IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA

Civil Action No. HBC 226 of 2013

BETWEEN : **SAFARI LODGE (FIJI) LIMITED** a limited liability company having its registered office at C/-G H Whiteside & Co, 211 Ratu Sukuna Rd, Suva.

PLAINTIFF

AND : **THE TIKI (FIJI) LIMITED** a limited liability company having its registered office at Level 8, Dominion House, Thomson Street, Suva.

FIRST DEFENDANT

AND : **MICHAEL HARVEY** Upper Mt Gravatt, P.O Box 6196, Queensland Australia.

SECOND DEFENDANT

AND : **ATTORNEY GENERAL OF FIJI** as representative of **MINISTRY OF LANDS AND MINERAL RESOURCES** and **DEPARTMENT OF ENVIRONMENT**.

THIRD DEFENDANT

Counsel : Mr. Ram and Mr. Padarath for the Plaintiffs
Mr. Varitimos QC, Ms Muir and Ms Nannius for the First and Second Defendants
Mrs. Lee for the Third Defendants
Date of Hearing : 21 May 2014
Date of Ruling : 10 July 2014

BACKGROUND

[1]. This case concerns a coastal engineering project in Fiji, and the spoils thereof, which are alleged to be an on-going source of public nuisance. The beach in question is Lomanisue Beach on Nanau-*i*-Ra island. And the project involved was some digging and excavation work which happened on 15 June 2007. All this work happened without any regulatory approval and/or any proper environment impact assessment. The plaintiffs, Safari Lodge (Fiji) Limited (**"Safari"**) and Warren Francis (**"Francis"**), allege that the defendants were the ones responsible for the "project". They sue for damages for losses they have suffered and are suffering as a result. In addition, they plead a cause of action under Fiji's Environment Management Act 2005.

[2]. Francis is the managing director of Safari. Safari owns a resort situated at Nananu *i* Ra. Michael Harvey (**"Harvey"**) is the managing director of The Tiki (Fiji) Limited (**"Tiki"**). Tiki also owns and operates a resort in Nanau *i* Ra which is just up the beach from Safari's resort.

[3]. What is before me at this time is whether or not to extend a mareva injunction that I had granted *ex-parte* on 31 December 2013.

ONUS

[4]. The onus is still on the plaintiffs at first *inter-partes* hearing to convince this Court that the mareva injunction granted *ex-parte* in their favour should continue as an interim injunction. The Fiji Court of Appeal in **Westpac Banking Corporation v Prasad** [1999] FJCA 2; [1999] 45 FLR 1 (8 January 1999):

> When the matter comes back into the list, it will not be for the defendant to establish why the injunction should be dissolved. It carries no onus. Instead, the plaintiff has the task of persuading the court that the circumstances of the case are such as to require the injunction to be continued.

[5]. The same applies in the case of a mareva injunction. What Safari/Francis must establish are: firstly, that they have a good arguable case, secondly, that there is a real risk that Tiki/Harvey may remove or conceal their assets or deal with them so as to defeat Safari's/Francis' claim and, thirdly, they must make a full and frank disclosure of all material facts known to them (including those unfavourable to their case). A failure to do so will result in the injunction being discharged. And, fourthly, like an ordinary junction, Safari/Francis must give an undertaking in damages in case either they fail on the merits of the action or the injunction turns out to be unjustified.

A GOOD ARGUABLE CASE

[6]. The Fiji Court of Appeal in **Silver Beach Properties Ltd v Jawan** [2011] FJCA 48; ABU0042.2009 (29 September 2011) resonates that an applicant must first establish a *"good arguable case"*[1]. "A good

[1] The FCA said:
21. In Chiou v. Wang (1984) FJHC 160 his Lordship Byrne J. summarized the law as follows:

arguable case" requires a higher threshold (of evidence) than that of "a mere arguable case" or that of the case of an interlocutory injunction under the **American Cyanamid** test. Hence, in **Silver Beach** (supra), the Court would say as follows:

> 22. ....it is clear that the presence of a mere arguable case is not sufficient to issue a ***Mareva Injunction***. .... the standard of proof in establishing the presence of a *prima facie* case is always higher than the standard required in cases where the interlocutory **injunctions** are issued with the view of maintaining the *status quo* until a final determination is made.
>
> 23. This proposition is supported by the decision of Lord Donaldson, M.R in the case of **Polly Peck International Plc. v. Nadir and Others** (no.2)(1992) 4 All ER 769 at pp785-786. In that judgment His Lordship said:
>
> > *"I therefore turn to the principles underlying the jurisdiction. (1) So far as it lies in their power, the Courts will not permit the course of justice to be frustrated by a defendant taking action, the purpose of which is to render nugatory or less effective any judgment or order which the plaintiff may therefore obtain. (2) It is not the purpose of a **Mareva injunction** to prevent a defendant acting as he would have acted in the absence of a claim against him. Whilst a defendant who is a natural person can and should be enjoined from indulging in a spending spree undertakes with the intention of dissipating or reducing his assets before the day of judgment, he cannot be required to reduce his ordinary standard of living with a view to putting by sums to satisfy a judgment which may or may not be give in the future. Equally no defendant whether a natural or a juridical person, can be enjoined in terms which will prevent him from carrying on his business in the ordinary way or from meeting his debts or other obligations as they come due prior to judgment being given in the action. (3) Justice requires that defendant by free to incur and discharge obligations in respect of professional advice and assistance in resisting the plaintiff's claims. (4) It is not the purpose of a **Mareva injunction** to render the plaintiff a secured creditor, although this may be a result if the defendant offers a third party guarantee or bond in order to avoid such an **injunction** being imposed. (5) The approach called for by the decision in **American Cyanamid Co. v. Ethicon Ltd** [1975] UKHL 1; (1975) 1 All ER. 504, (1975) AC 396 has, as such, no application to the grant of refusal **injunction** which proceeds on principles which are quite different from those applicable to other interlocutory **injunctions.**"*

[7]. But, while a *"good arguable case"* is a higher threshold than the **American Cyanamid** test, it (i.e. the *"good arguable case"* threshold) is still a notch below the standard required in a summary judgment application under Order 14 of the High Court Rules 1988. This point was made clear in **Third Chandris Shipping v Unimarine** [1979] 2 All ER 972. In that case, the Court at 975, cited **Rasu Maritima SA v Perusahaan Pertambangan** [1977] 3 All ER

"Since the case which gave its name to Mareva injunctions was decided namely Mareva Compania Naviera SA v. International Bulk Carriers SA" 1 All ER the rules relating to the granting of such injunctions have become reasonably well defined although I have little doubt that in the course of time they may be further enlarged. I will discuss some of these rules when dealing with particular parts of the evidence in this case but two basic propositions are clear:
- Any application for a Mareva Injunction must show that so far as the merits of his proposed actions are concerned he has a good arguable case.
- The defendant has assets within the jurisdiction and there is a real risk if not restrained he will remove the assets from the jurisdiction or dissipate them within it."

324, [1978] QB 644, as, *inter alia*, authority that the granting of the relief of mareva injunction:

> …….. should not be confined to cases strong enough for a judgment under RSC Ord 14. The plaintiffs need only show a good arguable case.

