IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 117 of 2017

IN THE MATTER of the Companies Act 2015

AND

IN THE MATTER of an application under Section 176 of the Companies Act 2015.

BETWEEN : **VILIAME FINAU, JAI D SINGH, IVA LENOA, MOHAMMED F. LATEEF, MANASA RATUVILI, KEVUELI TUNIDAU** and **BOB TUILAKEPA** all of Nadi as Trustees of **THE ATS EMPLOYEES TRUST**.

PLAINTIFFS

AND : **CIVIL AVIATION AUTHORTIY OF FIJI** an authority incorporated under the Civil Aviation Act with office at Nadi Airport.

1ST DEFENDANT

AND : **THE ATTORNEY GENERAL ON BEHALF OF THE PERMANENT SECRETARY FOR ECONOMY** under the State Proceedings Act.

2ND DEFENDANT

AND : **AIR TERMINAL SERVICES (FIJI) LIMITED** a limited liability company with registered office at ATS Head Office, Cruickshank Road, PMB, Nadi Airport, Nadi.

3RD DEFENDANT

AND : **ALAN SUCHIN** of Nadi, Company Secretary.

4TH DEFENDANT

Appearances	: Mr K. Vuataki with Ms P. Mataika for the plaintiffs
	: Mr R. Singh for the first defendant
	: Ms P. Prasad with Ms S. Chand for the second defendant
	: Ms M. Rakai for the third and fourth defendants
Date of Hearing	: 07 August 2017
Date of Ruling	: 06 February 2018

RULING

[On striking-out]

Introduction

[01] This ruling concerns to four separate striking out applications filed by the defendants/applicants (hereinafter sometimes may be referred to as the defendants). Each application is supported by an affidavit.

[02] The plaintiffs/respondents (hereinafter sometimes may be referred to as 'the plaintiffs') filed an affidavit in opposition.

[03] The defendants filed their affidavit in reply to the affidavit in opposition filed by the plaintiff.

[04] At the hearing, both the parties presented their oral arguments in court and in addition they filed their respective written submissions.

[05] I am grateful to counsel and their team for the quality of submission they made. I was immensely assisted by their submissions in arriving at my conclusion.

The Application

[06] The defendants seek orders striking out the plaintiffs' action on the ground that the originating summons filed by the plaintiffs does not disclose a reasonable cause of action against the defendants or it is otherwise an abuse of process of the

court. The applications are filed pursuant to Order 18, Rules 18 (a) and (d) of the High Court Rules 1988 ('the HCR').

[07] The chronology of the court documents - applications filed in this case are as follows:

15/06/17	-	Inter Partes Notice of Motion/Affidavit of Viliame Finau
19/06/17	-	Amended Originating Summons
29/06/17	-	Summons to Strike Out/Affidavit of Netava Waqa
05/07/17	-	Summons to Strike/Affidavit of Makereta Konrote
06/07/17	-	Affidavit of Alan Suchin
12/07/17	-	Affidavit of Viliame Finau replying to Netava Waqa's Affidavit
12/07/17	-	Affidavit of Viliame Finau replying to Makereta Konrote's Affidavit
12/07/17	-	Affidavit of Viliame Finau replying to Alan Suchin's Affidavit
17/07/17	-	Summons to Strike Out by Third and Fourth Defendants (Withdrawn]
17/07/17	-	Supplementary Affidavit of Viliame Finau responding to Netava Waqa/Makereta Konrote on striking out
19/07/17	-	Supplementary Affidavit of Viliame Finau
19/07/17	-	Notice of Motion by Plaintiff/Affidavit in Support of Viliame Finau seeking amendment

28/07/17	-	Second Defendant's Affidavit replying to Supplementary Affidavit of Viliame Finau responding to Netava Waqa/Makereta Konrote on striking out filed 17/07/17.
28/07/17	-	Third and Fourth Defendant's Affidavit replying to Supplementary Affidavit of Viliame Finau responding to Netava Waqa/Makereta Konrote on striking out filed 17/07/17.
28/07/17	-	Third and Fourth Defendant's Summons/Affidavit in Support of Alan Suchin for strike out.
02/08/17	-	Affidavit in Opposition of Viliame Finau responding to the Affidavit in Support of Allan Sachin.

The Background

[08] The brief background facts relevant to this case are as follows:

[09] The plaintiffs instituted this action by way of originating summons filed on 15 June 2017. Subsequently, before the service of the same, they filed an amended originating summons on 19 June 2017.

In the amended originating summons, the plaintiffs seek the following orders and relief mostly in the nature of declaration:

1. *A Declaration that the 1st Defendant holds 51% shares in the 3rd Defendant and not the Permanent Secretary for Economy.*

2. *Alternatively, a declaration that any transfer or transmission of 1st Defendant's shares to Permanent Secretary for Economy is in breach of Article 33(3) of the Articles of Association of 3rd Defendant and such shares be sold to the A.T.S. Employees Trust in accordance.*

3. *A declaration that Article 79 of the Articles of Association of 3rd Defendant is oppressive and prejudicial to the A.T.S. Employees Trust as minority shareholders.*

4. *Alternatively, a declaration that Article 79 of the Articles of Association of 3rd Defendant was only applicable and effective at the time the company was formed to allow 1st Defendant to remove Directors that were originally on the Board.*

5. *An injunction that the 3rd Defendant and/or its Directors or howsoever amend the Articles of Association of the 3rd Defendant to comply with the companies Act 2015 and delete Article 79.*

