

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 32 of 2013

BETWEEN : **DENARAU CORPORATION LIMITED** a company duly
incorporated under the laws of Fiji and having its registered office at
Level 10, FNPF Place, 343 Victoria Parade, Suva, in the Republic of
Fiji.

PLAINTIFF

AND : **VIMAL DEO, Director as Trustee of the DEO FAMILY TRUST**
Of Lot 3 Paradise Point, Denarau Island, Nadi in the Republic of Fiji.

DEFENDANT

(Ms) Bhavna Geeta Narayan for the Plaintiff
Mr. Adish Kumar Narayan with (Ms) Nilema Samantha for the Defendant

Date of Hearing: - 02nd May 2016
Date of Ruling : - 05th August 2016

RULING

(A) INTRODUCTION

- (1) The matter before me stems from the Plaintiff's application for 'Summary Judgment' against the Defendant, by way of Summons dated 17th August 2015, made pursuant to Order 14, rule 1 of the High Court Rules, 1988.
- (2) In support of the application, the Plaintiff relies on the followings;
 - ❖ Writ of Summons and Statement of Claim filed on 01st March 2013.
 - ❖ Reply to Defence and Defence to Counter-Claim filed on 18th April 2013.

- ❖ The previous Summons for Summary Judgment dated 25th August 2013.
- ❖ Affidavits of 'Rupeni Fonmanu' filed on 23rd August 2013, 14th February 2014, 31st March 2014 and 18th September 2014.

(3) The Plaintiff by the Summons filed, seeks the following Orders;

- Para 1. That final Judgment be entered in this action against the Defendant for the sum of \$59, 284.63 (Fifty Nine Thousand Two Hundred Eighty Four Dollars and Sixty Three Cents) being the amount of levies outstanding on State Lease No. 16815 being Lot 7 on SO No. 5486 and the sum of \$18, 518.96 (Eighteen Thousand Five hundred Eighteen Dollars and ninety Six Cents) being the amount of levies outstanding on State Lease No. 16822 being Lot 11 on SO No. 5486.*
- 2. The interest be awarded on the sums stated hereinabove pursuant to the Law Reform (Miscellaneous Provisions) Death and Interest) Act [Cap 27].*
- 3. That the Statement of Defence and the Counter Claim and Set-off filed herein be struck out or dismissed.*
- 4. That costs be awarded to the Plaintiff against the Defendant arising out of this action and this application.*

(4) The application for 'Summary Judgment' is vigorously contested by the Defendant.

(5) The Defendant relied on the following documents in support of its opposition to the Plaintiff's application for 'Summary Judgment';

- ❖ Amended Defence, Counter- Claim and Set-Off filed on 31st January 2014.
- ❖ Affidavit in Reply of 'Vimal Deo' sworn on 23rd September 2015.

(6) The Plaintiff and the Defendant were heard on the Summons. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff and the Defendant filed careful and comprehensive written submission for which I am most grateful.

(B) THE FACTUAL BACKGROUND

(1) What are the circumstances that give rise to the present application?

- (2) To give the whole picture of the action, I can do no better than set out hereunder the averments/assertions of the pleadings.
- (3) The Plaintiff in its Statement of Claim pleads *inter alia*;

- Para 1. THE Plaintiff is a body corporate which administers, manages and controls Denarau Island on an integrated basis in accordance with its constitutional documents.
2. THAT the Plaintiff under its constitutional documents being the Charter of Denarau Island, Articles of Association and By-laws is the regulatory body established as a body corporate with perpetual succession and can sue and be sued in its own name.
3. THAT the Plaintiff is empowered under the said constitutional documents to impose levies on owners of land on Denarau Island who by virtue of being owners are also shareholders of the Plaintiff.
4. THAT the costs incurred by the Plaintiff for administering, managing and controlling the Island in accordance with its Charter and Articles of Association is to borne by its shareholders, in a manner catered for in the Plaintiff's Articles of Association.
5. THAT the Defendant as an owner of the lots contained on State Lease No. 16815 being Lot 7 on SO No. 5486 and State Lease No. 16822 being Lot 11 on SO No. 5486 ("Lots") on Denarau Island and as a shareholder in the Plaintiff is liable to pay the levies imposed by the Plaintiff in accordance with the constitutional documents governing the affairs of Denarau Island.
6. THAT the Defendant is in arrears with regard to levies owing towards the said Lots.
7. THAT a fifteen (15) day written Demand Notice by the Plaintiff dated 13 December 2012 has been served on the Defendant but the Defendant has failed and/or neglected and/or refused to make the payment.
8. THAT the Plaintiff through its Solicitors served a final seven (7) days Demand Notice dated 6 February 2013 via Registered mail demanding payment of the outstanding levies. The Defendant has been provided with opportunities settle its arrears, yet to date, the Defendant, has but failed and/or neglected to make satisfactory arrangements towards settling its substantial arrears.
9. THAT as at the date of the Plaintiff's Solicitor's Demand Notice dated 6 February 2013 the Defendant owes to the Plaintiff:
- a. the sum of \$59,284.63 (fifty Nine Thousand Two Hundred and Eighty Four Dollars and Sixty Three Cents) being the amount of levies outstanding on State Lease No. 16815 being Lot 7 on SO No. 5486; and

- b. *the sum of \$18,518.96 (Eighteen Thousand Five Hundred and Eighteen Dollars and Ninety Six Cents) being the amount of levies outstanding on State Lease No. 16822 being Lot 11 on SO No. 5486.*

(4) Wherefore the Plaintiff claims from the Defendant;

- i. *The sum of \$59,284.63 (fifty Nine Thousand Two Hundred and Eighty Four Dollars and Sixty Three Cents) being the amount of levies outstanding on State Lease No. 16815 being Lot 7 on SO No. 5486;*

the sum of \$18,518.96 (Eighteen Thousand Five Hundred and Eighteen Dollars and Ninety Six Cents) being the amount of levies outstanding on State Lease No. 16822 being Lot 11 on SO No. 5486;

The total Judgment in the sum of \$77,803.59 (Seventy Seven Thousand Eight Hundred and Three Dollars and Fifty Nine Cents)

- ii. *Interest pursuant to the Law Reform (Miscellaneous Provision) (Death and Interest) Act [Cap.27];*
- iii. *Costs of an incidental to this legal proceedings; and*
- iv. *Such further order and/or other relief as this Honourable Court deems just.*

(5) The Defendant in his Amended Statement of Defence and Counter-Claim pleads *inter alia*;

Para 1. *The Defendant denies owing the sum of \$77,803.59 (Seventy Seven Thousand Eight Hundred and Three Dollars and Fifty Nine Cents) or any sum at all to the Plaintiff.*

2. *As to paragraphs 1 to 4 of the Particulars to the Statement of Claim (hereinafter called "the Statement of Claim") The Defendant:*

- i. *admits that the Plaintiff is a body corporate;*
- ii. *admits that the Plaintiff has been purporting to manage and control Denarau Island;*
- iii. *admits that the Plaintiff alleges to have authority to levy owners of land on Denarau island*
- iii. *admits that the Plaintiff alleges to have authority to levy owners of land on Denarau Island with charges;*

