' application to set aside the first and second orders entered in the Summary Judgment dated 31st of March 2009 is refused and dismissed,
- ii. The third order entered in the summary Judgment dated 31st of March 2009 is hereby set aside,
- iii. The first Defendants are ordered to provide an address within the jurisdiction for the purpose of service of documents in this matter,
- iv. The Plaintiff is awarded a cost of \$ 4000 assessed summarily,

Dated at Suva this 2nd day of June, 2014.



R.D.R. Thushara Rajasinghe
Acting Master of High Court, Suva