[8]. **Rasu Maritima** was the case that lowered the threshold to the *"good arguable"* standard. Before **Rasu Maritima**, a Mareva injunction was granted only if sufficient strong evidence was adduced to support a summary judgement under Order 14. Mustill J, explains this historical point as follows in **Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft** (1984) 1 All ER 398 at 401:

> ….Originally, the relief was reserved for cases where the creditor required protection until the hearing of an RSC Ord 14 summons, founded on a debt which was undisputed or indisputable. In **Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia (as Interveners) [1977] 3 All ER 324, [1978] QB** 644 the jurisdiction was enlarged so as to enable security to be granted in respect of claims against foreign defendants which were not appropriate for summary judgment"

[9]. The above is notable not only for its historical significance, but also in its utility in defining the boundary in any given case.

[10]. In Fiji, the law on summary judgment was laid down by the Fiji Court of Appeal in **Carpenters Fiji Ltd –v- Joes Farm Produce Ltd** Civil Appeal Number ABU 0019/2006[2] where the threshold for the plaintiff is, to **"prove his claim clearly"**. It follows then that in a mareva injunction application, it is not necessary for the plaintiff to prove his claim clearly.

[2] The Fiji Court of Appeal said:
*"Here it is timely to state some of the well-established principles relating to the entry of **summary** judgment:*

(a) The purpose of 0.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, a bona fide defence or raise an issue against the claim which ought to be tried.

(b) The defendant may show cause against a plaintiffs claim on the merits e.g. that he has a good defence to the claim on the merits or there is a dispute as to the facts which ought to be tried or there is a difficult point of law involved.

(c) It is generally incumbent on a defendant resisting summary judgment, to file an affidavit which deals specifically with the plaintiffs claim and affidavit and states clearly and precisely what the defence is and what facts are relied on to support it.

(d) Set off, which is a monetary cross claim for a debt due from plaintiff, is a defence. A defendant is entitled to unconditional leave to defend up to the amount of the set of claimed. If there is a set off at all, each claim goes against the other and either extinguishes or reduces it Hanak v. Green (1958) 2 QB 9 at page 29 per Sellers LJ.

*(e) Likewise where a defendant sets up a bona fide counterclaim arising out of the same subject matter of the action, and connect with the grounds of defence, the order should not be for judgment on the claim subject to a stay of execution pending the trial of the counter claim but should be fore unconditional leave to defend, even if the defendant admits whole or part of the claim; **Morgan and Son Ltd v. S. Martin Johnson Co (1949) 1 KB 107(CA).***

HAVE SAFARI/FRANCIS ESTABLISHED A "GOOD ARGUABLE CASE"?

[11]. I am of the view that the plaintiffs have established a good arguable case before me. As stated, they do not have to prove their claim clearly. Yet, they must do better than raise a *mere arguable case.*

[12]. The main fact from which the plaintiff's causes of action arise is the 15 June 2007 dredging and excavation work. That such work was carried out by the 1st and 2nd defendants is common ground (see underlined cited passage from Harvey's affidavit at paragraph [26] below).

[13]. On 23 June 2007, according to Francis, the Fiji Television ran a coverage in its news segment of all that was happening in Nananu-*i*-Ra. In that news coverage, Harvey, reportedly, stated that his digging works would be approved by the Department of Lands. Francis deposes that on 18 June 2007, Harvey through his solicitors Elliott and Harvey sent him a notice in which they admitted *inter alia* having carried out the excavation and construction works. A copy of the said letter is exhibited in Francis' affidavit and marked **"WF-6"**. Harvey himself concedes in his affidavit that he did carry out the alleged dredging and excavation works. Notably, there is no evidence before me to suggest that the works were ever approved by the Department of Lands.

[14]. Apart from the above, there is other evidence. Firstly, the primary evidence of Francis himself who has been a resident of the area since 1991 and who goes back a long way with Harvey[3] is credible in so far as the works go. Francis describes the excavation work as follows:

---

[3] It appears Francis and Harvey go back a long way. As Francis deposes:

> I have been promoting windsurfing and water sporting holidays at the second defendants resort from 1991 to 1999. Between 1997 to early 1999 I managed all the water sporting activities for the second defendants resort operated as Mokusigas Diving. I worked as an independent contractor and was well aware of the income made and income potential of that area for such activities. At this time used my company name as Safari Lodge - Fiji and the marketing material showed us as "Mokusigas Diving, Safari Lodge - Fiji". Exhibited hereto and marked with the letter **"WF-32"** is a copy of our marketing material. The Second Defendant unlawfully terminated my contract in about beginning of 1999. It took me several years thereafter to do various tourism works, save up and build the Plaintiffs resort on the adjoining property. When the Plaintiff Company commenced I had planned and projected substantial income. However within two (2) years of commencing the resort the first and second defendant took the actions mentioned herein and I have not been able to realize the full potential of the resort due to the destruction of our foreshore and inability to promote the area as a safe and professional location for Watersports. Our business plan of investment in the construction and operation of a Watersports specific resort has been severely strangled by the actions of the 1st and 2nd defendant through destruction of the operating areas of the Plaintiffs Watersports. As a result of the breaches we have also had to relocate our customers to other beaches to carry out the some of the activities at additional transportation costs on a daily basis. I am able to carry out windsurfing activities at the beach but for kite surfing I need to relocate. This delayed response from the Lands Department effectively condoned the illegal activity to commence and given they were briefed with specific information they choose to not act upon, this illegal activity could have been avoided through prompt response on behalf of the responsible Government Agency, namely the Lands Department Foreshore section.

I am aware that the Second Defendant intended on building a Private Marina for his boat on Lomanisue Beach, directly in front of his Lomanisue Bungalows Property. This was the reason for the Excavation works utilizing a 12 tonne digger to drive out onto the Coral and begin digging a channel from the edge of the reef, approx 75 meters long by 5m wide for the profile change of the rock shelf to a Sandy beach. This has now effectively cut the Beach in half with substantial Erosion of the Sea Shore on both sides of the channel. This selfish act was without thought or professional guidance, as its location was directly facing a 25-30 knot onshore wind onto a beach, with the planned Marina offering no protection to the Second Defendants boats from the wind or elements. The Plaintiff has suffered substantial loss of Beachfront in the past 7 years as sand has been blown by Longitudinal Drift along the flat hard Rock shelf of the island in the prevailing S.E. Trade winds. The sand now has disappeared into the channel that was excavated by the first and Second Defendant and out into the Deep water, never to return along the sea shore. Had it not been for the channel the sand would be blown back along the beach in the summer months? A U.S.P. Masters Student in his Marine Studies thesis has studied this.

[15]. Secondly, there are the photographs which depict the scene. Francis describes the photographs (marked **"WF-1"**) as follows:

These photographs have my notes on it and show dangerous debris left from the excavation and also dangerous steel protrusions from the sea. The second photograph in exhibit ***WF-1*** *shows a kite surfer approaching the rock wall. This photograph was set up by us to show the danger. The Kite Surfer photographed is experienced and an instructor and he is able to turn away in time. Most of our guests are not that experienced. They usually seek instructions from us. This had caused damage to my Watersports equipment and has also caused some incidences of injuries to my guests. Exhibited hereto and marked with letter* ***"WF-IA"*** *are copies of photographs showing damages to my equipment. Exhibited hereto and marked with the letter* ***"WF-18"*** *are photographs of the actual development done. The area which is shown as land, rock and sand used to be the sea.*

[16]. Like all excavation and dredging works, a lot of spoil has resulted from the dredging and excavation works. I figured from the photographs that the excavated rock and fine material was used to construct the breakwater or seawall that is visible in the photos.

