

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

CIVIL ACTION NO.: HBC 21 of 2016

**BETWEEN** : **RATU JOSEVA VATUNITU aka RATU JOSEVA  
SAMUDUNATUA VATUNITU** **PLAINTIFF**

**AND** : **I-TAUKEI LAND TRUST BOARD** **FIRST DEFENDANT**

**AND** : **BARTON LIMITED** **SECOND DEFENDANT**

**AND** : **DUBBO LIMITED** **THIRD DEFENDANT**

**AND** : **FARLEIGH LIMITED** **FOURTH DEFENDANT**

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**APPEARANCES/REPRESENTATION**

**PLAINTIFF** : No appearance of Counsel of the Plaintiff [Laesimaru & Co.]

**FIRST DEFENDANT** : Mr Yagona [Legal Department I.L.T.B.]

**SECOND/THIRD &  
FOURTH  
DEFENDANTS** : Mr J Apter with Ms W Chan [Munro Leys]

**RULING OF** : Acting Master Ms Vandhana Lal

**DELIVERED ON** : 07<sup>th</sup> February 2017

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**INTERLOCUTORY RULING**

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1. On 27 July 2017, upon reading the summons for further and better particulars filed on 1 March 2017 by the 2-4 Defendants, my Predecessor made following consent orders:
  - a) *The Plaintiff serve on the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants (together "Starwood Defendants") further and better particulars of the*

*Statement of Claim dated 22 September 2016 and file herein, as specified in the Schedule attached to the Summons for Further and Better Particulars;*

- b) All further proceedings be stayed until service of the said further and better particulars.*

The Plaintiff was directed to furnish said particulars in 21 days.

2. Later on 23 October 2017, there were certain consent orders made as follows:  
*"Plaintiff has failed to comply with Court Orders made on 27 July 2017 in terms of the Summons for further and better particulars.*

*The Plaintiff is now seeking further 07 days to comply with the further and better particulars;*

*By Consent further 07 days is granted to the Plaintiff to file/serve further and better particulars;*

*Impose an "unless order" and upon non-compliance by the Plaintiff with Consent orders of 27 July 2017 – for further and better particulars I will activate the unless order accordingly."*

3. On 30 October 2017 the Plaintiff had filed "Further and Better Particulars" stating the following:

*a) On paragraph 3 (c) in the Schedule, our client says as follows:-*

- i. The Plaintiff alone does not claim. It is clear that he sues in a personal capacity (propria persona) and in a representative capacity on behalf of the Native Owners defined in the lease.*
- ii. The specific provisions are clauses 15(a) and (b) in both NL 14619 (Sheraton lease) and NL 13796 (Westin lease). Those clauses are titled 'Participation of Native Owners' in the operation and resulting benefits thereof.*
- iii. The Native Owners own both the Sheraton lease and the Westin lease as stated in the preamble to both leases.*
- iv. The first lessee to the Sheraton lease was Fujikan Limited. It was issued registered title on 11<sup>th</sup> April 1974. Fujikan issued ordinary shares to the then Native Land Trust Board within 30 days after the registration*

*of the Sheraton lease. Capos Ltd became the new lessee on 24<sup>th</sup> July 1996.*