- iv. *admits that the Plaintiff has authority made levies against the Defendant and others on the Island.*
 - v. *otherwise denies the contents thereof or that the Plaintiff has any lawful authority as alleged in paragraphs 1 to 4 therein.*
3. *As to paragraph 5 of the Statement of Claim the Defendant:*
- a) *admits that it is the owner of Crown Lease Number 16815 being Lot 7 on SO 5486 and Crown Lease Number 16822 being Lot 11 on SO 5486 on Denarau Island ("the lots");*
 - b) *further to say that the lots are located in the industrial subdivision on Denarau Island;*
 - c) *otherwise denies the contents thereof.*
4. *The Defendant denies paragraphs 6 of the Statement of Claim.*
5. *As to paragraph 7 to 9 of the Statement of Claim the Defendant:*
- i. *admits the Plaintiff demanded monies in respect of the lots from another entity;*
 - ii. *admits that it then caused demands to be made to the Defendant which the Defendant has denied and disputed;*
 - iii. *otherwise denies the contents thereof.*

COUNTER-CLAIM AND SET OFF

6. *The Defendant reiterates paragraphs 1 to 5 herein.*
7. *The Defendant further say that he is not bound by the so called Plaintiff's Constitutional documents (Charter of Denarau Island, Articles of Association and By laws) referred to in paragraphs 3 and 4 of the Statement of Claim as the Defendant was and is not privy to the Constitutional documents and/or the Sale and Purchase Agreement entered into for the Lots at the time of acquisition and further the Defendant was not appraised or made aware or given notice of the so called Constitutional documents purportedly relied on by the Plaintiff.*
8. *The Plaintiff does not have any locus standi or cause of action against the Defendant.*
9. *Further or in the alternative if the Plaintiff is entitled to make any levies against the Defendant's land (which is denied) the amount of*

levies and charges are erroneous and wrongly charged in respect of industrial lots which is not provided for in the purported Constitutional documents relied on by the Plaintiff.

10. *The Plaintiff has erroneously, arbitrarily, unilaterally and without any lawful authority been imposing the so called "levies" in accordance with the calculation of costs on commercial basis for the Retail Centre and has accordingly acted ultra vires its powers (and in the process is liable to the Defendant as claimed herein).*
11. *Further and/or in the alternative the Plaintiff on 12th September 2012 erroneously refused and/or rejected the Defendant's application to operate wholesale liquor and other outlet on the Lots through a tenant. The Plaintiff refused approval purporting to have power under its misconceived purported and alleged powers in the Constitutional documents which also included the power to disrupt services to the lots and entry on to the Island.*
12. *As a result of the refusal aforesaid the Defendant suffered loss of chance of receiving anticipated income from a prospective 3 year tenancy agreement over Lot 7 and 11.*

Particulars of Special Damages

- a) *Loss of prospective income for \$6,000.00 per month from 1st September 2012 to 1st September 2015 in the sum of \$216,000.00.*
 - b) *Loss in value of the Defendant's land by the actions of the Plaintiff.*
13. *Further in the alternative the Plaintiff's refusal to approve a liquor and or other outlet on Lots 7 and 11 in itself and/or upon reliance on the alleged Constitutional documents and/or provisions of any purported Sale and Purchase Agreement is part of a contract the provisions of which are exclusionary or is part of an arrangement or understanding the purpose of which is or has or is likely to have the effect of substantially lessening competition and is contrary to Section 60 of the Commerce Commission Decree and is unenforceable, unlawful, illegal, null and void.*

Particulars of Breach

- i. *Assigning the lots in the industrial subdivision as being part of the retail/commercial precinct on Denarau Island.*
- ii. *Providing or requiring any retail or wholesale trade in the industrial subdivision to be carried on only in the retail/commercial precinct and not in the industrial subdivision despite unlawfully levying rates on a commercial basis treating the industrial area as a commercial precinct;*
- iii. *Granting permission to a subsequent applicant to conduct the same or similar activity as the Defendant/Applicant yet refusing the Applicant's application on the ground that a*

wholesale centre already existed at the retail centre of Port Denarau.

- v. *Refusing to disclose the existence of the competitive application and failing to give an opportunity to the Applicant to be heard and oppose the competitive application.*

- 14. *By reason of the breaches of the above provisions of the Commerce Commission Decree the Defendant is entitled to various reliefs under the Decree and otherwise including, but not limited to, injunction orders and damages.*

- 15. *The Defendant Counterclaims the sums due in terms of paragraph 12 herein which exceeds the Plaintiff's claim and which the Defendant seeks to set-off against any sum which the Plaintiff may obtain against the Defendant.*

- 16. *The Defendant claims interest on any award of damages made by the Court pursuant to Section 3 of the Law Reform (Miscellaneous Provisions) (death and Interest) Act Cap 27 from 12th September 2012 to date of judgement at a commercial rate to be fixed by the Court.*

WHEREFORE the Defendant prays that the Plaintiff's claim be dismissed with costs and judgment in favour of the Defendant on his counterclaim for:

- a) *A declaration that the alleged Constitutional documents and/or the alleged Sale and Purchase Agreement or other arrangement relied on by the Plaintiff does not bind the Defendant and cannot be relied on by the Plaintiff generally and/or as being contrary to the provisions of the Commerce Commission Decree.*

- b) *A declaration that the alleged Constitutional documents and/or the alleged Sale and Purchase Agreement or other arrangement relied on by the Plaintiff to restrict the carrying on of a retail or whole sale outlet in the industrial subdivision is unenforceable, unlawful, illegal and null and void as being contrary to Section 60 of the Commerce Commission Decree;*

- c) *An injunction to restrain the Plaintiff by its officers, servants, agents, contractors otherwise and howsoever from enforcing any provisions of the alleged Constitutional documents or any Sale and Purchase agreement or other arrangement restriction or prohibiting the carrying on of any retail or wholesale outlet from Industrial Lots 7 and 11 owned by the Defendant.*

- d) *An order that the Plaintiff reverse its decision not to grant the consent to construct and operate a liquor licence and wholesale business and do issue such consent to the Applicant therefore;*

- e) *Special Damages in the sum of \$216,000.00*
- f) *General Damages;*
- g) *Interest pursuant to the Law Reform (Miscellaneous Provisions) (Death and Interest) Act.*
- h) *Costs on a full Solicitor/Client Indemnity basis;*
- i) *Such further or other Orders as the Court deems just*

(C) **THE LAW**

- (1) Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing Summary Judgment.
- (2) Rather than refer in detail to various authorities, I propose to set out hereunder important citations, which I take to be the principles of the play.
- (3) The law relating to 'Summary Judgment' is contained in Order 14 of the High Court Rules, 1988.
- (4) I should quote Order 14, which provides;

SUMMARY JUDGMENT

Application by plaintiff for summary judgment (O.14, r.1)

1. (1) *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 such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.*

(2) *Subject to paragraph (3), this rule applies to every action begun by writ other than -*

(a) *an action which includes a claim by the plaintiff for libel, slander, malicious prosecution or false imprisonment.*

(b) *an action which includes a claim by the plaintiff based on an allegation of fraud.*

(3) *This Order shall not apply to an action to which Order 86 applies.*

**Manner in which application under Rule 1
Must be made (O.14, r2)**

2. (1) *An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim, or the part of a claim to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the cause may be, or no defence except as to the amount of any damages claimed.*

(2) *Unless the Court otherwise directs, an affidavit for the purposes of this rule may contain statements of information or belief with the sources and grounds thereof.*

(3) *The summons, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant not less than 10 clear days before the return day.*

Judgment for Plaintiff (O.14, r.3)

3. (1) *Unless on the hearing of an application under rule 1, either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the claim or part as may be just having regard to the nature of the remedy or relief claimed.*

(2) *The Court may by order, and subject to such conditions if any, as may be just, stay execution of any judgment given against a defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action.*

(5) Reading, as best as I can, between the lines of Order 14, it seems to me that the whole purpose of 'Summary Judgement' procedure is to obtain a quick Judgment, where there is no defence to a claim and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights. The onus remains on the Plaintiff throughout to establish that the Defendant has no defence.