6. *A declaration that the notification by the Permanent Secretary for Economy removing Jai D Singh, Manasa Ratuvili and Kevueli Tunidau as Directors of 3rd Defendant is illegal, oppressive and null and void.*

7. *A declaration that the termination notice given by the 4th Defendant on 3rd Defendant's letterhead terminating the position of Jai D Singh, Manasa Ratuvili and Kevueli Tunidau as Directors of 3rd Defendant is illegal and null and void.*

8. *An Order by way of injunction that the Defendants, their employees, contractors and howsoever do not hinder, stop and or howsoever prevent Jai D Singh, Manasa Ratuvili and Kevueli Tunidau as Directors of 3rd Defendant from exercising their function as such Directors.*

9. *An Order by way of injunction that the Defendants, their employees, contractors and howsoever do not hinder, stop and or howsoever prevent Jai D Singh, Manasa Ratuvili and Kevueli Tunidau as Directors of 3rd defendant and or any Trustee of the Plaintiff Trust from accessing their office.*

10. *General damages.*

11. *Any other Order the Honourable Costs (sic) deems just and reasonable.*

12. *Costs be paid by Defendants on an indemnity basis.*

[10] The plaintiffs' originating summons is made under Order 5 Rule 3 of the High Court Rules, section 176 and 183 of the Companies Act 2015 and the inherent jurisdiction of the Court. The grounds for seeking the aforesaid relief are that:

a. *To avoid industrial dispute Government set up the 3rd Defendant with one Crucikshank (sic) and Keil taking one share each in the company.*

b. *Article 79 was put in the Articles so that when 1st Defendant took 51% shares and Plaintiff Trust took 49% shares the 1st Defendant can remove the two initial Directors.*

c. *Also under Article 33(3) if the 1st Defendant desires to transfer its shares then Plaintiff Trust be given right to purchase such shares.*

d. *Due to issues arising from majority shareholder authorising payment of $3 million when insurance assessors assessed about $527,000.00 and installation of CCTV in change rooms of workers and non-compliance with new Companies Act 2015 there was exchange of letters between Parties.*

e. *Such exchange resulted in Permanent Secretary for Economy invoking Article 33(3) and purporting to remove three Directors representing the Plaintiff Trust on Board of 3rd Defendant.*

f. *The Plaintiff Trust is not aware of any transfer of 1st Defendant's shares to Permanent Secretary for Economy nor any transmission and believes that such Secretary is not a shareholder of 3rd Defendant.*

g. *Acting on such notification the 4th Defendant using 3rd Defendant's letterhead purported to terminate the services of the three Directors representing the Plaintiff Trust as minority shareholders on 3rd Defendant's Board.*

h. *The said three Directors have been prevented from access to their office and from performing their functions.*

i. *Such actions of the Defendants is contrary to the interests of the members of 3rd Defendant as a whole as two of the Directors representing he Plaintiff Trust are well experienced in ground handling while Directors representing majority shareholder have no experience in aviation ground handling and had authorised the $3 million payment and can further deplete 3rd Defendant's funds.*

j. *Further such actions of the Permanent Secretary for Economy in invoking Article 79 is oppressive, unfairly prejudicial to the Plaintiff Trust and unfairly discriminatory.*

k. *The action of the 4th Defendant and 3rd Defendant in purporting to terminate the three Directors representing the Plaintiff Trust on the 3rd Defendant's Board is oppressive and unfairly prejudicial to the Plaintiff Trust.*

Facts relied on by the third and fourth defendants.

[11] Air Terminal Services (Fiji) Limited, the third defendant (*ATS*) is a limited company located at Cruikshank Drive, near the Nadi Airport. ATS is the only company to provide total aircraft ground handling at the Nadi International Airport.

[12] ATS was incorporated in 1980 with 49% shares held by the ATS Employees Trust, the plaintiff (*ATSET*) and 51% shares held by the Civil Aviation Authority of Fiji, the first defendant (*CAAF*) (See **C1** and **C2** of Affidavit of Alan Suchin filed 6 July 2017).

[13] The ATSET and the Permanent Secretary for Economy, the second defendant (PSE) each have **three directors** represented at the ATS. Alan Suchin, the fourth defendant is the ATS's company secretary.

[14] The ATS employs about six hundred and fifty employees.

[15] In 2008, a cabinet decision was made whereby the Fiji Government decided to reassign its 51% shares in the ATS from the CAAF to the PSE, namely the Ministry of Finance. (See **D, D1** of Affidavit of Alan Suchin filed 6 July 2017).

[16] On 28 October 2009, the CAAF's shares were reassigned to the PSE second defendant with the knowledge and consent of the ATSET, the ATS and forth defendants. [See **D1, H3 and H4** of Affidavit of Alan Suchin filed 6 July 2017].

[17] In October 2009, these particulars were updated in the Registrar of Company's office (See **J** in the Affidavit in Support of Alan Suchin filed 28 July 2017).

[18] In December 2011, the ATSET's director, namely Rajeshwar Singh was removed by letter dated 30 December 2011. (See **K** in the Affidavit in Support of Alan Suchin filed 28 July 2017).

[19] From **2009 to 2016**, the ATSET has attended every Board meeting and Annual General Meeting of the ATS where financial statements were discussed and accepted. (See **L7, M1 to M8** of Alan's Affidavit responding to the Supplementary Affidavit of Viliame Finau filed 28 July 2017).

[20] The fourth defendant issued removal letters to the ATSET's directors (former)/trustees on 12 June 2017 for various breaches under the delegated authority of the PSE. (See **V11, V12, and V14** in the Plaintiff's Affidavit and **G** in the third and fourth defendant's Affidavit filed 6 July 2017).