- v. *Capos Limited issued 5% ordinary shares under and/or paid dividends to TLTB for and on behalf of the Native Owners in respect of the Sheraton lease. As at, 14<sup>th</sup> September 1987, Capos Ltd issued 100 ordinary shares equating to 5% equity stakes to the then Native Land Trust Board that owned the shares in trust for the Native Owners. The same also as at 26<sup>th</sup> June 1990 and 18<sup>th</sup> July 1995.*
  - vi. *The first lessee to the Westin lease was Commercial Investments Properties Limited CIPL was issued title on 23<sup>rd</sup> February 1971. CIPL did not develop the Westin. Nadi Beach Hotel Ltd became the new lessee on 4<sup>th</sup> July 1973 and completed development in or around July 1975.*
  - vii. *Nadi Beach Hotel Ltd issued 10% ordinary shares and/or paid dividends to TLTB for and on behalf of the Native Owners in respect of the Westin lease when the improvements constructed on the said land were first placed in operation. As at 1<sup>st</sup> December 1984 Nadi Beach Hotel Ltd issued a total of 227, 160 ordinary shares to the then Native Land Trust Board that held them in trust for the Native Owners, 5% shares were initially issued by Nadi Beach Hotel Ltd pursuant to clause 15(a) while TLTB through retained rent purchased a further 5% ordinary shares within 10 years pursuant to clause 15 (b). The same number of shares was outstanding to the Native Owners as at 12<sup>th</sup> June 1997.*
- b) *On paragraph 3 (e) in the Schedule, our client says as follows:-*
- i. *TLTB is nominee shareholder by operation of the iTaukei Land Trust Act and the leases, for and on behalf of the Native Owners. The Plaintiff is a Native Owner.*
  - ii. *The relevant provision of the Sheraton lease and the Westin lease on preemptive rights is clause 15 (c).*
  - iii. *The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's intention to sell their shares manifested itself when Starwood invited tenders for its Denarau properties as '3 trophies 1 chance' on*

*11<sup>th</sup> March 2015. Tenders closed on 23<sup>rd</sup> April 2015 based on the IMI.*

- iv. The Native Owners have preemptive rights under clause 15 (c) of both the Sheraton lease and the Westin lease first as 5% shareholders in the 2<sup>nd</sup> Defendant and 10% shareholders in the 3<sup>rd</sup> Defendant as at April 2015, and second as beneficiaries by operation of law – the Native Land Trust Act now (Taukei Land Trust Act) as amended).*
  - v. TLTB is the nominee shareholder and trustee for and on behalf of the Native Owners, who are the beneficiaries under the trust. TLTB has the first right of refusal as existing nominee shareholders in trust in both the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> Defendant.*
  - vi. "Before the sale" is the express wording and intention of clause 15 (c) in both leases which says that before Starwood accepted Avoser Challenge Ltd's offer to purchase the Starwood properties/shares for \$263 million, it should have first offered the said shares proratably to TLTB for an on behalf of the Native Owners.*
- c) On paragraph 3 (f) in the Schedule being "deliberate circumvention of the law" by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, our clients says as follows:-*
- i. Colluding with TLTB as nominee shareholder/trustee to vary the lease and remove the Native Owners' ordinary shareholding replacing it with a 'watered down' version.*
  - ii. Breaching the Sheraton lease and Westin lease by deliberating failing to offer first to the Native Owners as ultimate beneficiaries and ultimate existing shareholder when they decided to sell their shares being 95% in Barton Ltd, 90% in Dubbo Ltd and up to 90% in Farleigh Ltd.*
  - iii. Attempting to permanently alienate the Native Owners' I-Taukei land in breach of section 28 of the 2013 Constitution of the Republic of Fiji. The new owner will have an indefeasible I-Taukei title as a bona fide purchaser for value without notice.*