[17]. Thirdly, the fact that the various stakeholder- government departments are aware of the dredging and the excavation works is, itself, evidence going towards establishing the fact. The details of all the dealings that Francis did with the Ministry of Lands, the Department of Environment, the Prime Minister's Office, the Office of the Commissioner Western, the Ministry of Tourism, and the Police – are set out in his affidavit (see footnote no. 4 below).

[18]. Francis further alleges that the dredging and excavation works had the effect of introducing a waste pollutant into the sea near his land. This has proved to be a hindrance to marine activities and other legitimate uses of the sea by the plaintiff. These actions, says Francis, amount to an actionable *"pollution incident"* in terms of the Environment Management Act 2005.

[19]. Harvey states his position thus on this issue:

> 10. ....the Environment Management Act 2005 did not come into effect until 1st January 2008.
> 11. ....
> 12. On that basis, the Plaintiff does not have any claim under the Environment Management Act 2005 for an alleged pollution incident occurring in 2007, and its claim in respect thereto fails to state a valid cause of action and should be struck out.

[20]. I would rather yet, reserve comment on this point. Suffice it to say that the plaintiffs have a good arguable case based on the mere fact of the dredging and the excavation works and the fact that the works did result in some pollution or disturbance (or spoil as I have called it) of the environment. Whether he can establish his entitlement to damages is a factual and legal issue best reserved for trial (though he has so far, given an arguable case of this too, see further below). For now, the issue of construction with regards to the provisions of the EMA is, also, best reserved for trial as a matter of law.

[21]. Francis deposes that his business has suffered as a result.

> My business continues to suffer substantial damages, some of which is monetary. I have received verbal comments and complaints from Guests regarding how unsafe the location is for Windsurfing and Kitesurfing and their intention NOT to return due to these safety issues. This has caused substantial continued financial loss and I have been unable to attract Group Travel bookings and repeat clients due to the unsafe nature of my surrounds and neighboring Beach situ. It is difficult for me to determine the actual monetary loss these dangers are causing to my business, however one weeks Windsurfing or Kitesurfing Group booking grosses approx $27,000 AUD in booking revenue and the Season is approximately 8 months in duration, totaling 32 weeks of lost Bookings per year. The other 4 months are not key Windsurfing and Kitesurfing months, due to the South East Trade winds not being reliable and not seasonal. Due to the manner in which I market my resort, people expect a safe and clean environment for activities that the resort provides in its immediate area. All other services we provide are tourist related and if we receive Watersports negative feedback, our resort cannot function at its optimum level. Exhibited hereto and marked with letter **"WF-29"** is a copy of my web page showing the

services provided. The Second Defendant is aware of the substantial value and importance of the onshore location Lomanisue Beach offers for Windsurfing (since 1991) and more recently Kitesurfmg (since 2002), as the Plaintiff was operating from the Second Defendants Mokusigas Island Resort from 1991 until 1999. The 2nd Defendant lost Mokusiga Island Resort to the Fiji Development Bank, under Mortgagee Repossession and ultimate Sale to a third party. During those years the Plaintiff and Second Defendant worked closely promoting this same location actively for Windsurfing, so the Lomanisue Beach location value was well known by the 2nd Defendant. The Second Defendant retained certain parcels of Land from the original Mokusigas Island Resort title. He managed to sub-divide prior to the Mortgagee Repossession from FOB, on which one of these he later built the bungalows.

[22]. The photographs show that the sea-wall constructed from excavated rocks, and the metal spokes in the water, have reduced the quality of the surroundings and marred what used to be a free-and-wide expanse of beach and water. This, I gather was what the plaintiffs had capitalized on for their water-skiing and windsurfing business. And this, I gather, Harvey knew perfectly well. The disturbing thing is that, had Harvey tried to obtain the regulatory approvals before commencing the works Francis might have been afforded an opportunity to state his objectives. It does not take a genius to figure out that the dredging and excavation work would also have disturbed the surrounding sea life habitat as well as the natural shoreline and beach equilibrium.

[23]. Francis also alleges that the area is also used by locals as well as the villagers of nearby Malaki who were all extremely upset by the excavation which was all done in total flouting of Government planning and environmental laws:

The Second Defendant whilst present on site, ignored Government directions from, namely the RakiRaki Police Department, the Roko Tui Ra, Ra Rural Local Authority, Malaki Island Village elders and continued to instruct the operator of the Excavator on both Friday 15th, Saturday 161h, Sunday 17th June to continue Digging the Reef.

[24]. According to Francis, Harvey's total disregard and deliberate flouting of the laws and customs of the area would result in

.....repeated visits from the Fiji Police, Ra District Council members (Assistant Roko Tui Ra), Malaki Village Members to try to stop this illegal activity.

[25]. Francis says he did try all he could over the years to put a stop to the excavation work and to alert the relevant statutory authorities to take action – but to no avail[4].

---

[4] The details of all Francis had done are set out clearly in his affidavit:

On the 14th of June 2007, I wrote to the Ministry of Lands requesting them to put a stop work order on all digging and excavation works carried out near the reef. Exhibited hereto and marked with the letter ***"WF-2"*** *is a copy of the said letter. The Third Defendant failed to act on written advice formally delivered with confirmation of receipt. The first letter was sent on 14th June 2007 prior to any digging works commencing and timed with the arrival of the digger on the island. Follow ups were done on Friday to the Lands Department requesting their intervention and prevention of commencement of activity, again all ignored that could have prevented this action commencing in the first place. Following a Fiji One television 6pm News article on Sunday evening 17th June 2007, the Lands Department Foreshore Manager, Mr. Atama finally travelled to Lomanisue Beach, Nananu-i-Ra, RakiRaki from his office in Suva and appeared on Tuesday to meet the Second Defendant to halt any further work, pending investigation. The Chief of the Tui Navitilevu sent a letter dated 18th of June 2007 requesting the Defendant to stop work. Exhibited hereto and marked with the letter* ***"WF-3"*** *is a copy of the said letter. On the 15th of June 2007, the Ministry of Provisional Development also sent a notice demanding for the digging and excavation works to be stopped immediately. This letter is addressed to the manager of Lomanisue Beach Cottages. This is owned and operated by the First and Second Defendant. I was given a copy of this letter by Assistant Roko Senetiki, which is exhibited hereto and marked with the letter* ***"WF-4"*** *is a copy of the said notice. On 15th June 2007 the Turaga Ni Yavusa of Natokia wrote to the Lands Department complaining of the excavation and requesting for it to be stopped immediately. Exhibited hereto and marked with the Jetter* ***"WF-5"*** *is a copy of the said letter.*

Francis says that on 19 June 2007, he wrote a letter to the Ministry of Lands to tell them what had transpired on the visit by Mr. Atama. Atama had approached Harvey personally and demanded the works to stop. A copy of his letter is exhibited and marked **"WF-7"**.