[21] The Originating Summons relies on **Order 5 Rule 3** of the High Court Rules and **Sections 176 and 183** of the Companies Act 2015, the inherent jurisdiction of the Court and grounds set out in the Affidavit of Support of Viliame Finau.

The Law

[22] The applications are made pursuant to Order 18 Rule 18 (1) of the High Court Rules, which provides as follows:

> ***Striking out pleadings and endorsements*** *(O.18, r.18)*
>
> *18.-(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-*
>
> ***(a) it discloses no reasonable cause of action or defence, as the case may be; or***
>
> *(b) it is scandalous, frivolous or vexatious; or*
>
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
>
> ***(d) it is otherwise an abuse of the process of the court;***
>
> *and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*
>
> *(2) No evidence shall be admissible on an application under paragraph (1) (a).*
>
> *(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading'. [Emphasis added]*

[23] Applicants also rely on section 4 of the Limitation Act, which so far as material states:

> ***"4.-(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say –***
>
> ***(a) Actions founded on simple contract or on tort,"*** [Emphasis provided]

[24] The plaintiffs have based their action on section 176 and 183 of the Companies Act 2015.

[25] Section 176 of the Companies Act states:

"(1) The Court may make an order under section 177 if –

(a) the conduct of a Company's Affairs;

(b) an actual or proposed act or omission by or on behalf of a Company; or

(c) a resolution, or a proposed resolution, of Members or a Class of Members of a Company.

is either –

(i) contrary to the interests of the Members as a whole; or

(ii) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a Member or Members whether in that capacity or in any other capacity."

[26] Section 183 of the Companies Act states:

"(1) The Court may make any orders, and give any directions, that it considers appropriate in relation to proceedings brought or intervened in with lease, or an application for leave, including –

(a) interim orders;

(b) directions about the conduct of the proceedings, including requiring mediation;

(c) an order directing the Company, or an Officer of the Company, to do, or not to do, any act; and

(d) an order appointing an independent person to investigate, and report to the Court on –

(i) the financial affairs of the Company or Related Body Corporate;
(ii) the facts or circumstances which gave rise to the cause of actions the subject of the proceedings; or
(iii) the costs incurred in the proceedings by the parties to the proceedings and the person granted leave.

(2) A person appointed by the Court under subsection (1)(d) is entitled, on giving reasonable notice to the Company or Related Body Corporate, to inspect any Books of the Company or Related Body Corporate for any purpose connected with their appointment.

(3) If the Court appoints a person under subsection (1)(d) –

(a) the Court must also make an order stating who is liable for the remuneration and expenses of the person appointed;

(b) the court may vary the order at any time;

(c) the persons who may be made liable under the order, or the order as varied are –
(i) all or any of the parties to the proceedings or application; and
(ii) the Company or Related Body Corporate; and

(d) if the order, or the order as varied, makes two or more persons liable, the order may also determine the nature and extent of the liability of each of those persons.

(4) Subsection (3) does not affect the powers of the Court as to costs."

The Governing Principle

[27] In *Paulo Malo Radrodro v Sione Hatu Tiakia & ors* HBC 204 of 2005 the High Court in striking out the claim filed by the plaintiff made the following observations on the exercise of Jurisdiction under Order 18 rule 18 application;

"The principles application to applications of this type have been considered by the Court on many occasions. Those principles include:

(a) A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered – Lord Pearson in Drummond – *Jackson v British Medical Association* [1970] WLR 688.

(b) Frivolous and vexation is said to mean cases which are obviously frivolous or vexatious or obviously unsustainable – Lindley LJ in *Attorney General of Ducky of Lanaster v L.N.W. Ry [1892]* 3 Ch. 274 at 277.

(c) It is only in plain and obvious cases that a recourse should be had to the summary process under this rule – Lindley MR in *Hubbuck v Wilkinson [1899] 1 Q.B. 86*.

(d) The purposes of the Court's jurisdiction to strike out pleading is twofold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice, defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.

(e) "The first object of pleadings is to define and clarify with position the issues and questions which are in dispute between the parties and for determination by the Court. Fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that the opposing parties can bring evidence on the issues disclosed – *ESSO Petroleum Company limited v Southport Corporation* [1956] A.C. 218 at 238"- *James M. Ah Koy v Native Land Trust Board & Ors* – Civil Action NO. HBC 0546 of 2004.

(f) A dismissal of proceedings often be required by the very essence of justice to be done"- *Lord Blackburn in Metropolitan v Pooley* [1885] 10

DPP Cas. 210 at 221 – so as to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless allegation – *Lorton LJ in Riches v Director of Public Prosecutions* (1973) 1 WLR 1019 AT 1027."

[28] For the purposes of determining if an action is an abuse of process in the case of *Sheetal Investments Ltd v Australia and New Zealand Banking Group Ltd [2011] FJHC 271; HBC 227.2010 (12 May 2011)* the court quoting Halsbury's Laws of England said that:

> *"...In Halsbury's Laws of England Vol. 37 page 322 the abuse of process is described as follows:*
>
> *An abuse of process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the process is misused. In such a case, even if the pleading or endorsement does no offend any of the other specified grounds for striking out, the facts may show it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleadings or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of an abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court ...'*

[29] The term 'abuse of process' is defined in the following extract from *Walton v Gardiner (1993) 1777 CLR 378* as follows:

> *"..... Abuse of process includes instituting or maintaining proceedings that will clearly fail, proceedings unjustifiably oppressive or vexatious in relation to the defendant, and generally any process that gives rise to unfairness....."*

[30] The case of *Timber Resource Management Ltd v Minister for Information [2011] FJHC 770; HBC 212.2000 (22 November 2011)* states that:

"....The term abuse of the process of the court' is also explained in White Book as follows:

This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevents its machinery from being used as a means of vexation and oppression in the process of litigation. (Castro v Murray (1875) 10 Ex. 213; Dawkins v. Prince Edward of Saxe Weimar; Willis v. Earl Beauchamp (1886) 11 P. 59, PER Brawn L.J. p. 63)....."