- d) *On paragraph 8 (a) in the Schedule, our client says as follows:-*
- i. *The first lessee to the Sheraton lease was Fujikan Limited. It was issued registered title on 11<sup>th</sup> April 1974. Fujikan issued ordinary shares to the then Native Land Trust Board within 30 days after the registration of the Sheraton lease pursuant to clause 15(a) of the Sheraton lease.*
  - ii. *Capos Ltd as a permitted assigns became the new lessee on 5<sup>th</sup> September 1985. Capos Limited issued 5% ordinary shares and/or paid dividends to TLTB for and on behalf of the Native Owners in respect of the Sheraton lease. As at, 14<sup>th</sup> September 1987, Capos Ltd issued 100 ordinary shares to the then Native Land Trust Board that held in trust for the Native Owners 5% ordinary shares. The same also as at 26<sup>th</sup> June 1990 and 18<sup>th</sup> July 1995.*
  - iii. *Barton Ltd as a permitted assigns became the new lessee on 24<sup>th</sup> July 1996 via a purchase by mortgage sale. The Denarau properties were mortgagee sold however, the shares remained as it survived mortgagee sale. The Native Owners shares survived because it touched and concerned the itaukei land. Whether it liked it or not, the 2<sup>nd</sup> Defendant purchased only 95% shares from mortgage sale and legally obliged to issue 5% shares in Barton Ltd to TLTB for and on behalf of the Native Owners.*
  - iv. *The first lessee to the Westin lease was Commercial Investments Properties Limited. CIPL was issued title on 23<sup>rd</sup> February 1971. CIPL did not develop the Westin. Nadi Beach Hotel Ltd became the new lessee on 4<sup>th</sup> July 1973 and completed development in or around July 1975.*
  - v. *Nadi Beach Hotel Ltd issued 5% ordinary shares first and another 5% after the Native Owners through retained rent provisions in the lease purchased them. It issued shares to TLTB for and on behalf of the Native Owners in respect of the Westin lease when the improvements constructed on the said land are first placed in operation.*
  - vi. *As at 1<sup>st</sup> December 1984 Nadi Beach Hotel Ltd issued a total of 227, 160 ordinary shares to the then Native*

*Land Trust Board that owned in trust for the Native Owners 10% ordinary shares being 22,716 ordinary shares. 5% shares was initially issued by Nadi Beach Hotel Ltd pursuant to clause 15 (a) while TLTB through retained rent purchased a further 5% ordinary shares within 10 years pursuant to clause 15(b). The same number of shares was outstanding to the Native Owners as at 12<sup>th</sup> June 1997.*

- vii. *Dubbo Ltd as a permitted assignee became the new lessee on 24<sup>th</sup> July 1996 via a purchase by mortgagee sale. The Denarau properties were mortgagee sale. The Denarau properties were mortgagee sale. The Native Owners' shares survived because it touched and concerned the (taukei) land. Whether it liked it or not, the 2<sup>nd</sup> Defendant purchased only 90% shares from mortgagee sale and was legally obliged to issue 10% shares in Dubbo Ltd to TLTB for and on behalf of the Native Owners.*
- e) *On paragraph 8 (c) in the Schedule, our client says that a further 5% shares in the 2<sup>nd</sup> Defendant was lost at the expiration of ten (10) years after the Sheraton was operational pursuant to clause 15(b).*
- f) *On paragraph 8 (d) in the Schedule, our client says as follows:-*
  - i. *The 4<sup>th</sup> Defendant is the ultimate beneficiary in the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.*
  - ii. *The non-issuance of shares and breach of preemptive rights by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is a continuing breach so there is no time limitation for the Plaintiff to commence proceedings against the Defendants herein.*
  - iii. *On or about 24 July 1996, control of the right to exclusive possession under the leases was transferred (on a 'warts and all' basis by mortgagee sale) to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. On a common sense reading of the company records, the interconnecting shareholding in these companies makes the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants nominal lessees and operators, whilst the 4<sup>th</sup> Defendant is the actual lessee because it controls exclusive possession in both.*

- iv. *The interconnecting or cross shareholding in these companies is referred to in paragraph 16 to 23 of my Statement of Claim filed in the within proceedings.*
- g) *On paragraph 8 (e) – (g) in the Schedule, our client says that the pleadings therein is neither related to nor concerns the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. They are also matters to be discovered pre-trial and proved at trial.*
- h) *On paragraph 10 in the Schedule, our client says that the Variations to both leases speak for themselves.*
- i) *On paragraph 10 (a) (ii) in the Schedule, our client says as follows:-*
- i.
- The leases intended that the Native Owners as defined on page 1 are parties to the leases, so that we have privity of estate and privity of contract, and our participation in the business operations to be carried out on our land, as set out in clause 15, is a fundamental term of the leases, touching and concerning the land.*
- ii.
- The demise expressly incorporated Native Owner participation as consideration or premium for the demise, which is expressly defeasible for any unrectified fundamental breach under clause 12 of the leases.*
- iii.
- The execution and registration of the variation to clause 15 of the leases by the Defendants are fraudulent because they are intended to deprive us the Native Owners of substantial financial benefit and permanently alienate our ownership contravening our constitutional right under Article 28(1) and the government's policy on Native Owners participation through share ownership.*
- j) *On paragraph 10 (b) in the Schedule, our client says that those particulars are clear at paragraph 1 and 4 herein.*
- k) *On paragraph 10 (c) in the Schedule, our client says that those particulars are clear at paragraph 6 herein.*
- l) *On paragraph 11 in the Schedule, our client says that the variations tantamount to abandonment of the terms and conditions*