On 21 June 2007, Francis says he had a meeting with the Director of Environment over the phone. Before that date, Francis had written to the Director to inform him that a site inspection had been done. Francis notes however that there did not appear to be an Environment Assessment Report. He says that the excavation and reclamation works done by the defendants affected him as well as the i-Taukei Land Owners and they would have been kept informed of any environment impact assessment report.

Francis says that he wrote to the Ministry of Lands on 25 June 2007 to inquire whether any assessment had been carried out. The *i*-Taukei land owners also called a meeting with the Roko Tui Ra in Suva. On 26 June 2007 Isikeli Naitura, the Chairman of the Ra Province Qoliqoli wrote to the Roko Tui Ra to bring certain issues in the meeting. A copy of that letter is exhibited and marked **"WF-10"** which outlines the landowners' grievances.

Francis says that he even lodged a complaint at the Prime Minister's office vide a letter dated 19 June 2007. The Deputy Secretary of Home Affairs and Immigration were then directed vide a memo dated 11 July 2007 to organize a meeting to address the complaint, pursuant to which, a notice dated 16 July 2007 was sent by the provisional administrator Ra to all parties. The meeting took place on 25 July 2007 at 10.00 am. The outcome of this meeting yielded a resolution as follows:

(i) that Harvey to return the condition of the beach to its original condition.
(ii) damage done to the foreshore to be compensated to the qoliqoli owners.
(iii) letter to be written to the contractors to sight legal consent before carrying out excavation.

(exhibited to Francis' affidavit and marked **"WF-13"** is a copy of the minutes of the above meeting).

A separate inter-governmental department meeting was also held on 27 July 2007 where, according to Francis, the representative of the Lands Department condemned the actions of Harvey as illegal.

There was, reportedly, a resolve in that meeting "that the first and second defendant will be taken to task and the illegal development should stop". A copy of the minutes is exhibited and marked **"WF-14"** to Francis' affidavit.

Francis deposes that, thereafter, Harvey had removed the excavator/digger from the site. Francis said he then wrote a letter to the Ministry of Lands to let them know of this. He said he also wrote to the Ministry of Tourism on 18 August 2007. Francis says that following the meeting of 27 July 2007, the Commissioner Western sent a Memo to the Deputy Secretary Home Affairs to report on all that had transpired. Thereafter, another meeting was convened on 17 September 2007 to discuss the issues. In this meeting one of the resolutions was that the committee is to look at all operational and procedural applications done and what breaches have taken place.

On 30 September 2007, Isikeli Naitura the Chairman of the Ra Province Qollqoli wrote a letter addressed to the Home Affairs Office to clarify certain issues that were raised during the meeting of 27 July 2007. On l0 October 2007, Naitura again wrote a follow-up to the Home Affairs Office and further clarifying issues raised at the 17 September 2007.

Francis also deposes that a meeting had been held on 3 October 2007 where, according to the minutes, the Ministry of Lands had noted that there was a public objection to the development carried out by the defendant. A copy of the minutes is exhibited in Francis' affidavit marked **"WF-21"**.

On 30 October 2007, Francis wrote another follow-up letter to the Office of the Prime Minister. On 03 November 2007, Francis met a representative from Corerega Consultants who was engaged by Harvey as Environment Consultant.

Following that meeting, Francis wrote a letter to the representative to record his strong objections to the defendant's projects. At this point no substantial action was taken by any of the relevant Government Authorities. Francis wrote another letter on 08 May 2008 to the Prime Minister's Office. On 13 May 2008, one Mr. Alifereti Nailoko emailed Francis to advise that the Office was working on the environmental assessment.

On 10 February 2010, Francis wrote again to the Ministry of Tourism to set out some of the issues raised at a meeting on 05 February 2010 and again wrote to the Ministry of Lands 30 May 2010. He again wrote to the Prime Minister's Office on 07 December 2010.

To date no action has been taken by any government department.

[26]. According to Francis, the excavation work done on the beachfront has been left as it is and proving to be a continuing danger to the guests at his resort. At this point, I would like to record the objections of Harvey, as sworn, where the fact is emphasized that the plaintiff's property is located some distance away from the dredging and excavation sites:

> The Plaintiff's own First Affidavit and Statement of Claim clearly refer to digging works on the foreshore in front of the First Defendant's property on Lomanisue Beach and also under the sea.
> In respect of the Plaintiff's claim of nuisance, the First Defendant's activities did not impinge upon or harm the Plaintiff's land in any way, as the Plaintiff's property is located some distance away.
> Annexed hereto and marked with the letters "**MH 3**" is a copy of satellite photograph from Google Earth of Lomanisue Beach showing the location of the Plaintiff's property and the rock wall.
> The First Defendant's digging works for a narrow boat channel only affected the foreshore and land under the water.

[27]. It would be inappropriate for me at this interlocutory stage to make a determination as to whether or not the point made above is sufficient to reduce the strength of the plaintiff's case below the "good arguable" standard. But, as Harvey himself has admitted in his affidavit, the site of the dredging and excavation work vests in the state. Why then, he did not, at least obtain the consent of the State, is beyond me

> I am informed by my solicitors and I verily believe the foreshore and the land under the sea are the property of the State pursuant to the State Lands Act.
> The Plaintiff does not hold any qoliqoli rights over the foreshore or the land under the sea, nor has it exhibited any foreshore lease or license in respect of the area affected by the digging works.
> In the circumstances, I say that the Plaintiff lacks standing to bring a claim of damages based on nuisance.
> The Plaintiff's claim of nuisance is subject to the equitable defence of laches, on the basis that it has slept on its rights for more than 6 years.
> There is also serious objection to the damages claimed by the Plaintiff as not being foreseeable or arising as the consequence of the First Defendant's actions, and being too remote. The boat channel is located some distance away from the Plaintiff's property, and it is located amid shallow coral reefs unsuitable at low tide for water sports in any event.
> The Plaintiff's claim to have lost substantial income every year from windsurfing groups due to the condition of a small portion of the foreshore a substantial distance from its property is dubious at best, particularly since its own financial statements characterize its income as being derived from "Dive – Sales and Services" as shown in Annexure "WF-30" to the First Affidavit.

[28]. Francis responds to these in his affidavit in reply as follows:

> With regards to paragraph 18 I say the pollutants remain in the area, which was used for sporting activities by the Plaintiff.
>
> With regards to paragraph 24, the actual Digging works is approximately 300 meters from Safari Lodge Property. This is a very short distance and can be travelled in approximately 2 minutes on a WindSurfer or Kitesurfer by the guests of Safari Lodge.
>
> With respect to paragraph 26, the excavation of the foreshore destroyed the Virgin Coral Reef, used for Tourist Snorkeling, to make way for a private boat channel.
>
> With respect to paragraph 28, I say it was the First and/or the Second Defendant who carried out the digging works. They have to show that they had the appropriate approvals to excavate and destroy a natural environment. They have shown none.
>
> With respect to paragraph 31, I say that after the illegal excavation by the First and/or Second Defendant, the area has been made unsuitable for water sporting activates at any tide level. Prior to excavation the area had pristine world class coral for snorkeling and diving experiences. The excavation has totally destroyed this.
>
> With respect to paragraph 32 Dive sales and services refers to all water sports activities offered by the Plaintiff and that is the classification used in our books. In any event the Plaintiff does not show water sporting such as windsurfing/kitesurfing as a separate category of income because business in that area has been greatly reduced due to the breaches by the Defendants.