(6) I bear in mind the principle behind the power to give Summary Judgment under Order 14, namely that it is:

".....intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where

therefore it is inexpedient to allow a defendant to defend for mere purposes of delay"
(*Jones v Stone* [1894] A.C. 122).

It has been held that:

"As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend:"
(*Saw v Hakim* (1889) 5 T.L.R. 72).

On the authorities it is quite clear that:

"leave to defend must be given unless it is clear that there is no real substantial questions to be tried' (Codd v Delap (1905 92 L.T. 510 H.L.) That there is no dispute as to facts or law which raises a reasonable Doubt that the plaintiff is entitled to judgment (Jones v Stone (1894) A.C. 122)

(7) Recently the Court of Appeal in **Carpenters Fiji Ltd v Joes Farm Produce Ltd**, Civil Appeal number ABU 0019/2006 comprehensively listed principles at page 9 and 10 of the judgment as follows:-

- (a) *The purpose of .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 plaintiff's 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 plaintiff's 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 when 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).

- (8) In Halsbury's, Laws of England (4th Ed) Volume 37 paras. 413 – 415, the relevant portions of which read:

Where the plaintiff's application for summary judgment Under Order 14 is presented in proper form and order, the burden shifts to the defendant and it is for him to satisfy the court that there is some other reason to be a trial. Unless the defendant does so, the court may give such judgment for the plaintiff against the defendant as may be just

The defendant may show cause by affidavit or otherwise to the satisfaction of the court. He must 'condescend upon particulars', in all cases, sufficient facts and particulars must be given to show that there is a genuine defence.

And in a note (Note 4) to the paragraph it is stated that:

"The normal everyday practice is for the defendant to show cause by affidavit, and except in a clear case, it is rare for the court to allow a defendant to show cause otherwise than by affidavit. A defence already served may be a sufficient mode of showing cause, but not if it is a sham defence served early to avoid showing cause by affidavit: see McLardy v. Slateum (1890) 24 Q.B.D. 504.

- (9) Once a claim is established, the evidential and persuasive burden shifts to the Defendant (See, Thomas J in Hibiscus Shopping Town Pty Ltd -v- Woolworths Ltd [1993] FLR 106 at 109) who must adduce affidavit evidence dealing specifically with the plaintiff's claim and affidavit and also state clearly and precisely what the defence is and what facts he relies on to resist the entry of summary judgment: Magan Lal Brothers Ltd -v- L.B.Masters & Company Civil Appeal No: 31/84.

If the Defendant has not filed an affidavit but a defence, the Court must then direct its mind on the issues raised in the defence to see whether it has merits and is not just a sham defence to delay judgment or avoid the necessity of showing cause by Affidavit (See, the Fiji Court of Appeal in Magan Lal Brothers Ltd -v- L.B. Masters (*supra*); See also, Halsbury's, Laws of England (4th Edition) volume 37 Para 413 – 415, notes 4).

- (10) In Vatukoula Gold Mines Ltd -v- Anand [2010] FJHC 46. HOBC 219 of 2008 it has been held:-

"Order 14 summary judgment procedure is available to any plaintiff who desires a quick judgment on his or her claim where there is no

defence to a claim. It is also available where any defence raised is either not a bona fide defence or discloses no triable issues so as to merely delay a Judgment in favour of the plaintiff."

- (11) The onus is on the plaintiff in a summary judgment and the way it can be resisted was discussed by Fatiaki J in Fiji Development Bank –v- Inoke Moto & Others [1995] 41 FLR 236, where his Lordship quoted a New Zealand decision and stated:

The correct approach to an application for summary judgment is succinctly summarised in my view in the head note to the New Zealand Court of Appeal decision in Pemberton v. Chappel [1987] 1 NZLR 1 where it was said of the N.Z. equivalent of Order 14"

"Held: ...The High Court Rules cast onto the plaintiff the onus of convincing the Court that the Defendant has no fairly arguable defence. Normally that onus will be satisfied by the plaintiff's affidavit verifying the allegations in the Statement of Claim and his oath that he believes that the defendant has no defence to the claim. ... If a defence is not evident on the plaintiff's pleading and the defendant wishes to resist summary judgment, the defendant must file an affidavit raising an issue of fact or law and give reasonable particulars of the matters which he claims ought to be put in issue. Where the only arguable defence is a question of law which is clear-cut and does not require findings on disputed facts or the ascertainment of further facts, the Court may, and normally should, decide it on the application for summary judgment. But where the defence raises questions of fact on which the outcome of the cause may turn it will not often be right to enter summary judgment."

Over a century earlier in 1880 Lord Blackburn in Wallingford v. Mutual Society [1880] 5 A.C 685 said of the nature of the affidavit required from a defendant in opposing an Order 14 application at p. 704 and he quoted:- "I think that when the affidavits are brought forward to raise (a) defence they must, if I may use the expression, condescend upon particulars. It is not enough to swear "I say I owe the man nothing". Doubtless, if it was true, that you owed the man nothing as you swear, that would be a good defence. But that is not enough. You must satisfy the judge that there is reasonable ground for saying so ... And in like manner as to illegality, and every other defence that might be mentioned."

(D) ANALYSIS

- (1) Let me now turn to the merits of the application bearing in my mind the above mentioned legal principles and the factual background uppermost in my mind.
- (2) Before dealing with the merits of the application, let me record that Counsel for the Plaintiff and the Defendant in their written submissions have done a fairly exhaustive

study of judicial decisions and other authorities which they considered to be applicable.

I interpose to mention that I have given my mind to the oral submissions made by Counsel, helpful written submissions and the judicial authorities referred to therein.

(3) As I understand the pleadings and evidence, the following facts are admitted by the Defendant;

- ❖ The Plaintiff is a duly incorporated Company under the laws of Fiji.
- ❖ The existence of the Plaintiff's Constitutional Documents (viz, Articles of Association and Charter of Denarau).
- ❖ The Defendant is the registered owner of two properties on Denarau Island contained in State Lease No:- 16815 being Lot 7 on SO No:- 5486 and State Lease No:- 16822 being Lot 11 on SO No:- 5486.
- ❖ The Restrictive Covenants No:- 600178 and 600171 are registered on the memorials of State Leases 16822 and 16815.
- ❖ The Defendant admits receiving the Plaintiff's Demand Notice on 13th December 2012 to pay the sum of \$59,284.63 being the amount of levies outstanding on State Lease No:- 16815 being Lot 7 on SO No:- 5486 and \$18,518.96 being the amount of levies outstanding on State Lease No:- 16822 being Lot 11 on SO No:- 5486.
- ❖ The Plaintiff was formally known as 'Chakola Limited'.