*of the leases formulated and agreed upon after extensive consultations and consent of the Native Owners. The 4<sup>th</sup> Defendant abandoned these terms and conditions as the operating company in the lease.*

- m) On paragraph 15 (c) in the Schedule, clauses 15 (a) of the leases are the source of the right of the Native Owners to such mandatory shareholding.*
- n) On paragraph 22 in the Schedule, the variations go to the root of consideration or lack thereof. It goes to the root of the contract. The variations that totally removed the Native Owners' shareholding needed the consent and concurrence of the Native Owners after consultations by TLTB as statutory trustee pursuant to the iTaukei Land Trust Act.*
- o) On paragraph 23 (d) to (k) in the Schedule, the Plaintiff says as follows –*
  - i. The controlling interest in the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants will be changed if shares in Farleigh is transferred to the new buyer like Avoser;*
  - ii. Avoser has lodged caveats on both titles which in fact shows the Plaintiff that the share sale is a dealing in land;*
  - iii. The share sale is a dealing in land which is why Fiji Cayman Holding as owner of Farleigh is selling the Denarau leases as "3 trophies 1 chance";*
  - iv. The Native Owners lose their participation including shareholding rights under clause 15 in both leases because the new owner like Avoser becomes a bona fide purchaser of the leases for value without notice;*
  - v. Parting with possession to Farleigh and Fiji Cayman is a question of fact and law. The law being section 8 of the leases however the fact is a matter for trial showing breach of lease or contract by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants;*
  - vi. The Native Owners are privy to the leases (exception to the privity of contract general rule) as owners acknowledged therein therefore any amendments or alterations needed the consent of the Native Owners after consultation.*



- p) On paragraph 25, 26, 28 and 29 (a) and (b) the Plaintiff says that it intends to apply to amend all paragraphs in the pleadings that impute shares sale due to the fact that Fiji Cayman shares are on sale.*
- q) On paragraph 31 the Plaintiff refers to paragraph 32.*
- r) On paragraph 33 and 34 the Plaintiff refers to the statutory trust created between the Native Owners as beneficiaries and the TLTB as trustee under the I-Taukei Land Trust Act.*
- s) On paragraph 35 and 37 the Plaintiff shall apply to have this amended.*

4. The summons for further and better particulars by the 2-4 Defendants sought orders that Plaintiff serves on the Defendants further and better particulars of the Statement of Claim dated 22 September 2016 and as specified in schedule attached.
5. The schedule sought following particulars:

Paragraph No. in Statement of Claim	Particulars Required
3 (c)	<p>Of why and with reference to what provisions of the specific leases referred to in the Statement of Claim, the Plaintiff claims:</p> <p>a) "5% shares and dividends in the 2<sup>nd</sup> Defendant" and</p> <p>b) "10% shares and dividends in the 3<sup>rd</sup> Defendant"</p>
3 (e)	<p>Of why and with reference to what provisions of the specific leases referred to in the Statement in Claim, the Plaintiff claims:</p> <p>a) "their pre-emptive right as beneficiaries to be given the first chance, through the 1<sup>st</sup> Defendant, to purchase 95% ordinary shares in the 2<sup>nd</sup> Defendant"</p> <p>b) "90% shares in the 3<sup>rd</sup> Defendant" and</p> <p>c) "not less than 90% shares in the 4<sup>th</sup> Defendant"</p> <p>Before the sale as alleged by the Plaintiff.</p> <p>[Note that this request is related to the one concerning paragraph 10 (c)].</p>