Discussion

[31] The plaintiffs initiated this action by way of originating summons against the defendants.

[32] The striking out applications are filed pursuant to HCR O.18, r.18. The defendants rely on paras (a) and (d) of rule 18. Under this rule, the Court is empowered to strike any pleading on the ground that it discloses no reasonable cause of action (ground (a)) or it is an abuse of the process of the court (ground (d)). The defendants seek to strike out the action on either of the two grounds.

[33] The power to strike out a pleading under rule 18 extends to the originating summons as well. Rule 18 (3) states that this rule shall apply to an originating summons as it were a pleading.

[34] Evidence is inadmissible on an application under paragraph (1) (a)-striking out a pleading on the ground it discloses no reasonable cause of action. The court will only consider the pleadings on an application under paragraph (1) (a). However, the court will consider the affidavit evidence when considering an application for striking out on any other grounds including the ground that it is otherwise an abuse of the process of the court (para (1) (d)). The defendants also rely on para (1) (d) for striking out. Therefore, I will consider the affidavits filed by the parties. The defendants' striking out applications relate to the originating summons. Generally, an originating summons is filed supported by an affidavit.

Claim against the CAAF and 2nd defendant

[35] Let me consider the claim made against the CAAF, first defendant and second defendant. The plaintiffs seek a declaration that:

> *'The 1st defendant holds 51% shares in the 3rd defendant and not the Permanent Secretary for Economy, the 2nd defendant or alternatively, that any transfer or transmission of 1st defendant shares to the Permanent Secretary for Economy is in breach of Article 33(3) of the Articles of Association of ATS, the 3rd defendant and such shares be sold to the ATS Employees Trust in accordance.'*

[36] The plaintiffs in their originating summons plead (para (f) that;

> *"The plaintiff trust is not aware of any transfer of 1st defendant's shares to Permanent Secretary for Economy nor any transmission and believes that such Secretary is not a shareholder of 3rd defendant."*

[37] In support of the remedy, the plaintiffs state that:

> *'The plaintiff does not know that the 1st defendant has assigned the shares in the company of the 2nd defendant.' (See: para 20 of the affidavit of Viliame Finau filed on the 15 of June 2017 in support).*

[38] The second defendant in response states as follows:

> *"There was no share transfer and the shares were reassigned to the Ministry of Finance, not by sale or exchange of consideration and so no notifications for transfer was registered as there was no transfer of the shares." (See paragraph 4, 5 and 6 of the affidavit of Makereta Konrote filed on the 5 July 2017.)*

[39] The documentary evidence particularly the plaintiffs' exhibit- **EX-VF23E** and **EX-VF23N** and the fourth defendant's documents **EX-H3** and **EX-H4** clearly show that the CAAF re-assignment its 51% shares in the ATS to the 2nd defendant in 2009 following a cabinet decision made in 2008. These documents state:

a) **Exhibit VF 23E** – a letter dated 1 May 2009, from the Public Enterprise and Tourism addressed to the 3rd defendant, ATS advised of the intention of the Cabinet to assign the shares held by the 1st defendant to the Ministry of Finance. The letter reads:

"01st May 2009

Mr Jone Raqona
Air Terminal Services
Private Mail Bag
Nadi Airport

Dear Mr. Raqona,

Re: Government's Shares in Air Terminal Services

We would like to thank you and your delegation from ATSET for the meeting we had on 29th April, 2009 in our Conference Room.

As agreed in the meeting, we are now notifying ATSET that the responsibility of holding Government's 51% shares will be moved from Civil Aviation Authority of Fiji Islands to Ministry of Finance as per Cabinet Decision of 16/10/08 attached. *(Emphasis provided)*

To facilitate this transfer of responsibility, we will submit the draft Shareholder Agreement to your office for your perusal. On the same note, we would also like to re-assure ATSET that should Government wish to divest the shares, we would be guided by the pre-emptive rights under the Articles of Association. Also we do not envisage any immediate change to government representatives in the ATS Board.

We look forward to your continuing co-operation and support.

Yours sincerely,

[Mrs Taina Tagicakibau]
Permanent Secretary – Public Enterprises & Tourism

cc. *Chairman – ATS*
Director - Civil Aviation
Permanent Secretary – Finance
CEO – CAAFI"

b) **Exhibit VF 23N** – This is a situation report of Jone Raqona (Secretary of ATS) dated 2 January 2010. This clearly refers to the assignment of the shares and an acknowledgment that the shares have been assigned.

c) **Exhibit H3** (affidavit of Alan Suchin filed on the 6 of July 2017) – is a copy of the Minutes of the Special General Meeting held on 7 October 2009. Item number 2296 of the Minutes states:

"2296. <u>RE-ASSIGNMENT OF SHARES</u>
The Chairman requested the Company Secretary to circulate and read out the one page paper for discussions regarding the Re-assignment of Shares.