(4) The Writ in the action was indorsed as follows; "*The Plaintiff claims from the Defendant the sum of \$77, 803.59 (Seventy Seven Thousand Eight Hundred and Three Dollars and Fifty Nine Cents) being monies due and owing by the Defendant to the Plaintiff*".

(5) As I mentioned before, the Plaintiff in its Statement of Claim pleads;

Para 3. THAT the Plaintiff is empowered under the said constitutional documents to impose levies on owners of land on Denarau Island who by virtue of being owners are also shareholders of the Plaintiff.

4. THAT the costs incurred by the Plaintiff for administering, managing and controlling the Island in accordance with its Charter and Articles of Association is to borne by its shareholders, in a manner catered for in the Plaintiff's Articles of Association.

5. *THAT* the Defendant as an owner of the lots contained on State Lease No. 16815 being Lot 7 on SO No. 5486 and State Lease No. 16822 being Lot 11 on SO No. 5486 ("Lots") on Denarau Island and as a shareholder in the Plaintiff is liable to pay the levies imposed by the Plaintiff in accordance with the constitutional documents governing the affairs of Denarau Island.
6. *THAT* the Defendant is in arrears with regard to levies owing towards the said Lots.
7. *THAT* a fifteen (15) day written Demand Notice by the Plaintiff dated 13 December 2012 has been served on the Defendant but the Defendant has failed and/or neglected and/or refused to make the payment.
8. *THAT* the Plaintiff through its Solicitors served a final seven (7) days Demand Notice dated 6 February 2013 via Registered mail demanding payment of the outstanding levies. The Defendant has been provided with opportunities settle its arrears, yet to date, the Defendant, has but failed and/or neglected to make satisfactory arrangements towards settling its substantial arrears.
9. *THAT* as at the date of the Plaintiff's Solicitor's Demand Notice dated 6 February 2013 the Defendant owes to the Plaintiff:
 - a. the sum of \$59,284.63 (fifty Nine Thousand Two Hundred and Eighty Four Dollars and Sixty Three Cents) being the amount of levies outstanding on State Lease No. 16815 being Lot 7 on SO No. 5486; and
 - b. the sum of \$18,518.96 (Eighteen Thousand Five Hundred and Eighteen Dollars and Ninety Six Cents) being the amount of levies outstanding on State Lease No. 16822 being Lot 11 on SO No. 5486.

(6) The Defences on which the Defendant relies and by which he is prepared to swim or sink are in these terms in his 'Amended Statement of Defence';

- Para 2.
- ii. admits that the Plaintiff has been purporting to manage and control Denarau Island;
 - iii. admits that the Plaintiff alleges to have authority to levy owners of land on Denarau Island with charges;
 - iv. admits that the Plaintiff has arbitrarily made levies against the Defendant and others on the Island.
 - v. otherwise denies the contents thereof or that the Plaintiff has any lawful authority as alleged in paragraphs 1 to 4 therein.

Although the Defendant in his 'Amended Statement of Defence' has raised four (04) defences, some of them are interconnected and over-lapping.

- (7) In order to defeat the Plaintiff's application for 'Summary Judgment' it is sufficient for the Defendant to show some "real prospect", (The Court will disregard prospects which are false, fanciful or imaginary.)

The inclusion of the word 'real' means that the Defendant has to have a case which is better than 'merely arguable'. See; International Finances Corporation v Utexafrika Sprl (2001) C.L.C. 1301 and EDF Man Liquid Products Ltd v Patel (2003) EWCA Civ. 472

- (8) With that in mind, I turn to the first ground of Defence;

"..... the Plaintiff has been purporting to manage and control Denarau Island".

(Ms) Narayan, Counsel for the Plaintiff responds that the Plaintiff is the body Corporate in charge of administrating, controlling and managing Denarau Island in accordance with the provisions of the 'Charter of Denarau Island' and its 'Articles of Association'. It was further contended that in the Preamble of the 'Charter of Denarau Island' (Annexure RF1) at clause D (b) it is outlined that the Plaintiff is the legal entity which administers, controls and manages Denarau Island. (Ms) Narayan says that the 'Charter of Denarau Island' is the 'core document' and the 'Constitution' of 'Denarau Island'.

She drew my attention to the 'Charter of Denarau Island' (Annexure RF-1) and submitted that the charter links the land ownership of land on Denarau Island to share ownership in the Plaintiff Company. She goes on to argue that ownership of shares in the Plaintiff creates membership in the Plaintiff. Membership in the Plaintiff binds members to the Plaintiff's Articles (RF-4). She also drew my attention to Clause 8.1 of the 'Charter' under the heading "Linkage of land and share ownership" and submitted that Clause 8.1 shows the nexus between the ownership of land and the acquisition of shares or an interest in the Plaintiff. She concludes by saying that no owner of land on Denarau Island, including the Defendant, can own land without contemporaneously acquiring shares in the Plaintiff.

Mr. Narayan, Counsel for the Defendant responds by pointing to the fact that the 'Charter' is not a registered document with the Companies office. (There is no controversy as to this in the Affidavits). In the same breath, he asserted that the Defendant is not a shareholder and has no interest in the Plaintiff. He also asserted that the Defendant has never been issued a share certificate.

During the course of the argument, (Ms) Narayan took me through a passage at paragraph (03) of the High Court decision, "Slatter & Gutherine Company Ltd v

Denarau Corporation Limited, Civil Action No:- HBC 116 of 200L. The passage is this;

"The defendant [Denarau Corporation Limited] is the company which controls and manages the various areas or precincts that make up Denarau Island in Nadi. It performs functions similar to those of a municipal council. The owners of the various areas are bound by a restrictive covenant which requires them to obtain development consent and approval from the defendant before undertaking any development or other works in their respective areas"

Moreover, she took me through a passage in the **Fiji Court of Appeal** decision in the above, viz, 'Denarau Corporation Limited v Slatter & Gutherine Company Limited, Misc No:- 10 of 2012. The passage is this;

"..... The Applicant controls and manages the development of Denarau Island. It performs functions similar to those of a municipal council. Owners and lessees on Denarau Island are bound by a restrictive covenant that requires them to obtain a form of planning approval from the Applicant before undertaking any development or other works on the Island."

I closely read the High Court and the Court of Appeal Judgment. The case of "Slatter & Gutherine Company Ltd v Denarau Corporation Ltd, which was cited by (Ms) Narayan, though it differed in its facts from the present case, certainly appears to carry her a good way in her argument.

It is important to remember that, significantly as I believe, a 'Charter' is not a document that is required to be lodged at the 'Registrar of Companies' under the provisions of the **Companies Act** (Cap 247).

Is there any authority which precludes me from giving effect to the view which I have expressed?