3 (f)	Of what " <i>deliberate circumvention — of the law</i> " was engaged in by the 2 <sup>nd</sup> and 3 <sup>rd</sup> Defendants " <i>to defeat the benefits and interest</i> " of the Plaintiff.
8(a)	Of when the 1 <sup>st</sup> Defendant was entitled to: a) " <i>issuance of 5% of shares in the 2<sup>nd</sup> Defendant and 5% shares in the 3<sup>rd</sup> Defendant</i> " and b) " <i>additional issuance of 5% shares in the 3<sup>rd</sup> Defendant purchased by the 1<sup>st</sup> Defendant for and on behalf of the Yavusa e tolu</i> ".
8 (c)	Of when the 1 <sup>st</sup> Defendant was entitled to " <i>a further 5% shares in the 2<sup>nd</sup> Defendant</i> ".
8 (d)	Of when the 1 <sup>st</sup> Defendant was entitled to sue the 4 <sup>th</sup> Defendant for " <i>non-payment of 5% share of dividends in the 2<sup>nd</sup> Defendant and 10% share of dividends in the 3<sup>rd</sup> Defendant, owed to the Yavusa e tolu</i> ".
8 (e) – (g)	Of: a) How and b) In what respect  The 1 <sup>st</sup> Defendant " <i>failed to comply with the reassessment schedule and provisions stipulated in the Sheraton lease and the Westin lease for the calculation of the fair market rentals to be paid by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the 1<sup>st</sup> Defendant for and on behalf of the Yavusa e tolu</i> " and c) If they are different from the "fair market rentals" referred to above, of the claimed " <i>fair and market rentals</i> " in sub-paragraph (e) and d) If they are different from the "fair market rentals" referred to above, of the claimed " <i>true lease rentals</i> " in sub-paragraph (g).
10	Of the 4 <sup>th</sup> Defendant's alleged " <i>collusion</i> " with the 2 <sup>nd</sup> and 3 <sup>rd</sup> Defendants with respect to the Variation of Lease as pleaded.
10 (a) (ii)	Of: a) When the relevant sub-clause (a) was to " <i>facilitate the issuance of 5% shares of the 2<sup>nd</sup>, 3<sup>rd</sup> and/or 4<sup>th</sup> Defendants' profit participation stock of units of ownership to the 1<sup>st</sup> Defendant...</i> " and b) How the intention of the relevant sub-clause (a) was to " <i>facilitate the issuance of 5% shares of the...4<sup>th</sup> Defendant's profit participation stock of units of ownership to the 1<sup>st</sup> Defendant...</i> "

10 (b)	<p>Of:</p> <p>a) How and with reference to what document the Yavusa e tolu obtained the right to "acquire additional 5% shares of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants through the 1<sup>st</sup> Defendant"</p> <p>b) When the Yavusa e tolu's right accrued to "acquire additional 5% shares of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants through the 1<sup>st</sup> Defendant".</p>
10 (c)	<p>Of:</p> <p>a) The nature of the claimed "pre-emptive rights of refusal in favour of the Yavusa e tolu" and in particular whether these pre-emptive rights were rights to all of the shares being sold by another shareholder or a pro rata in respect of those shares</p> <p>b) How and in what manner such rights accrued to the 1<sup>st</sup> Defendant against the 4<sup>th</sup> Defendant.</p>
11	Of how the covenants referred to were "abandoned" by the 4 <sup>th</sup> Defendant.
15 (c)	Of the claimed "mandatory shareholding of the Yavusa e tolu in the 2 <sup>nd</sup> Defendant, the 3 <sup>rd</sup> Defendant and/or the 4 <sup>th</sup> Defendant" and the source of the right of the Yavusa e tolu to such "mandatory shareholding"
22	Of the specific "consultation, consent and concurrence" obligations to the State, the 1 <sup>st</sup> Defendant and the Yavusa e tolu which were avoided as a result of "the incorporation of the 4 <sup>th</sup> Defendant and the cross-shareholding of the 2 <sup>nd</sup> , 3 <sup>rd</sup> and 4 <sup>th</sup> Defendants"
23 (d)	Of the Plaintiff's claim that "if the 2 <sup>nd</sup> and 3 <sup>rd</sup> Defendants are sold then the lessees will be changed from the 2 <sup>nd</sup> and 3 <sup>rd</sup> Defendants to the buyer or transferee like Avoser Challenge Limited"
23 (e)	Of the Plaintiff's claim that "if the 4 <sup>th</sup> Defendant is sold then the 2 <sup>nd</sup> and 3 <sup>rd</sup> Defendants remain as lessees however, the buyer (like Avoser Challenge Limited) becomes the owner of the Sheraton lease, assets and chattels, the Westin lease, assets and chattels and the Denarau Golf Course, assets and chattels"
23 (f)	Of the Plaintiff's claim that "if the 4 <sup>th</sup> Defendant is sold then at the completion of the sale, the Yavusa e tolu loses its entitlement to own shares in the 2 <sup>nd</sup> and 3 <sup>rd</sup> Defendants".
23 (g)	Of the Plaintiff's claim that "this cross-shareholding means that whoever owns the 4 <sup>th</sup> Defendant, owns the 2 <sup>nd</sup> and 3 <sup>rd</sup> Defendants plus the Denarau Golf and Racquet Club without any consideration for the Yavusa e tolu shareholding"