The members present were invited to comment from the floor.

*Ms Vasantika Patel stated that the **transfer** of shares were both covered in the Articles of Association (AoA) and the Companies Act; the **re-assignment**/or whichever term we use comes under the same section and as such the pre-emptive rights of the shareholders may be in compromise.*

The Company Secretary replied pointing out that the Company stand was supported by legal opinion from the Government's Legal Advisers and Babu Singh & Associates. The legal opinion from Baby Singh & Associates was read out:

> *"This is an internal exercise and does not need "transfer" of shares as in the literal sense. The "transfer of shares" should include issues of consideration/share price and pre-emptive rights in question.*
>
> *The AoA Clauses 33.2 and 33.3 onwards are not invoked as there is no sale of shares, there is no vendor and purchaser. If clause 33 of the AoA was applicable, then this can be contracted out i.e this can be explained that there is no sale and purchase of shares but rather than change in shareholding name for and behalf of the Government of Fiji.*
>
> *The "core" element of this change and to be reminded to all concerned that there is in fact NO TRANSFER of proprietorship/ownership of shares but the representative holder.*

There is no issue of pre-emptive rights as there are no share changes to any stranger and ownership is intact.

To facilitate the changes, an agreement between the Shareholders to be written up but this should not be construed as a condition as the rights of the members were already protected in the Companies Act and AoA.

***The Board** noting the legal opinion from Babu Singh & Associates, **approved the recommendation of the re-assignment of shares from CAAFI to the Permanent Secretary of Finance and a Shareholders' Agreement between ATS Employees Trust and the Ministry of Finance to be entered into.** The Shareholders Agreement is to be completed before Friday/16 October 09 when the Annual General Meeting would take place, otherwise through exchange of correspondence between the Ministry of Finance and ATSET.* [Emphasis provided]
The issue of a review of the AoA was raised but had to be deferred for discussion to a later date since this item was outside the agenda.

Moved by Mr M Luveniyali and Seconded by Mr A Waradi.

The decision was unanimous."

d) **Exhibit H4** (affidavit of Alan Suchin filed on the 6 of July 2017) – is minutes of a subsequent meeting of Board Directors held on 20 November 2009. Item number 2301 of the Minutes states:

"2301 <u>MINUTES OF THE SPECIAL BOARD MEETING-07 OCTOBER 2009</u>

Mr J Ragona raised the question on mode of reassignment of shares which he mentioned was not stated in the Minutes of the Special Board meeting held on 07 October 2009. The Company Secretary was requested to liaise with Mr J Raqona and finalise issues raised. Moved by Mr M Luveniyali and Seconded by Mr A Waradi.

The amendments received by Ms Vasantika Patel were as follows:

Item 2296 – Re-assignment of Shares

3rd paragraph, 2nd line:

.....the Companies Act; the ***transfer/assignment*** *or whichever.....*

New paragraph:

Form of transfer set out in Articles to be used whether transfer is by way of sale or an "assignment" of shares. Form used by them can be approved by Directors at the Board Meeting. ***No issue with transfer of shares from CAAFI to Ministry of Finance, but need Shareholder Agreement in place and proper documentation as provided in Article of Association and Company Act.*** [Emphasis provided]

Last sentence read:

ATSET's view was that the Shareholders Agreement to be done first. The form of "Transfer "/"Assignment" be agreed by Directors at the Board Meeting.

The HRSC to take over the finalisation of the Shareholders Agreement."

[42] The plaintiffs' own documents establish that the plaintiffs were aware of the re-assignment of 51% shares in the ATS held by the government through the CAAF to the Ministry of Finance (Now Ministry of Economy). They knew very well of the re-assignment in April 2009. The re-assignment has been accepted by the Board of Directors of the ATS. The re-assignment was confirmed and approved by the Board of Directors for the ATS in October 2009. In the proposed amendment, the plaintiffs concede that the re-assignment was effected on 28 October 2009.

[43] The plaintiffs did not take any objection to the re-assignment of the shares from CAAF to the Ministry of Finance. The cause of action, if any, in respect of the re-assignment arose in October 2009, for the plaintiffs to pursue the matter in court. Whereas, they did not do so. They have filed the action challenging the re-assignment in June 2017, which is some 8 years after the cause of action arose. This claim is clearly caught by the Limitation Act. An action founded on a simple contract must not be brought after the expiration of 6 years from the date on which the cause of accrued (section 4 (1) (a), Limitation Act). The plaintiffs' action is founded on a simple contract because a Company's Articles of Association have effect as a contract between the company and each Director and Company Secretary (See S.47 (1) (b) of the Companies Act, 2015). The plaintiffs placed no

evidence in court that they raised an objection to the re-assignment. The plaintiff had knowledge of the assignment in 2009. They did not take objection to the re-assignment being taking place. Therefore, they have waived their rights, if any, to challenge the re-assignment of the shares to the Ministry of Finance from the CAAF.