Let me have a closer look at the 'Charter of Denarau Island'. (Annexure RF-1)

The Charter of Denarau Island clearly states at clause D (B) that;

"DCL would be the legal entity which would undertake the control, management and administration functions acting, for most purposes, like a Municipal Council, and its shareholders would pay the cost of its operations on an equitable basis."

The language of clause D (b) of the 'Charter' is unmistakably clear, *i.e.* 'DCL would be the legal entity which would undertake the control, management and administration functions.'

I am bound by the Judgment of the Fiji Court of Appeal in 'Denarau Corporation Limited v Slatter & Gutherine Company Limited, Misc No:- 10 of 2012, (as cited by (Ms) Narayan) where His Lordship W.D.Calanchini at paragraph (04) stated;

"..... The Applicant controls and manages the development of Denarau Island. It performs functions similar to those of a municipal council. Owners and lessees on Denarau Island are bound by a restrictive covenant that requires them to obtain a form of planning approval from the Applicant before undertaking any development or other works on the Island."

(Emphasis Added)

Being guided by those words, I think it is right in this case to say that the Plaintiff is the body corporate in charge of administrating, controlling and Managing Denarau Island. I certainly, agree with the sentiments which are expressed inferentially in the submissions of (Ms) Narayan.

I do not forget what was further said in argument by (Ms) Narayan. She took me through paragraph (3) of the correspondence annexed and marked VD-1, the letter addressed to the 'Commerce Commission' by the Defendant dated, 15th June 2012. The paragraph (3) reads;

"That Denarau Corporation Limited, a Company responsible for the management by way of maintenance and provision related services levy charges to each of the lot owners on Denarau Island."

She submitted that the only inference which could practically arise from the paragraph (3) of the aforementioned correspondence is that the Defendant accepted and acknowledged that it is the Plaintiff who controls, administers and managers Denarau Island. As against this, I heard no word said on behalf of the Defendant. Mr. Narayan did not argue on this point.

I acknowledge the force of the submissions by Counsel for the Plaintiff.

I must confess that I place much value on the paragraph (3) of the aforementioned letter dated 15th June 2012. The said paragraph effectively nullifies the Defendant's assertion that the Plaintiff 'purports' to manage and control Denarau Island. The said paragraph of the Defendant's correspondence puts flesh on the bones of the Defendant's first ground of Defence and makes plain the unfairness of it. All these clearly demonstrate that the Defendant is not merely clutching at a non-existent straw but expecting to be carried by it. This should be made clear; no amount of hair splitting with regard to the first ground of defence, by Counsel, will be of any avail to him. The impression produced on my mind by the first ground of Defence is that I have here the evolution of a myth, and not a gradual unfolding of a real defence. Anything more shadowy, anything more unsatisfactory, anything more unlikely to produce persuasion or conviction on the mind of the Court, I can scarcely imagine.

It is also important to remember that, the Defendant applied for Development consent in accordance with Clause 7 of the Charter of Denarau Island to develop State Lease No:- 16815 being Lot 7 on SO No:- 5486.

The only inferences which could practically arise from the Defendant's action of applying for Plaintiff's Development consent as per clause 7 of the Charter of Denarau Island is either that the Defendant accepted and acknowledged that it is the Plaintiff who controls, administers and manages Denarau Island or that his defence (viz, the Plaintiff purports to manage and control Denarau Island) is insincere.

In my Judgment, the first ground of Defence is fanciful, almost certainly dishonest and has no chance of success whatsoever. I cannot resist in saying that to suggest that 'the Plaintiff 'purports' to manage and control Denarau Island' stretches the judicial imagination quite unreasonably.

- (9) Next, I propose to consider the second and fourth defence 'jointly' since they are interconnected and over-lapping. They cannot be divorced from each other.

"..... the Plaintiff alleges to have authority to levy owners of land on Denarau Island with charges".

"Otherwise denies the contents thereof or that the Plaintiff has any lawful authority as alleged in paragraph 1 to 4 therein."

(Emphasis added)

I do not forget what was said in argument by (Ms) Narayan, as against this.

I also bear in mind and focus on what was stated and outlined in her written submissions. (Reference is made to paragraph 6.16, 6.19, 6.20, 6.21, 6.22, 6.23, 6.24, 6.25, 6.27, 6.28, 6.32 and 6.33 of the written submissions).

Para 6.16 *The Plaintiff submits that ownership of land on Denarau Island is Contemporaneous with owning shares in the Plaintiff. The Defendant by his own admission is the registered owner of the Lots in question. Annexed "RF5" to the Plaintiff's Affidavit in Support are copies of the Titles of both Lots registered at the Titles Office on 19 December 2006. Therefore, in light of the fact that the Defendant is the registered proprietor of the Lots the Plaintiff submits that the Defendant also falls within the definition of "Member" in Article 2.1 of the Plaintiff's Articles.*

6.19 *Therefore, the Plaintiff submits that the Defendant as the registered owner of the Lots falls within the definition of an "Owner", more specifically "a lessee of land from the State or NLTB (now known as i-TLTB). As an "Owner", the Defendant also falls within the*

definition of a "Member". Thus, since the Defendant is a Member of the Plaintiff he is bound to comply the Plaintiff's Articles of Association of which he automatically becomes a shareholders by virtue of owning land.

6.20 Therefore, the Defendant's contention in paragraph 4 and 6 of the Defendant's Affidavit in Reply that he is neither a shareholder nor a member of the Plaintiff and therefore is not liable to pay the operating costs of the Plaintiff administering, controlling and managing Denarau Island on behalf of lot owners also has no merit especially in light of the Defendant's admission that he is the registered owner of the Lots.

6.21 The Plaintiff further submits that the Defendant's contentions of not being either a shareholder or member of the Plaintiff also lack substance in light of Clause 8.1 and the Charter under the heading "Linkage of Land and Ownership" where the nexus between the ownership of land and the acquisition of shares or an interest in the Plaintiff is clearly outlined:

"No person can become by transfer the owner of land unless that person contemporaneously acquires shares in the DCL, or an interest in a body corporate which is itself a shareholder of DCL where, in each case, such shares, under DCL's Articles of Association, are designated as attached to the land concerned". (Emphasis ours)

6.22 Similar provisions pertaining to the attachment of shares to land on Denarau Island are mirrored in Articles 20.1 of the Plaintiff's Articles of Association under the heading Shares as incidental to Land on the Island, where it is provided that:

"Subject to Article 20.1 an Owner of Land –

(a) may not transfer any shares or interest ins hares attached to that Land except to a person who contemporaneously becomes the transferee or lessee of the land;

(b) must transfer the shares or interest in shares attached to that Land to such transferee or lessee contemporaneously with effecting the transfer or lease of the Land" (emphasis ours)

6.23 Therefore, as the owner of the Lots, the Defendant contemporaneously holds shares in the Plaintiff and as such the Plaintiff submits that the Defendant is a Member and therefore bound to comply with the Plaintiff's Articles of Association.