23 (j)	Of the Plaintiff's claim that <i>"this cross-shareholding arrangement shows that the 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendant as lessees, ... have parted with possession of the leases they were granted, to Farleigh Limited"</i> .
23 (k)	Of the Plaintiff's claim that <i>"the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant have respectively illegally assigned or alienated their leasehold interest/estate to the 4<sup>th</sup> Defendant (Farleigh Ltd) without the requisite consultation"</i>
25	Of this paragraph as follows: a) in using the words <i>"in the event the 4<sup>th</sup> Defendant transfer its shares"</i> , does the Plaintiff mean: i. shares in the 4 <sup>th</sup> Defendant being transferred? Or ii. the 4 <sup>th</sup> Defendant transferring its shares in the 2 <sup>nd</sup> and 3 <sup>rd</sup> Defendants?  b) Whether the answer to (a) is (i) or (ii), what <i>"benefits"</i> are lost to the landowners as a result (and how they are lost).
26	If they are different from the particulars given in answer to paragraph 23 (j) above, of the Plaintiff's claim that <i>"the change in the shareholding of the 4<sup>th</sup> Defendant will also mean that the purchaser of the shares in effect becomes the lessee"</i>
28	Of what is claimed: a) [similarly to 25 (a) above] in using the words <i>"in the event the 4<sup>th</sup> Defendant transfers its shares"</i> , does the Plaintiff mean: i. That Farleigh is selling its shares (in Dubbo and Barton)? Or ii. That Farleigh's owner is selling its shares in Farleigh? And  b) Whether the answer to (a) is (i) or (ii), how <i>"the landowners are being unfairly disadvantage by this sale because the capital accretion and the benefits earned in the transaction, rests with the 4<sup>th</sup> Defendant and does not trickle down to the Yavusa e tolu as landowners."</i>
29	Of: a) When the right to all or any shares in the 2 <sup>nd</sup> Defendant accrued to the 1 <sup>st</sup> Defendant an  b) When the right to all or any shares in the 3 <sup>rd</sup> Defendant accrued to the 1 <sup>st</sup> Defendant.