[29]. I reiterate here my comments above. I am of the view that the plaintiffs have established a good arguable case.

FRANCIS' BELIEF THAT DEFENDANTS ARE DISPOSING OFF THEIR ASSETS

[30]. Francis believes, and he says he is "reliably informed" that the first and second defendants are "negotiating to dispose off all their assets in Fiji". He deposes as follows:

> This Month (December 2013) I have seen people coming into the property and inspecting the property of the First and Second Defendant, which I believe, is for the purpose of purchase. One of the main assets is the land and the Bungalows built on the land and owned by the First and Second Defendant. This has been operated as the Bungalows Fiji, Lomanisue Beach bungalows and Lomanisue Beach resort. They had a website which was www.bungalowsfiji.com. Currently that website is unavailable and I believe this is because of an imminent sale.

[31]. Francis further deposes:

> If the First and/or Second Defendant sell their property and leave Fiji, I will have extreme difficulty in recovering the damages that I may be entitled to.

[32]. I note the objections raised by Harvey as follows:

The First Defendant is the registered proprietor of Certificate of Title No. 33161 since 15th February 2007, and has remained the registered proprietor thereof at all material times.

There is no mortgage registered against Certificate of Title No. 33161. The property is unencumbered and the First Defendant has no debt whatsoever. Annexed hereto and marked with the letters "**MH4**" is a copy of Certificate of Title No. 33161.

The First Defendant is a limited liability company incorporated in Fiji.

Annexed hereto and marked with the letters "**MH5**" is a copy of the First Defendant's Certificate of Incorporation dated the 4th day of September, 1998.

Francis states in paragraph 54 of his First Affidavit that he is "reliably informed that the First and Second Defendant are negotiating to dispose off all their assets in Fiji."

However Francis neglects to name the source and grounds of this information and belief.

I am informed by my solicitors and I verily believe that this is required by Order 41 of the High Court Rules. On that basis, paragraph 54 of the Plaintiff's First Affidavit should be struck out as not conforming to the rules of the Court.

In paragraph 55 of his First Affidavit, Francis alleges that he has seen people coming into the property and inspecting it.

He alleges that he believes this is for the purpose of purchase.

However Francis has wholly neglected to adduce any evidence that would support such a conclusion, such as an estate agent's listing or advertisement.

He does not appear to have enquired of the alleged inspectors as to their purpose.

To the best of my knowledge, the only people who have come onto the First Defendant's property recently were diesel mechanics engaged to repair and maintain the generators.

I say that there is no imminent sale of the First Defendant's property pending, and the First and Second Defendants have not taken any steps to dispose of their assets in Fiji.

Therefore there is no need for any *Mareva* injunction against the First and Second Defendants.

The First Defendant is a Fiji company, it has not sold any assets and it is not going anywhere.

I admit that the website for The Bungalows has been taken down while the property is closed for repairs and maintenance. The same does not constitute a disposition of assets however, just a change in operations.

I am not the owner of The Bungalows or Certificate of Title No. 33161 as alleged by Francis. These are false claims.

In its Statement of Claim, paragraph 30, the Plaintiff alleges that I have left the Fiji Islands and am usually absent for long periods of time. This implies that I live or lived in the Fiji Islands previously, but that is not the case.

I am a citizen of Australia, and I reside permanently in Queensland with my family.

[33]. Francis, after Harvey's affidavit, did file a supplementary affidavit in which he deposes as follows:

I cannot comment on whether or not the First Defendant company or the Second Defendants have any debts or not. There have been no documents exhibited to show that the First and/or Second Defendants are debt free.

A developer by the name of Lomanisue Property Holdings Limited (referred to as **"Developer")** has acquired properties in and around the area of the First Defendant. These properties include the Second
Lomanisue Property Holdings Limited purchased the following titles:-

16.3.1. Certificate of Title No. 33159. A certified copy is exhibited hereto and marked with the letter **"WF-1"**

16.3.2. Certificate of Title No. 33160. A certified copy is exhibited hereto and marked with the letter **"WF-2"**

The last registered proprietors of the above property are Lomanisue Property Holdings Limited.
The properties mentioned above are next to the property owned by the First Defendant (the subject of the injunction granted in this matter).
I had instructed my lawyers to conduct a search of this company. The companies office had difficulty in obtaining the company records and this is why there has been a delay in filing this reply. A copy of the particulars of directors and shareholders is exhibited hereto and marked with the letter **"WF-3".**
There is no need for the First Defendant to advertise the sale of this property, as it would be sold by a private sale.
The property belonging to the First Defendant falls within the surroundings of the land purchased by the developer, Lomanisue Property Holdings Limited.
I have also witnessed the developer's onsite manager Mr. Geoff, inspecting the First Defendants property for the purpose of sale. He has discussed the inspection report with me and the extensive repairs required prior to sale.
Mr. Godfrey who is an associate of the Second Defendant has also discussed the impending sale with my manager, Mr. Lawrence Naidu.

[34]. Before Francis can establish a risk of dissipation, he must first establish that Harvey/Tiki have assets in Fiji (see The **MBXL Corpn v International Banking Corpn** [1975] Court of Appeal Transcript 411 (cited in **Third Chandris**). I am satisfied that he has discharged this burden as Francis' affidavit sworn on 17 December 2013 exhibits various real properties in Fiji registered in the name of Tiki.

5. Subsequent to the swearing of this affidavit my solicitors obtained several searches, which I am advised, are relevant to some injunction orders I have sought.
6. The First defendant is the registered proprietor of CT 33161. A copy certified by the Registrar of Titles as at 1Sth December 2013 is exhibited hereto and marked with the letter **"WF-33".**
7. The Second Defendant is a director and shareholder of Silverdale Trading Limited. Exhibited hereto and marked with the letter **"WF-34"** is a copy of summary of company search conducted on the 20th of December 2013.
8. Silverdale Trading Limited shows a company by the name of MJLH Investments Pty Limited as a majority shareholder. Exhibited hereto and marked with the letter **"WF-35"** is a copy of search extracted from the Australian Securities and Investments Commission as at 23rd December 2013. This shows Michael Harvey as a previous shareholder and director. It appears Michael Harvey (the second defendant) ceased being a director as at 6th June 2013.

9. Exhibited hereto and marked with the letters **"WF-36"**, **"WF-37"**, **"WF-38"**, **"WF-39"** and **"WF-40"** are copies of freehold title numbers CT 36817, CT 36818 CT 368:_9, CT 36820 and CT 36821 certified by the Registrar of titles on 17th of December 2013.
10. The plaintiff company has Caveats registered on the above mentioned titles but they are in relation to another cause of action, which is subject of High Court Lautoka, Civil Action No. 319 of 1999. That is a matter between me personally and the plaintiff company against Rosedale Limited, Dromama Limited and Silverdale Trading Limited
11. The second defendant is also a director and shareholder in Rosedale Limited and Dromama Limited. Company searches for these companies are exhibited hereto and marked with the letters **"WF-41"** and **"WF-42"** respectively.
12. I believe Rosedale Limited has been wound up.