6.24 The Articles of Association of the Plaintiff clearly provide for how levies are implemented on Owners of Land on Denarau Island. As submitted earlier, there are costs incurred by the Plaintiff administering, managing and controlling Denarau Island. These costs are incurred for the benefit of Owners of Land and/or Members

of the Plaintiff throughout Denarau Island, including the Defendant, and Owners of Land/Members of the Plaintiff accordingly. Contribute to the costs. Articles 35 to 37 of the Plaintiff's Articles of Association clearly outline the prescribed formula utilised by the Plaintiff when determining the amount of levies. These Articles will not be reproduced here; however, this Honourable Court may review the said Articles at annexure "RF4" of the Plaintiff's Affidavit in Support.

6.25 As per Articles 33.1 of the Plaintiff's Articles of Association a Member's liability to pay levies arises when a member receives a written notice from the Plaintiff:

"Notwithstanding the preceding Articles, the liability to pay a Contribution arises when a Member received a written notice the Company signed by any Director or Secretary or another person authorised by the Board for that purpose..." (Emphasis ours)

6.27 The Defendant by his own admission has received such written notice from the Plaintiff to pay the sum of \$59,284.63 (Fifty Nine Thousand Two Hundred Eighty Four Dollars and Sixty Three Cents) being the amount of levies outstanding on State Lease No. 16822 being Lot 11 on SO No. 5486. The said written notice can be seen at annexure "RF7" of the Plaintiff's Affidavit in Support.

6.28 Therefore it follows that the Defendant has admitted that he is an Owner of Land on Denarau Island which in turn makes him a Member and/or shareholders in the Plaintiff and he has further admitted that he has received the Plaintiff's written notice sent in accordance with Articles 33.1 of the Plaintiff's Articles of Association above. As such, the Defendant is liable to pay levies to the Plaintiff. Therefore any contention on the part of the Defendant to the contrary is frivolous and/or vexatious and merely an attempt to create triable issues to delay the Plaintiff's claim and recovery of the outstanding levies.

6.32 The Plaintiff has submitted above as to how and why the Defendant is bound by the Plaintiff's Constitutional Documents. However, in addition to being the registered Owner of the Lots and therefore being a Member/Shareholder in the Plaintiff, the Defendant has admitted that there are Restrictive Covenants registered on the memorials of both the Lot's State Lease Titles.

6.33 For Lot 7 on SO No. 5486 the Dealing Number for the registered restrictive covenant is 600171. Or Lot 11 on SO No. 5486, the Dealing Number is 600178. Annexed "RF6" to the Plaintiff's Affidavit in Support are copies of the Restrictive Covenants Number 600171 and 600178 registered on State Lease No. 16815, Lot 7 on SO No. 5486 and State Lease No. 16822, Lot 11 on SO No. 5486 respectively. The Restrictive Covenants on both the State Leases impose a negative obligation on the Defendant not to breach the Charter or the Plaintiff's Articles of Association. This can be seen at clauses 1 and 2 (a) of both Restrictive Covenants where it provides:

“Scheme acknowledgement

(1) Each party acknowledges that each parcel of the Land is intended to be subject to a scheme of development for the benefit of all parcels and that the owner and occupiers for the time being of each of the parcels (and any lots resulting from subdivisions of a parcel) shall be bound by the stipulations and restrictions set out in clause 2.

Restrictive Covenants

(2) Each of the parties (“Covenantor”) for itself and its successors in title covenants with and for the benefit of each of the other parties (“Covenantee”) and their respective successors in title so as to bind the Covenantor’s land described in Schedule in favour of the Covenantee’s land described in the Schedule or any part of such land (“Covenantee’s land”) –

(a) Not to breach the Charter of the Articles”. (Emphasis ours)

In *adversus*, Mr. Narayan, Counsel for the Defendant, stated and outlined several serious issues that ought to be tried. He urges that there are triable issues in this case. I focus on paragraph (02), (11) and (12) of his written submissions.

Para (2) *If the AOA is as per what the Plaintiff claim, then it is ultra vires, as it is inconsistent with the Charter which is proffered to be the Constitution of Denarau Island.*

(11) *Is the Defendant bound by the alleged articles?*

Annexure RF-4 is the Articles of Association which the Defendant states has not been lodged at the Companies Office. The Defence is saying that those articles relied on by the Plaintiff are in fact not the articles of the Plaintiff. A search by the Defendants Solicitors confirms this. Annexure VD-10 provides written con formation from the Companies Office (See; Paragraph 27 (iv) in Vimal’s Affidavit) that the only Articles of Association registered is VD- 9 being Articles of Association of Chakola Limited, the former name of the Plaintiff.

If the Plaintiff’s alleged articles of association are not lodged at the company’s office then any member of the public or proprietors of land on Denarau who search for the articles will only have notice of VD-3. The Defendant submits the article proffered by the Plaintiff is not binding on the Defendant. The Plaintiff has not produced evidence from Companies office to prove otherwise.

(12) *If the Articles of Association relied on to levy charges were not substituted at the Companies office, can the Plaintiff charge levies?*

The formula for calculation is part of the AOA which was never lodged at the Companies Office; the current AOA is devoid of any

formula for calculation of the levies. As per paragraph 2 (c) of Rupeni's First Affidavit, the Owners as members are bound by the Articles. There is no specific mention as to what articles the Charter refers to.

I do not forget what was re-emphasised in argument by (Ms) Narayan;

“Upon acquisition of the Lots the Defendant has acquired shares or an interest in the Plaintiff and is bound to comply with the Articles of Association. As per Article 33.1 of the Plaintiff's Articles of Association, a member's liability to pay levies arises when a member receives written Notice from the Plaintiff. The Defendant as a member of the Plaintiff is bound to comply with the provisions of the Articles and therefore upon receipt of the Demand Notice dated 13th December 2012, the Defendant is liable to pay levies within the demand Notice period.”

But what I have to bear in mind is what the search at the Companies office reveals.

The Articles of Association relied on by the Plaintiff (RF-4) is not lodged/Registered at the Companies office. This is corroborated by the email from the Registrar dated 9th November 2012 annexed and marked VD-4 in the Defendant's Affidavit. Annexure VD-10 provides written confirmation from the Companies Office (viz, paragraph 27 in Vimal's Affidavit) that the only Articles of Association registered is VD-9 being Articles of Association of Chakola Limited, the former name of the Plaintiff. I do not attach importance to that the Plaintiff via its Solicitors has brought to the attention of the Registrar of Companies the defect in their records pertaining to the Plaintiff's Articles. This will be of no assistance in the enforcement of Articles of Association.

Despite the skilful advocacy of (Ms) Narayan, indeed, I find some difficulty in understanding how the Plaintiff's Articles of Association confer rights or obligations on the members in the absence of registration at the Companies office.

There may, of course, be reasons why the Plaintiff's Articles (RF-4) are not registered at the Companies office, but I am only concerned at the moment with the preliminary questions of whether the Plaintiff has any legally enforceable right against its members in the absence of registration of the Articles (RF-4) at the Registrar of Companies.

This is a point of law. It cannot properly be determined on the **bare facts** pleaded. It should be better determined at the trial in light of the **actual facts** of the case.

All that can be said is that the matter is not straightforward. It cannot sensibly be said that the second ground of Defence has no real prospect of success. That window has already been lost.

(10) Let me now move to consider the third defence raised by the Defendant.

“..... the Plaintiff has **arbitrarily made levies** against the Defendant and others on the land.”