[44] In *Burgess v Prasad* [1974] FijiLawRp 14; [1974] 20 FLR 49, the Court cited with approval Lord Denning in *Rickards v Oppenheim* [1950] 1 KB 616 when the Law Lord stated:

> Lord Denning said at p.625 –
>
> *"Counsel for the plaintiffs said that even accepting the notice of June 29 a notice making time of the essence, nevertheless even that notice afterwards waived by the defendant. On July 10 1948, there was a discussion between the defendants on the one hand and the plaintiff's representatives on the other as to what was to be done about the car. They said that the defendant authorized the plaintiff's to go ahead with the work, and promised to take delivery of the car after he came back from his holiday and then to decide whether they should sell it for him; whereas the defendant said that he only offered to do what he could to help them, and that he suggested their best course was to do on and complete it and sell it on their own account, no on his behalf, but in order to save any loss. The Judge took the view that the defendants' memory about it was probably the more accurate, and I see no reason for taking a different view. This interview was followed on July 16, by a letter from the plaintiffs to the defendant in these terms: In view of your comments during our conversation re this subject last week, we assume that you are prepared to lease the order with Messrs, Hones Bros. Ltd. Until your return "from holiday, by which time the car should be ready for delivery. Every effort will be made on our part to expedite delivery, and we feel sure you appreciate our desire to settle this matter amicably.' The defendant did not reply to that letter, and Mr Saschs says that the proper inference was that he assented to it. Upon this point, I would say that in order to constitute a waiver there must be conduct which leads the other party reasonably to believe that the strict legal rights will not be insisted upon. The whole essence of waiver is that there must be conduct which evinces an intention to affect the legal relations of the parties. If that cannot properly be inferred, there is no waiver."*

[45] There were discussions between the parties about the assignment of shares from CAAF to the Ministry of Finance. By letter dated 1 May 2009 (VF23E), the then Secretary to the Ministry of Public Enterprises & Tourism notified the then Secretary of the ATSET (plaintiffs) of the assignment that: *'As agreed in the meeting, we are now notifying ATSET that the responsibility of holding Government's 51% shares will be moved from Civil Aviation Authority of Fiji Islands to Ministry of Finance as per Cabinet Decision of 16/10/08 attached.'* Even after official notice is given to the plaintiffs about the assignment, the plaintiffs did not complain. They had accepted the assignment. This constitutes a waiver that the strict legal rights will be insisted upon. In other words, the plaintiffs had acquiesced to the assignment.

Assignment or transfer

[46] The government is the majority shareholder in the ATS by having 51% of the shares of the ATS. The government held the 51% shares through the CAAF, an entity established by the Act of Parliament. In 2008, the cabinet decided to assign its 51% shares in the ATS hold through the CAAF to the Ministry of Finance. The 51% the CAAF held on behalf of the government to the 2nd defendant to hold it on behalf of the Ministry of Finance.

[47] Counsel for the plaintiffs contends that what has happened is a transfer of shares and that their pre-emptive rights given under Article 33 (3) AoA of the ATS is violated by this transfer. Citing section 77 of the Companies Act, he further contends that the assignment of 51% shares by 1st defendant to 2nd defendant dated 28 October 2009 was in breach of section 77 of the Companies Act 1984. Section 77 of that Act states:

> *"77. The shares or other interest of any member in a company shall be* ***personal property transferable in the manner provided by the articles of the company."*** *[Emphasis added]*

[48] The proposed amendment now incorporates reliefs regarding the assignment of shares as follows:

a. *"A Declaration that **the assignment of 51% shares by 1st Defendant to 2nd Defendant dated 28th October 2009 was in breach of section 77** of the Companies Act and therefore illegal and null and void.*

b. *Alternatively, a declaration that **the assignment of 1st Defendant's shares to Pernanent Secretary for Economy is in breach of Article 33(3)** of the Articles of Association of 3rd Defendant and such shares be sold to the A.T.S. Employees Trust in accordance with said Article."*

[49] The plaintiffs submit, relying on section 77 of the repealed Companies Act, the 1st defendant ought to have followed the provision of that section when they transfer the shares to the 2nd defendant. Section 77 provides that *the shares or other interest of any member in a company shall be personal property transferable in the manner provided by the articles of the company.*

[50] The CAAF assigned 51% of the shares it was holding on behalf of the government (on behalf of the Ministry of Public Enterprises & Tourism) to the 2nd defendant to hold the shares for the Ministry of Economy. The government is the majority shareholder in the ATS. The assignment of shares appears to be an internal arrangement. It was not transferred to a third party by sale or for consideration. There was no change in the shareholding. The government is still the majority shareholder in the ATS, even after the assignment.

[51] In my judgement, the assignment did not change shareholding of the ATS. Therefore, it is not a transfer of shares as alleged by the plaintiff. As such, it did not affect the plaintiffs' pre-emptive right guaranteed in Article 33 (3) of AoA of the ATS. This follows that not only the plaintiffs' claim that the assignment of 51% shares by 1st defendant to 2nd defendant dated 28th October 2009, was in breach of section 77 of the Companies Act and therefore illegal and null and void, but also their claim that the assignment of 1st defendant's shares to Permanent Secretary for Economy is in breach of Article 33(3) of the Articles of Association of 3rd defendant and such shares be sold to the A.T.S. Employees Trust in accordance with said Article is unsustainable.

The issue of Article 79

[52] Article 79 of the Article of Association of the ATS states as follows:

"A Director shall hold office subject only to Article 86, but may at any time be removed from office by ***the holders for the time being of a majority of the issued shares*** *in the capital of the Company conferring the right to vote as aforesaid. Any appointment under Article 77 or any removal under this Article may be made at any time and shall be in writing under the hands of* ***the holders for the time being*** *of a majority of the issued shares in the capital of the Company conferring the right to vote as aforesaid or under the hand of the Chairman of Directors or some other person as attorney or officer of each such holder duly authorised in their behalf. Any such appointment or removal shall take effect immediately upon delivery of the instrument of appointment or removal (as the case may be) to the office."* [Emphasis provided]

[52] The plaintiffs seek declarations that:

A declaration that Article 79 of the Articles of Association of 3rd Defendant is oppressive and prejudicial to the A.T.S. Employees Trust as minority shareholders, or

Alternatively, a declaration that Article 79 of the Articles of Association of 3rd Defendant was only applicable and effective at the time the company was formed to allow 1st Defendant to remove Directors that were originally on the Board.