[35]. To determine 'real risk of dissipation of assets, the Fiji Court of Appeal in **Silver Beach Properties** underscores the need to examine the facts carefully:

> 24. ....Such an examination of the facts is necessary in order to ensure the satisfaction of a decree in the event the Court holds with the applicant in the main action. This requirement too, depends mainly on the facts placed before court by the respective parties.

[36]. As a starting point, the fact that Harvey is a foreigner is, itself, not enough ground to raise a presumption that there is a serious risk of dissipation. As Lord Denning said in **Third Chandris** (supra) at paragraph a to b page 985:

> The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgement or award is satisfied. The mere fact that the defendant is abroad is not by itself sufficient.

[37]. Having said, I need also stress that the existence of the danger of dissipation may be inferred from the facts raised at the "good arguable case" stage of the inquiry. The type of evidence from which the court can make that inference was addressed in **Third Chandris** (supra). As Mustill J said at page 977 paras f to h:

> But what standard of proof is required? Counsel for the charterers argues that the plaintiff must show likelihood that his claim will prove fruitless if an injunction is refused. If likelihood involves the idea of "more likely than not", I consider that the level is pitched too high. In most cases the plaintiff cannot produce affirmative proof to this effect. All he can show is that a danger exists, and this is all that it seems to me the reported cases require. How does he prove such a danger? Prima facie by demonstrating that the asset is present, that it is moveable and that the defendant is abroad. Of course this always leaves the possibility that the defendant can point to facts which demonstrate he is someone who can be relied on to meet his obligations. Conversely, the plaintiff

may be able to give concrete instances of events which put the defendant's reliability specifically in doubt.

[38]. Hence, while the threshold for meeting a *"good arguable case"* may be high, there is still room for the drawing of inferences when it comes to *"risk of dissipation"*. For example, in a case where fraud or dishonesty is alleged, once a good arguable case is established that the defendant has acted fraudulently or dishonestly, it is hardly necessary to require specific evidence of risk of dissipation.

[39]. The same applies where an applicant has established a good arguable case of an unacceptably low standard of commercial morality if it gives rise to a feeling of uneasiness about the defendant. In **Patterson v. BTR Engineering (Aust) Ltd & Ors** (1989) 18 NSWLR 319 at 325 paras E to G, Gleeson CJ of the New South Wales Supreme Court commented obiter as follows:

> ....I consider that Giles J was correct in taking the view that the evidence as to the nature of the scheme in which the appellant was allegedly involved, which established a prima facie case against him, was such as to justify the conclusion that there was a danger that the appellant would dispose of assets in order to defeat any judgement that might be obtained against him and that such danger was sufficiently substantial to warrant the injunction. There is no reason in principle why the evidence which is relevant to the first of the issues earlier referred to might not have a bearing on the second, and this will especially be so where the prima facie case is made out against a defendant is one of serious dishonesty involving diversion of money from its proper channels. The present is not a case in which a plaintiff who claims simply to be an unsecured creditor seeks to prevent a dissipation of assets which have no particular connection with the claim in question. This is a case in which the plaintiff claims that the defendant, making use of a corporation controlled by him, fraudulently misappropriated a large sum of money which, if it is still under the control of the appellant, would be quite likely to constitute, directly or indirectly, the bulk of his assets. As Giles J held, the nature of the scheme in which, on the evidence to date, the appellant appears to have engaged, is such that it is reasonable to infer that he is the sort of person who would, unless retrained, preserve his assets intact so that they might be available to his judgement creditor.

[40]. In **Ninemia Maritime Corp v. Trave Schiffahrtsgesellschaft mbH & Co**, the judge said that:

> "It is not enough for the plaintiff to assert that the assets will be dissipated. He must demonstrate this by solid evidence... It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on... Precisely what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there..."

[41]. In **<u>Ang Chee Huat v. Thomas Joseph Engelbach</u>** [1995] 2 MLJ 83, the Malaysian Court of Appeal took the view that the conduct of the appellant lacked probity and honesty. This, the Court held, supported a finding that there was a real risk of dissipation. Similarly, in **<u>Amixco Asia Pte Ltd v Bank Negara Indonesia</u>** [1992] 120 SLR 703, the Singaporean Court of Appeal accepted that there is a co-relation between objective evidence of prima facie dishonest conduct and the real risk of asset dissipation.

[42]. In this case before me, there is a good arguable case that Tiki and Harvey had deliberately flouted the law in carrying out the excavation and dredging works. There is a good arguable case that a lot of spoils resulted from those works. And there is a good arguable case that, they had a duty to remove the spoils, and in failing to remove this, they were continuing in their breach of that duty. The fact that Tiki and Harvey did all this in total disregard of the planning and environmental laws, not to mention the stake of the traditional *qoliqoli* owners, gives me an uneasy feeling about them. In my view, this registers unfavorably against Tiki and Harvey, so to speak, on the commercial moral scale. In turn, it is something from which I draw the inference that there is a risk of dissipation in this case. The Court does not wait for the defendants to start removing assets before a finding of risk of dissipation can be arrived at. After all, I am here concerned about the "risk", not "actual".

<u>UNDERTAKING AS TO DAMAGES</u>

[43]. Francis undertakes as follows:

> In the event the court deemed it necessary, I hereby give undertaking to abide by any Order of this Court may make as to damages in case this Court should hereafter be of the opinion that the Defendants shall have sustained any by reason of this Order sought by me and which I ought to pay. The Plaintiff Company has an annual turnover of $350,000 FJD and owns several properties unencumbered including Certificate of Title no. 20497, Lot 6 DP 4773 and Crown Leases over Ellington Wharf on the mainland. Exhibited hereto and marked with the letter **"WF-30"** are copies of my financial returns for the year 2012. Exhibited hereto and marked with the letter **"WF-31"** is a copy of Certificate of Title no. 20497.

[44]. Harvey attacks that undertaking in the following words:

I refer to paragraph 67 of the First Affidavit, in which the deponent, not the Plaintiff, gives his undertaking as to damages.
The Plaintiff itself has not given any undertaking as to damages.
I crave leave to refer to Annexure "WF-30" to the First Affidavit, which purports to be the unaudited financial statements of the Plaintiff.
On page 3 of those financial statements, the Plaintiff's net worth or net assets is shown as (1288675) for 2012.
Page 6 of those financial statements shows that the Plaintiff operated at a loss for each year shown.
As demonstrated by its own evidence, the Plaintiff has a large **negative** net worth of approximately $1.2 million. The Plaintiff is deep in debt to its creditors and is not in a position to pay the First and Second Defendants' damages arising from the *Mareva* injunction should there be any.
Francis has not offered any financial statements or other evidence to fortify his personal undertaking as to damages.