- (Emphasis added)

The Defendant says that the subject properties are located in the ‘industrial precinct’. The Plaintiff relies on its Articles (RF-4) on the collection and the formulation in which the levies are raised. The Defendant contends that there is no provision in any document which allows the Plaintiff to charge levies on the subject properties in the ‘industrial precinct’ on any formula for some other precinct. The Defendant alleges that the Plaintiff has wrongly applied ‘commercial precinct’ rates for his two subject properties located in ‘industrial precinct’. The Defendant denies that the Plaintiff is entitled to levy him as it has been doing in the past and had asked the Plaintiff to explain how it can justify levies. The Defendant has produced a copy of a letter addressed to the Plaintiff regarding queries on the levies (VD-1). The matter was also reported to the Commerce Commission. The Defendant argued that he had been wrongly assessed and levied approximately \$97,243.61 by the Plaintiff for the two subject properties and he had paid this in error. The Defendant concludes by pointing three specific issues which ought to be tried, i.e. ;

- ❖ Is DCL (Plaintiff) entitled to charge levies on industrial subdivision?
- ❖ If so where is the resolution to evidence that power?
- ❖ Where is the evidence to show that the ‘commercial precinct’ rates could be applied for industrial precinct?

The Plaintiff says that although the subject lots are within the ‘industrial subdivision’ or ‘industrial area’, which is a new area on Denarau Island and which has not yet been classified as a ‘separate precinct’, it still falls within the ‘Commercial precinct’. The Plaintiff asserted that Commercial precinct is catered for by the charter (RF-1) and the Articles of the Plaintiff (RF-4). In the same breath the Plaintiff argues that the formula used to allocate the levies payable by the Defendant is the formula used to allocate costs to the Commercial precinct which is then subsequently distributed between the members based on the proportion of common costs allocated within the Commercial precinct.

I get the distinct impression that (Ms) Narayan seeks to push those propositions much further than they can be taken.

I am entitled to look beyond the Plaintiff’s Statement of Claim to the Plaintiff’s Affidavit in Support to discover evidence.

“Rupeni Fonmanu”, the Chief Executive Officer of the Plaintiff, deposed *inter alia* in his Affidavit sworn on 16th July 2013; (Reference is made to paragraph 8, 9, 10, 12, 13 and 14 of the Affidavit).

- Para 8 *I refer to paragraph 4 of the Statement of Claim and say that the Plaintiff incurs costs for carrying out its functions on Denarau Island. These costs or levies are borne by the owners of land on Denarau Island being members required to contribute towards the costs associated with running Denarau Island.*
9. *To further explain this formula that the Plaintiff uses to allocate the levies payable by its members, I specifically refer to Article 36.1 which states that the costs associated with running the Island are first allocated towards a particular Precinct. - The Precincts on Denarau Island are listed in the Charter at Clause 4 under the heading "Precincts (and Neighbourhoods) and use of land" and are namely: the Hotel Precinct, Residential Precinct, Golf & Racquest Precinct, Commercial Precinct, Marina Precinct, Future Development Precinct and Common Area Precinct.*
10. *That once the costs associated with running Denarau Island are allocated to a particular Precinct, the cost is then distributed between the members in that particular precinct. This formula is provided for in Article 37.1 of the Articles.*
12. *As a Member of the Plaintiff Company the Defendant is bound to contribute towards the Plaintiff's costs associated with running the Island, similarly as allocated to all its Members which arises upon receipt of a written notice from the Plaintiff. This liability is clearly states in Article 33.1.*
13. *The Defendant, on or about 13 December 2012 received such written notice from the Plaintiff to pay the sum as outlined in paragraphs 9a and 9b of the Plaintiff's Statement of Claim. Annexed hereto and marked "RF5" are copies of the Demand Notice dated 13 December 2012 and the Statement enclosed therewith.*
14. *I refer to paragraphs 6 and 7 of the Statement of Claim and confirm that the Defendant is in arrears of the levies payable towards the said Lots which to date remain due and owing. The Defendant as a Member of the Plaintiff is bound to comply with the provisions of the Articles and therefore upon receipt of the Demand Notice dated 13 December 2012 is liable to pay the levies within the demand notice period.*

Mr. Narayan concludes by arguing that if there has been no allocation it clearly supports his defence that the charging of levies on a commercial basis is arbitrary and not provided for under the documents relied on to oblige the Defendant.

As I understand the evidence, the Charter and the Articles of the Plaintiff are silent on "Industrial Precinct".

The Charter of Denarau Island (RF-1) defines "Commercial Precinct" at Clause 4.1 (d) as follows;

Clause 4.1 (d) Commercial Precinct

- (i) *Primarily the development and operation of commercial facilities to service all persons lawfully on the Island (including retailing, food outlets, restaurants, gaming facilities, bars, entertainment, offices, health and medical services, travel reservations, transit operations and bus and car parking, motor-vehicle fuel station/garage and air terminal facility).*
- (ii) *Secondary activities are permitted, but the provision of visitor and permanent residential accommodation is restricted to less than 25% of the total floor area of all buildings in the Precinct.*

What concerns me is whether the subject lots fall within the definition of "Commercial Precinct" as defined above.

This cannot properly be determined on the bare facts pleaded. It should be better determined at the trial in light of the actual facts of the case at which the parties and all relevant witnesses give evidence and the facility exists for that evidence to be tested.

All that can be said is that this is a case which ought to be scrutinised with some care. The matters are not straightforward. Order 14, is for the plain and straightforward, not for the devious and crafty. There is here a case for investigation, and so not for summary decision.

If I may adopt the language of Lord Parker of Waddington in Daimler Co. Ltd v Continental Tyre and Rubber Co. (Great Britain Ltd) 1916, 1A.C. 307, referred to in the Notes to Order 14 in the Supreme Court Practice, if the circumstances of the case are "such as to require close investigation", this will "preclude the propriety of giving leave to sign judgment under Order 14, rule 1."

The question is thus whether this is such a case. I think it is. In my judgment "the Plaintiff ought to be put to strict proof of its claim, and exposed to full investigation possible at a Trial"; and the reason is that of justice.

The Writ in this action has been endorsed with a claim for a liquidated amount, but the evidence, as it stands, appears to me raise a question whether the amount so claimed is due or not?

The evidence before me raised plausible dispute as to the rates to be applied and the manner/calculation of the levies. There is a controversy as to this on the Affidavits. Therefore, the claim is unliquidated. In other words, the amount and liability cannot be determined without an evidentiary hearing.

There is a plausible dispute on the Affidavits regarding either the amount due or the Defendant's liability.

Under those circumstances, it would be improper to deprive the Defendant of his prima facie right to challenge the claim and insist on strict proof. Broadly speaking, leave to Defend should ordinarily be given where there is a reasonable ground for an enquiry or account to ascertain the precise amount owed; See; Contract Discount Corp. Ltd v Furlong (1948) 1 ALL ER 274

Therefore, it appears to me that the case before me is not a proper case for the application of Order 14.

There is another side of the coin in the argument. (Ms) Narayan submitted that the Defendant has been paying levies for the subject lots since 2009 despite the "Industrial Subdivision" not falling within a precinct catered for under the Articles. It is only now that the Defendant is refusing to pay.