A declaration that the notification by the Permanent Secretary for Economy removing Jai D Singh, Manasa Ratuvili and Kevueli Tunidau as Directors of 3rd Defendant is illegal, oppressive and null and void.

[53] The plaintiffs' contention is that Article 77 is oppressive and prejudicial to ATSET, as a minority shareholder and therefore the removal of its three Directors is illegal, oppressive and null and void.

[54] Counsel for the 3rd and 4th defendant submits that the AoA has been in effect since 1980 and the 3rd defendant has been operating for more than 30 years using the same AoA with no issue being raised by the plaintiffs on the effect of article 79. Moreover, Article 79 has been invoked on an earlier occasion where one of the ATSET directors was removed from the 3rd defendant board. Mr Rajeshwar Singh was removed on 30 December 2011 (See 'EX-J' in the affidavit of Alan Suchin

sworn on 27 July 2017 and filed on 28 July 2017) pursuant to Article 79 and ATSET has never raised any concern on that removal. She relies on the common law principle of *'estoppel by acquiescence'*.

[55] In ***Byrnes v Kendle*** (2011) 243 CLR 253 French CJ considered that the defence of acquiescence to equitable relief is used in at least two different senses –

> *"A person who is aware that an act is about to be done to his or her prejudice takes no step to object to it.*
>
> *A person being aware of a violation of his or her rights which has occurred fails to take timely proceedings to obtain equitable relief* ..." [Emphasis added]

[56] French CJ in ***Byrnes*** referred to ***Orr v Ford*** (1989) 167 CLR 316 at 337 where Deane J in setting out the various meanings of the word 'acquiescence' said:

> *"acquiescence" is commonly used to refer to acceptance of a past wrongful act in circumstances which give rise to an active waiver of rights or a release of liability.*
>
> ...
>
> *Thirdly, and more commonly, acquiescence is used, in a context where laches is used to indicate either mere delay or delay with knowledge, to refer to conduct by a person, with knowledge of the acts of another person, which encourages that other person reasonably to believe that his acts are accepted (if past) or not opposed (if contemporaneous)."*

[57] In ***Edmund Ming Kwan v Extra Excel (Malaysia) Sdn Bhd & Ors*** (2013) MWKAeJ0123 it was held that:

> *"In equity, a party may by his conduct disentitle himself from relief. This principle is known as the principle of acquiescence. This principle states that a person may by his conduct be deemed to have acquiesced to a state of affairs that is complained of, whereby the complaint would be regarded as having been made not in good faith, thereby disentitling relief.*

...

It is settled law that delay by petitioners in initiating proceedings after they have realized that they have been victims of a scheme of oppression will induce the Court to refuse relief, since this indicates that they have acquiesced in the conduct complained about and their complaints are not therefore made in good faith." [Emphasis added].

[58] *Owen Sim Liang Khui v Piasau Jaya* [1996] 2 LRC referred to the judgment of Edgar Joseph Jr J in *Re Senson Auto Supplies Sdn* [1988] 1 MLJ 326 which stated that:

> ***"A petitioner who claims that he is a victim of oppression should not unduly delay his approach to the court, for otherwise he may be held to have acquiesced in the conduct complained of."***

[59] ATS's AoA was formulated when it was formed in 1980. Article 77 has been there since then with no issue being raised by the plaintiffs on the effect of Article 79. In 2011, one of the ATSET Directors was removed invoking Article 77. Even then, the plaintiff did not approach the court. In the circumstances, the principle of acquiescence applies to the plaintiff's claim relating to Article 77. By their own conduct and delay, the plaintiffs' are now estopped in bringing such a claim. In my judgment, the plaintiff's claim based on Article 77 is unsustainable.

[60] The plaintiffs claim that Article 79 was put in the AOA so that when the 1st defendant took 51% shares and the plaintiff took 49% shares, the 1st defendant can remove the two initial Directors is also unsustainable. There is nothing in Article 77 to suggest that this Article was intended to remove the two initial Directors and thereafter it will become ineffective.

[61] In ***Attorney-General of Belize v Belize Telecom Ltd*** [2009] 2 All ER 1127 Lord Hoffmann stated:

> ***"The court had no power to improve upon an instrument which it was called upon to construe, whether it was a contract, a statute or articles of association. It cannot introduce terms to make it***

fairer or more reasonable. It is concerned only to discover what the instrument means. ...

...

The question of implication arises when the instrument does not expressly provide for what was to happen when some event occurs. The most unusual inference was that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise the express provisions of the instrument are to continue to operate undisturbed."

[62] Article 77 is intended to be operative continually. Its operation is not limited to a particular event or period. The wording in that Article does not suggest that it is intended to remove the two initial Directors from the ATS Board of Directors. I agree with the 3rd defendant's submission that if such was the intention of Article 79 of the AoA, it would have expressly stated so.