[45]. Francis responds as follows:

The undertaking as to damages has been given on behalf of the company as I swore the entire affidavit on behalf of the Plaintiff company.
To avoid doubt the Plaintiff company has resolved to provide an undertaking as to damages in the terms stated under paragraph 67 of my Affidavit sworn on the 17th December 2013 and I hereby in my personal capacity and on behalf of the company give such undertaking.
In any event, the undertaking is for any damages the First or Second Defendant will suffer as a result of the injunction. The Second Defendant has deposed for himself and on behalf of the First Defendant that they had no intention to sell the property now or anytime in the future. If that were correct, I cannot anticipate what damages they would suffer by the injunction orders, which restrain its sale.
The freehold property being CT 20497, belonging to the Plaintiff has no encumbrances on it and I estimate its value at $3,500,000.00 (Three Million Five Hundred Thousand Dollars) based on improvements and land value and operating business goodwill.
I can also confirm that the Plaintiff does not owe any creditor nor has any loans to clear. I hold 98% of the shares in the Plaintiff company and I exhibit hereto and marked with the letter **"WF-5"** a copy of the current company search of the company.

[46]. I am satisfied that the undertaking given meets the test in **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 46; ABU0011&ABU0011A.2004L (22 April 2005).

LOCUS TO INSTITUTE PUBLIC NUISANCE CLAIM

[47]. The issue, which is a valid one, was raised by Mr. Varitimos at the hearing. A **public nuisance** is an act "which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's

subjects"(as per Romer LJ in **A-G v PYA Quarries** [1957] 1 All ER 894).

[48]. In England, public nuisance is primarily a crime, prosecuted by the Attorney-General, and only actionable as a tort if the claimant has suffered damages over and above other members of the public. But even if actionable in tort, the action is usually instituted by the Attorney-General in a realty action.

[49]. Mr. Ram did not quite address the point raised by Mr. Varitimos. But on my own research, I have come across a ruling of Mr. Justice Scott which allows me to at least reserve the issue for trial. In **Tuisawau v Suva City Council and Attorney-General** [1995] FJHC 185; [1995] 41 FLR 70 (13 March 1995) Scott J opined that the law pertaining to relator actions as it applies in England with regards to public nuisance - does not apply in Fiji:

> The Second Defendant's Application ....is for the action to be dismissed on the ground that this being an action where a private person is seeking the abatement of a public nuisance or is seeking to compel the performance of a public duty the action should have been brought in the name of the Attorney-General, and not against him. In other words, the Action should be a Relator Action and should have complied with RHC O 15 r 13 which it did not ....
> In the course of his submissions in support of his Application Mr. Ahmadu referred to the leading English authorities citing ***Attorney General Ex Rel McWhirter v. I.B.A.*** [1973] QB 629; [1973] 2 WLR 444; [1973] 1 All ER 689 and ***Gouriet v. Union of Post Office Workers*** [1978] AC 435 to which might be added ***London County Council v. The Attorney-General*** [1902] AC 165. Suggesting that a principal purpose of Relator Actions was to prevent the Courts from being overwhelmed with hopeless and unmeritorious actions, Mr. Ahmadu submitted that the rules not having being followed the Plaintiff's case should be struck out.
> Mr. Gopal supported Mr. Ahmadu and further submitted that on the facts the Plaintiff's Action did not fall into those three special categories of action which did not require the Attorney-General's consent. (See Halsbury's Laws of England - 4th Edition - Volume 37 - paragraph 231).
> In answer to these arguments the Plaintiff in an eloquent and thoughtful submission stressed the nature and the importance of the subject matter of the action. He was not, he told me, interested "in legal gymnastics". His concern was to get something done about the rubbish dump which, on the affidavit evidence, he submitted was clearly a public health risk. In the face of continuing inaction by the proper authorities he was left with no alternative but to come to Court. He also pointed out that by section 103 of the 1990 Constitution Fijian Customary Law had been incorporated into the Laws of Fiji. He was, as appeared from the Statement of Claim, a paramount chief of Rewa within which province the rubbish dump lay and he was bringing the action on behalf of his people and out of concern for their health and well being.

The Defendants' Applications and the response thereto by the Plaintiff raise important questions central to the development of administrative law in Fiji. The first question to be answered is whether the Relator Action is part of the Law of Fiji at all.

As has been seen, Mr. Ahmadu's submissions were predicated on the assumption that since Relator Actions are part of the law of England and Wales they must therefore be part of the Law of Fiji. In my view the position is rather less straightforward.

So far as I am aware no Relator Action has ever been brought in Fiji and certainly none has been brought since 1987. That it has however at least been envisaged that there might be such Actions is clear from the existence of RHC O 15 r 13 and also from section 18(3)(a) of the Crown Proceedings Act (Cap. 24) (presumably now to be known as the State Proceedings Act) - see Fiji Interim Military Government Decree No. 3). Neither of these provisions however has the effect of introducing the Relator Action into Fiji Law.

Section 22(1) of the High Court Act (Cap. 13) should also be noted. Under that section "The Common Law (which was) in force in England .... on the 2nd day of January 1875 shall be in force within Fiji". This provision is however subject to the important qualification imposed by section 24 which provides that section 22(1) shall only apply "so far as the circumstances of Fiji and its inhabitants permit and subject to any existing or further Acts of the Parliament of Fiji." The relevance of these sections lies in the origins of the role of the Attorney-General in Relator Actions.

The most detailed account which I have been able to find is in ***Attorney-General and Spalding Rural Council v. Garner*** [1907] 2 KB 480 where Channel J described the position as follows (page 485):-

> *The Attorney-General takes proceedings as the representative of the public, for he represents the Crown and the Crown represents the public. I quote from a book which I understand is recognised as an authority in the Chancery Division namely **Calvert on Parties (2nd Edition at page 26)** and the matter is there stated as follows: "The Attorney General is by law the representative of public interests. The reason for that he is the officer of the Crown, and that, according to the principles of our law the interest of the public is vested in the Crown."*
>
> *The Attorney-General" said Lord Eldon in **Attorney-General v. Brown** "is an officer of the Crown and in that sense only the officer of the public. Whenever therefore the rights of the Sovereign, as the guardian of the interest of the public are affected they must find their protection in the presence of the Attorney-General".*

This analysis of the basis of the Attorney-General's role in Relator Actions is confirmed in **Wade - Administrative Law - 6th Edition** where at page 604 the author states:-

> *"The foundation of this procedure (relator actions) is the interest of the Crown, as parens patriae, in upholding the Law for the general public benefit. The Crown is concerned to see that public bodies, public trusts and charities should not exceed or abuse their powers or their funds; to abate public nuisances and to prevent the Law being flouted."*

How far, then, are these principles applicable in Fiji?

As Sir Mari Kapi recently pointed out in ***Nava v. Native Lands Commission and Native Land Trust Board*** (FCA 55/93) the fact that Fiji has its own written Constitution which England does not must be remembered when considering the

relevance of English authorities to Fiji's situation. Furthermore there is now a crucial difference between the legal systems of Fiji and England brought about by the promulgation of the 1990 Constitution namely, the fact that Fiji is now a Republic and that all references to the Crown are to be deleted from Fiji's Laws. Now, in many cases the deletion of the word "Crown" and its substitution by the word "State" would make little practical difference to the application of the Law. But as has been seen a Relator Action and the role of the Attorney-General therein stems directly and exclusively from the Crown exercising its function as *parens patriae*. In my view it is senseless to think of the State acting as *parens patriae* - how could the State be the guardian of itself?