30	Of when the right to all or any shares in the 4 <sup>th</sup> Defendant accrued to the 1 <sup>st</sup> Defendant.
31	Of why clauses 17 and 18 of the Sheraton Lease and the Westin Lease: a) Make them "special leases" with "special conditions applicable" [ and the exact nature and effect of these "special conditions"] and b) "specifically require strict compliance with the clauses that mandate the participation of native owners in the operation and resulting benefits of the special leases"
33 and 34 (c) (ii), (iv) and (v) respectively	Of where it is shown that: a) "the Sheraton lease is special native (itaukei) lease being a trust property held by the 1 <sup>st</sup> Defendant as lessor and trustee for and on behalf of Yavusa e tolu members as beneficiaries" b) "that the trustee/beneficiary relationship between the 1 <sup>st</sup> Defendant and the Yavusa e tolu continues" and c) "that at the time of the negotiations of the conditions of the lease it was a policy of the 1 <sup>st</sup> Defendant to promote the interests of the Fijians (Itaukei) and as such the conditions were agreed to between the parties to promote the interests of the Yavusa e tolu including [the Plaintiff?] as beneficiaries"
35	Of why and for what reason it is alleged that the 2 <sup>nd</sup> and 3 <sup>rd</sup> Defendant, as owners of 25% and 75% shares of Rylestone Limited respectively, "currently own the 4 <sup>th</sup> Defendant"
37	Of whether the Plaintiff alleges, and if so, in what respect the Plaintiff alleges, that the Westin Lease or the Sheraton Lease or any land comprised in them have at any time been "permanently alienated" from their customary landowners.

6. On 20 May 2018, the Court was informed that the Plaintiff has not supplied further and better particulars for 04 Questions. Hence the Court allowed Plaintiff further time to do so.
7. On 25 June 2018 after hearing counsels for all the parties, my predecessor had made following orders:
  - a) An unless order is imposed and four particulars to be furnished to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants Counsel within 7 days;

*b) Upon failure to furnish the remaining four particulars, as the Plaintiff is aware on this, the Court will activate the imposed unless order accordingly striking out the Plaintiff's Statement of Claim and accordingly dismiss the Action.*

8. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants submit that the Plaintiff has till to-date failed to provide the particulars as sought for following:
- i. **Paragraph 8(c) to (g) of the statement of claim**
  - ii. **Paragraph 25-29 of the statement of claim**
  - iii. **Paragraphs 31, 33, 34, 35, 37 of the statement of claim**

9. The footnote to corresponding Order 18 rule 12 in the Supreme Court Practice (1993) Volume I on paragraph 18/12/39 reads:

*"The party in default may be ordered to pay costs of the application.*

*Where having regard to the nature of the allegation, precise particulars cannot be given, the particulars may be ordered to be given in the form of a Statement of Nature of the case relied on.*

*If a party consents to an order for further and better particulars of his pleading, it will not thereafter be open to him to contend that certain of these particulars could not be ordered as a matter of fact, of law or practice but he will be obliged to give all the particulars to which the consent order refers (Ferris v Davies [1989] 1 F.L.R. 555).*

*The Court has power to order particulars on such terms as it thinks just. These words authorise an order that if proper particulars be not served within a certain time, the action shall stand dismissed or that the allegation of which particular were ordered should be struck out from the pleading (Davey v Bentinck CA [1892] QB 185)."*

10. Paragraph 8(e) – (g) of Statement of Claim against 1<sup>st</sup> Defendant claims negligence and for breaches of fiduciary powers, duties, duty of care and function as a statutory trustee, lessor in trust, nominee shareholder,

The Plaintiff has in the Further and Better Particulars stated that it does not concern the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant and are matters to be discovered pre-trial and proved at trial.

11. For particulars to Statement of Claim paragraph 8(e) – (g) the Plaintiff had consented to provide the same and has now failed to provide the same. The Plaintiff once consenting to provide particulars is obliged to give the particulars.
12. For paragraphs 25, 26, 28, 29(a), 35 and 37 the Plaintiff stated it intends to apply to amend pleadings but since 30 October 2017 has failed to make any necessary application.

Again if this was their stance, they should not have entered into a consent order. Since they had consent to provide particulars they are obliged to do so and has failed to do so.

13. Accordingly, I find that the Plaintiff has failed to provide further and better particulars it had agreed to do so by consent.
14. Since an "Unless Order" had been imposed by My Predecessor on 25 June 2018 the action stands dismissed.

Plaintiff is further ordered to pay cost summarily assessed at \$2,000 to the Defendants.



  
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**Vandhana Lal [Ms]**  
Acting Master  
At Suva.