[63] If the ATSET are desirous of modifying or repealing ATS's Articles of Association by special resolution pursuant to Section 46 (7) of the Companies Act, which provides that *"the company may modify or repeal its articles of association, or a provision of its articles of association, by special resolution."* Further, section 46 (12) of the Companies Act 2015 states that *"In the event of an inconsistency between this Act and the Articles of Association, this Act will apply."*

Preliminary objections

[64] The third and fourth Defendants have raised the following as preliminary objections:

1. *There is no evidence before this Honourable Court that the trustees have the consent of majority of the beneficiaries of the Trust whose members are about 291.*

2. *The orders sought are injunctive in nature against the State namely prayer 1 of the Motion contrary to Section 15 (2) of the State Proceedings Act Chapter 24 of the laws of Fiji.*

3. *There is nothing to stay as three of the Plaintiff's trustees/directors (Jai D Singh, Manasa Ratuvili and Kevueli Tunidau) were validly removed by Article 79 of the Articles of Association of the Third Defendant) on 12th June 2017.*

4. *The Plaintiff is estopped from challenging a reassignment of shares which took place on 28th October 2009 more than six years later under Section 4 (1) of the Limitation Act.*

5. *Seeks that paragraphs 8, 9, 10, 11, 21, 22, 23, 28 and 29 in the Supplementary Affidavit of Viliame Finau filed on 17th July 2017 be struck out as it is contrary to Order 41 Rule 5 of the High Court Rules 1988.*

6. *Further, Exhibits "VF23-N" is challenged on the basis that the deponent is trying to adduce hearsay evidence when he is not the maker. The document is also undated and unsigned. Exhibit "VF-24" is challenged that no leave has been given to the Plaintiff to amend its Amended Originating Summons. This application is yet to be heard by His Lordship.*

[65] Since I have decided that the plaintiffs' substantive claims are unsustainable, it is unnecessary to deliberate on the preliminary issues raised by the third and the fourth defendant.

Proposed amended originating summons

[66] I have read the proposed amendments to the amended originating summons. The claims in the proposed originating summons is basically based on Article 77 and 33 (3) of the AoA of the ATS. Again, Limitation Act and principles of acquiescence and estoppal would apply to that claim. In my judgment, the proposed

amendments to the amended originating summons will not improve the plaintiffs' case.

Overall conclusion

[67] Having carefully considered the application for striking out the action, the affidavits and documents filed in court and submissions advanced by the parties and bearing in mind the principles applicable to the application, I come to the conclusion that:

i) The amended originating summons under attack fails on its face to disclose a substantive claim which needs a full hearing. This is a case bad in law and it is a case weak on evidence. In My opinion, the casue of action pleaded does not show some chance of success when only the allegations in the pleadings are considered.

ii) The plaintiffs challenge the re-assignment of 51% shares held by the CAAF on behalf of the government to the 2nd defendant (Ministry of Economy) which occurred on 28 October 2009. The re-assignment has been duly registered at the Registrar of Company's office. The plaintiffs knew very well that the re-assignment of shares was made in 2009. They neither objected to nor took any action to challenge it. A cause of action, if any, would have accrued to the plaintiffs to challenge the re-assignment sometime in October 2009. The plaintiffs bring the action in June 2017, which is some 8 years after the cause of action arose. This claim is clearly caught by the Limitation Act. An action founded on a simple contract must not be brought after the expiration of 6 years from the date on which the cause of action accrued (section 4 (1) (a), Limitation Act). The plaintiffs' action is founded on a simple contract because a Company's Articles of Association have effect as a contract between the Company and each Director and Company Secretary (See S.47 (1) (b) of the Companies Act, 2015).

iii) ATS has acted invoking Article 79 of its Articles of Association. This Article is there since the formation of the ATS in 1980. In 2011, the ATS removed a Director exercising its powers under Article 79. The plaintiffs, as minority shareholders did not take any action to have that Article amended or deleted. At least, the plaintiffs did not even propose for the removal or amendment of that Article. Therefore, the plaintiffs had acquiesced by their conduct and thereby estopped from challenging it now in 2017. In the event of an inconsistency between this Act (Companies Act 2015) and the Article of Association, this Act will apply (S. 46 (12) of the Companies Act 2015). Therefore, a declaration or a direction from the court may be necessary in relation to the Articles of Association of a company, if there were an inconsistency between that Article and the Companies Act. The plaintiffs did not plead that Article 79 of the Article of Association of the ATS is inconsistent with the Companies Act.

iv) In my judgment, the re-assignment of 51% shares from the CAAF to the 2nd defendant (PS, Ministry of Economy) did bring any change in the shareholding of the ATS as it was only an internal arrangement between the government entities. As a result of this re-assignment, the 2nd defendant is now holding 51% shares of the ATS on behalf of the government. Still, the government is the majority share holder as was before the re-assignment.

v) In my judgment, the proposed amendments to the amended originating summons will not improve the plaintiffs' case.

vi) In my judgment, the amended originating summons fails on its face to disclose a sustainable claim. I would, therefore, acting under O.18, r. 18(a) of the High Court Rules strike out and dismiss the amended originating summons filed by the plaintiffs.

vii) The plaintiffs will jointly and severally pay $1000.00 as costs (summarily assessed) to each defendant totalling $4,000.00.

Final outcome

1. Plaintiffs' action is struck out and dismissed.
2. Plaintiffs will jointly and serverally pay $1000.00 as costs to each defendant totalling $4000.00.

6/2/18

.....

M.H. Mohamed Ajmeer

JUDGE

At Lautoka

6 February 2018

Solicitors:

For the plaintiffs: Messrs Vuataki Law, Barristers & Solicitors

For the first defendant: Messrs Patel & Sharma lawyers, Barristers & Solicitors

For the second defendant: Office of the Attorney General

For the third & fourth defendants: Messrs Sherani & Co.