It is also of interest to note in passing that even in a kingdom such as Scotland the Relator Action is unknown and there is no bar to individuals with very general interests suing on their own account in order to prevent breach by a public body of a duty owed by that body to the public (See ***Wilson v. I.B.A.*** [1979] SLT 279). There is a further and most important consideration. 1977 saw the introduction in England of a new Order 53 and a similar Order 53 was introduced into Fiji in 1981 (See LN 3/81). The purpose of this Order was to introduce a uniform, flexible and comprehensive code or procedure for the exercise by the High Court of its supervisory jurisdiction over the proceedings and decisions of inferior Courts, Tribunals, or other bodies or persons charged with the performance of public actions and duties. At the same time it was designed to eliminate procedural difficulties relating to the machinery of administrative law, mainly by removing procedural differences between the remedies which an applicant was formally required to select as most appropriate for his case. ***Gouriet's*** case, heavily relied upon by Mr. Ahmadu, was decided before the introduction of the new Order 53 and was followed and distinguished in 1982 by the House of Lords in ***Inland Revenue Commissioners v. National Federation of Self Employed etc.*** [1982] AC 617. The result was to marginalise ***Gouriet***. This was because on the new view of standing the Court held that it would be "a grave lacuna in our system of public law if a pressure group like a federation, or even a single public spirited taxpayer were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the Court to vindicate the rule of law and to get the unlawful conduct stopped" (*ibid* page 644). As Wade puts it (page 705) "a ratepayer will now have the standing to challenge the legality of his local authority's actions without needing to enlist the aid of the Attorney-General providing only that he can show a good case". It is doubtless for these reasons that in 1988 the Justice - All Souls review recommended that Relator Actions be abolished.

At this point some mention of section 103 of the Constitution may also be made. The sub-section reads as follows:-

> *"Until such time as an Act of Parliament otherwise provides, Fijian customary law shall have effect as part of the Laws of Fiji: provided that this sub-section shall not apply in respect of any customs, traditions, usage of values that is and to the extent that it is inconsistent with a provision of this Constitution or a statute repugnant to the general principles of humanity".*

The problem about provisions such as this (even when grammatically drafted), which exist in many Pacific Constitutions, is to determine what precisely the customary law is. In the present case the only evidence and submissions were from the Plaintiff who is an intelligent and educated traditional high chief. What better person could there be to tell the Court that in Fijian customary law the role

of the high chief was to protect his people, by all means possible, from dangers to their health and well being?

For the Relator argument based objections to succeed would entail the curious and anomalous result that in the Republic of Fiji public **nuisances** cannot be restrained at the instance of a high chief acting under Fiji traditional law but only at the instance of the Attorney-General acting on behalf of a nonexistent *parens patriae*.

From all the above it will be apparent that I can find no scope purpose or benefit to be derived from introducing the Relator Action at this stage into Fiji's legal system.

Before finally leaving the question of the Attorney-General's role in this Action I observe that study of the Statement of Claim does not reveal that the Plaintiff is in fact seeking any actual relief against the Attorney-General. In these circumstances I can see no purpose in joining the Attorney-General as a Defendant. Under the provisions of Order 15 Rule 6 2(a) I therefore dismiss him from the suit.

Unfortunately there remains a final complicating matter arising from the fact that the Plaintiff commenced his proceedings by Writ. The general rule is that where a person seeks to establish that a decision of a person or body infringes his rights which are entitled to protection under public law then that person must proceed by way of Judicial Review (see ***O'Reilly v. Mackman*** [1983] 2 AC 237; [1982] 3 All ER 1124) and there is as yet no power corresponding to RHC O 53 r 9(5) to allow proceedings commenced by Writ to continue by way of Judicial Review. There are however three considerations which I take to be particularly relevant. The first is that given the **continuing** nature of the **nuisance** complained of by the Applicant there is every likelihood that leave to seek Judicial Review would be granted were the present proceedings to be dismissed for technical reasons. Second, the reliefs sought by the Applicant, namely declarations and injunctions are both reliefs obtainable both in proceedings began by writ and in proceedings brought by way of Judicial Review. Thirdly, the rule in ***O'Reilly v. Mackman***, which of course is at most highly persuasive in Fiji, has been the subject of considerable criticism. In 1984 Lord Wilberforce said in ***Davey v. Spelthorne*** [1984] AC 262, 278:-

> *"We have not yet reached the point at which mere characterization of a claim as a claim in public law is sufficient to exclude it from consideration by the ordinary Courts; to permit this would be to create a dual system of law with the rigidity and procedural hardship for Plaintiffs which it was the purpose of the recent reforms to remove".*

With the greatest respect and taking advantage of that increased degree of latitude which Fiji's total legal independence affords its Courts I prefer to be guided in this case by another Decision of the House of Lords namely ***Roy v. Kensington and Chelsea FPC*** [1992] 2 WLR 229 where Lord Lowry said:-

> "In conclusion, ... it seems to me that, unless the procedure adopted by the moving Party is ill-suited to dispose of the question at issue, there is much to be said in favour of the proposition that a Court having jurisdiction ought to let a case be heard rather then entertain a debate concerning the form of proceedings".

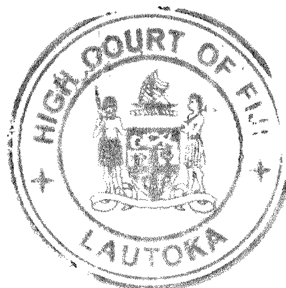
For the above reasons I am of the view that there no is technical or procedural objection to the Plaintiff's Writ as it now stands save that the Attorney-General was improperly joined and has accordingly been dismissed from the suit. The two Applications to strike out the Statement of Claim are dismissed.

LIMITATION ACT ISSUE

[50]. Mr. Varitimos had submitted that the claim on public nuisance is statute barred under the Limitation Act. It is true that under section 4 of the Limitation Act (Cap 35) the limitation period for an action founded on nuisance is 3 years. I make no determination of the issue now except to say that there is a good arguable case that the initial act of creating something that is a public nuisance, if left unabated, is a continuing actionable wrong until the condition is abated. In other words, a fresh cause of action accrues every day that the nuisance is left unabated. And flowing from that, it is a good arguable case to say that the Limitation Act will apply only to limit recovery for the three year period immediately preceding the filing of the claim. In other words, the Act, arguably, will not work to bar a nuisance action entirely, but will only limit recovery. A lot of this may hinge, ultimately, on whether the court will approach the issue from the viewpoint of the defendant's on-going duty (if any) to abate, or from the viewpoint of the defendant's duty not to have created the public nuisance at all in the first place. These, I postpone for trial.

CONCLUSION

[51]. For all the above reasons, I am of the view that the limited Mareva injunction granted *ex-parte* on 31 December 2013 should continue until further Orders of the Court. Costs in the cause. I have, already, last week, granted Order in Terms on the plaintiff's Summons for Directions. Matter to take normal course.



....

Anare Tuilevuka
JUDGE
10 July 2014.