Mr. Narayan responds by pointing to the fact that the Defendant has produced a copy of a letter to the Plaintiff regarding queries on the levies as (VD-1.) Moreover, he says that the matter was reported to the Commerce Commission.

As I understand the evidence, the Defendant had even prior to 2009 until May 2012, having agreed to and subjected to this formula had paid levies to the subject lots approximately \$97,243.61 (See, annexure VD-1 and RF-6). On 15th November 2012, the Defendant for the first time raised issues on the calculation of the levies.

I must not lose sight of the important fact that, the Defendant has previously admitted and acknowledged the 'liability' and 'formula' and made payments on account of it for more than three years.

It is not correct to suggest that the Defendant, a sophisticated businessman, paid a sum of \$97,243.61, as levies for more than three years, without admitting and acknowledging the 'formula' and 'liability'. I do not believe that any sophisticated businessman who had made those payments would genuinely believe that the debt was not due.

The Defendant is a man in his 30s, he has been in business for some 10 years and I cannot believe that any businessman would have made these payments if he did not genuinely accept liability and the formula. It was said that the Defendant made those payments in error. I regard that suggestion as 'risible'.

What concerns me is how the Defendant could surmount the hurdle of Common Law Doctrine of "**approbate and reprobate**" or the Latin '*quod approbo non reprobo*'.

The Defendant had previously for more than three years accepted and acknowledged the validity of the formula and had made payments on account of it irrevocably and with knowledge. Therefore, he is prevented from asserting its nullity.

The doctrine of approbate and reprobate was initially developed in the field of trusts, wills and succession. It is clear from the following judicial decisions, that the doctrine has been applied much more widely in determination of commercial and other compensation disputes over the last 70 years.

- See; * **PT Building Services Ltd v Rok Build Ltd. (2008) EW 18C 3434 (TCC)**
- * **Lissenden v Basch Limited (194C) AC 412**
- * **Linnett v Italliwells LLP (2009) EWHC 319 (TCC)**

I accept the potential application of the Common Law Doctrine of ‘approbate and reprobate’ but a trial is necessary to ascertain whether the conduct referred to was sufficient to meet the test outlined by “Bell” (See; **Bell’s Commentaries, 7th Edition Vol.1, pp – 141, 142.**)

- (11) In view of the approach I have adopted, it is strictly unnecessary for me to go on to consider Counsel’s argument relating to legal set-off. Nevertheless, for the sake of completeness, it would be right for me to do so.

It was agued on behalf of the Defendant that unconditional leave to defend should be granted because a ‘legal set-off’ has been pleaded by the Defence. Reference was made by Counsel to the case of **ML Paynter Ltd v Ben Candy Investment Ltd, 1987 (1) NZLR 857.**

The Plaintiff replies that the Counter-Claim and se-off should be tried separately since it is a separate issue and the Defendant cannot claim any set-off on his alleged Counter-Claim against his responsibility to pay outstanding levies.

The background giving rise to the Defendant’s defence of ‘legal set-off’ is to be found in paragraph (11) and (12) of the Amended Statement of Defence and are in these terms;

Para 11. Further and/or in the alternative the Plaintiff on 12th September 2012 erroneously refused and/or rejected the Defendant’s application to operate wholesale liquor and other outlet on the Lots through a tenant. The Plaintiff refused approval purporting to have power under its misconceived, purported and alleged powers in the Constitutional documents which also included the power to disrupt services to the lots and entry on to the island.

12. As a result of the refusal aforesaid the Defendant suffered loss of chance of receiving anticipated income from a prospective 3 year tenancy agreement over Lots 7 and 11.

Set-off

Set-off is a defence to a monetary claim that is used to either reduce the amount owed or completely extinguish the debt. It is not used where a party wishes to obtain more than merely extinguishing a claim and hence, it cannot be used as a ‘sword’, only as a ‘shield’.

A Counter-Claim, may give rise to an award for damages which may exceed the sum claimed. A Counter-Claim therefore is a 'sword' with which a claimant may be pursued but which provides a Defendant no protection against a claimant's claim as such, unless it can also plead as a set-off.

A legal set-off is not available as a 'self-help remedy'. It is a procedural right and, generally speaking, can only be resorted to as a defence to a court action by enabling a debtor to set-off his cross-claim against the creditor's primary claim. Set-off is a defensive tool, a 'shield', and is always capped by the amount of the Plaintiff's claim. Therefore, set-off is examined only if the Court finds that the Plaintiff's claim exists. However, legal set-off is only available where the two claims are liquidated or ascertainable with certainty. In addition, both must be due and payable at the commencement of the action.

Unlike equitable set-off, there is no need for the cross-claims to arise from the same action or be closely connected. The cross claims may be independent. (See; **Derhams, The Law of Set-Off 3rd Edn, 2002**).

The law is succinctly stated in the words of Cockburn CJ in **Stoke v Taylor (1880) 5 QBD 569, 575**, to the effect that a legal plea of set-off is available only where the claims on both sides are in respect of liquidated debts, or money demands which can be readily and without difficulty ascertained.

The principle was re-formulated by Lord Hoffman in **Stein v Blake (1996) AC 243, 251**. Lordship stated that the relevant debts must be "..... either liquidated or in the sums capable of ascertainment without valuation or estimation".

Thus, my understanding of the law is that, for set-off at law to occur, the following circumstances must arise;

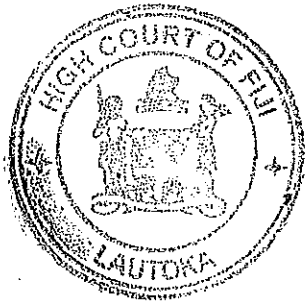
- ❖ The obligations existing between the two parties must be debts, and they must be debts which are for liquidated sums or money demands which can be ascertained with certainty; and
- ❖ Both debts must be mutual cross-obligations, i.e. cross claims between the same parties and in the same right.

In the present case, the obligations existing between the Plaintiff and the Defendant are for unliquidated sums. The amount and liability cannot be determined without an evidentiary hearing. As I said in paragraph (10) above the Plaintiff's claim is unliquidated. Although the Defendant has indicated an amount in the Counter-claim as special damages, its ascertainment does require proof which leads the claim to be an unliquidated claim. **Therefore, a legal set off will not be allowed.** Thus, it is not correct to submit that; "*if the defence of set-off is raised, the defendant is entitled to unconditional leave to defend*" (Paragraph 5.5 of the Defendant's written submissions).

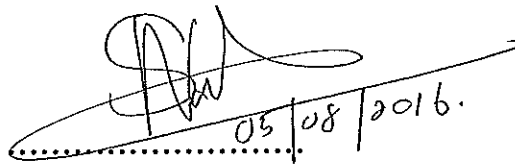
Essentially that is all I have to say !

(E) FINAL ORDERS

- (1) The Plaintiff's Summons for Summary Judgment is dismissed.
- (2) The Plaintiff to pay costs of \$750.00 (summarily assessed) to the Defendant within 14 days hereof.



At Lautoka
05th August 2016.


05/08/2016.
Jude Nanayakkara
Master