IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No: HBC 119/17

BETWEEN	**:**	**ONE STOP WAREHOUSE (FIJI) LIMITED** **PLAINTIFF**
AND	**:**	**MATAQALI CU DEVELOPMENT DEED OF TRUST** **FIRST DEFENDANT**
AND	**:**	**SAILASA DUNIBITU & AMENIO BEBE** **SECOND DEFENDANTS**
Appearance	**:**	Mr S Koya, Ms J Takali & Ms A Chand for the Plaintiff Mr A Singh for the First & Second Defendants
Date of Hearing	**:**	4 & 5 November 2019
Date of Judgment	**:**	30 January 2020

DECISION

Introduction

1. This case deals with the fall-out from a failed property transaction between the parties that occurred in the first half of 2017. The plaintiff, which was the vendor in that transaction, seeks to recover from the purchaser and its trustee's payment of the amount recorded in the sale and purchase agreement as the deposit payable by the purchasers on signing the agreement.

Background and undisputed facts

2. In early 2017 the plaintiff owned a leasehold interest (under a lease from iTaukei Land Trust Board for 99 years commencing 1 January 2013) in a residential property comprising two recently built and well-appointed apartments/flats at Lot 13 Votualevu Road, Nadi. It was looking to sell its interest in the property to relieve some financial difficulties the company and its business were facing at that time. It engaged Harcourts Bluewater Real Estate (Fiji) Limited (*Harcourts*) at Nadi to find a buyer for the property.

3. At around the same time, the First Defendant, the Mataqali Cu Development Trust (*the Trust*) was looking to invest (using part of the proceeds from land that the Mataqali had sold at Denarau Island) in property that the Trust intended to rent out.

4. The Trust had been formed, with the agreement of the members of Mataqali Cu of Sikituru Village, in Nadi, by Deed of Trust dated 28 August 2016 signed by the three initial trustees comprising the two second defendants and Mr Epeli Qoro, who played no part in this matter.

5. The deed of trust requires the trustees to obtain the advice and approval of the Working Committee (as defined in the deed) and the majority of the Mataqali before

borrowing any sum of money (clause 6) or entering into any undertaking for a commercial of business venture, investment or finance for the benefit of the Mataqali (clause7), and provides at clause 10:

> *... three (3) of the Trustees after the resolution of either the working committee or constituted meeting may sign and execute any documents, contracts and agreement entered into for the purpose of this trust*

6. With a view to them investigating investment opportunities the three trustees of the Trust had been referred to Mr Elix Antonio, a real estate agent working at Harcourts, who introduced them to three properties:

   i. The first was a property at Vunaviavia Road, Martintar, Nadi belonging to a Mr Jennings. The two second defendants signed an offer to buy this property for F$1.25m with a deposit of $500,000 payable on execution of the agreement to Harcourt's trust account. Apart from the usual requirement for the lessor's (ILTB) consent to any assignment, the offer was subject to a condition that the vendor was to obtain within 10 working days a valuation for the property equal to or higher than the purchase price. This offer was not accepted by the vendor, and lapsed when the second defendants were told that the vendor had sold to someone else.

   ii. The second property that the Trust looked at buying was a property that belonged to a Mr Patel, also in Nadi. There was discussion about putting an offer in for that property also, and some work was done on preparing a draft agreement. The proposed purchase price was F$1.2m, the proposed deposit was the same as in the previous agreement, and again the agreement required a valuation equal to or higher than the purchase price, plus a requirement that the vendor provide a record of rental returns for the last 12 months. This agreement was never signed by the defendants or – apparently – put to the vendor. The defendants say that the property was sold to an Asian purchaser before they could even finalise their offer.

   iii. The third property was the plaintiff's property the subject of these proceedings.

7. The agreement between the plaintiff and the defendants for purchase of the plaintiff's property is signed, for the purchaser, with the common seal of the Mataqali Cu Development Deed of Trust, witnessed by the two second defendants on behalf of the Trust. The plaintiff has also executed the agreement under its common seal. The agreement is dated 2 March 2017 and obviously follows a standard template used by Harcourts. It provides (among other details that are not relevant here) for:

   i. A purchase price of F$1m.

   ii. A deposit of $500,000 payable to Harcourt's trust account 'on execution of this agreement' (page 1 of the agreement).

iii. Settlement to be 90 days or earlier from the unconditional date (being the date when *all further terms of Sale have been satisfied, and all consents under clause 24 have been granted.*

iv. Clause 24 requiring the consent of the Itaukei Land Trust Board *(ILTB*) (which each party agrees to co-operate in obtaining)

v. Interest rate for late payment: 15% per annum.

8. There are no added clauses (such as those related to valuations that appeared in the earlier draft agreements). The agreement includes a clause (clause 15) setting out what is to happen should the purchaser make default. This clause provides:

> *If the Purchaser shall make default in payment of any moneys when due or in the performance or observance of any other stipulation or agreement on the Purchaser's part herein contained and if such default shall continue for the space of 60 days from the due date then and in any such case the Vendor without prejudice to any other remedies available to it may at its option exercise all or any of the following remedies namely:*
>
> *(a) May enforce this present contract in which case whole of the purchase monies then unpaid shall become due and at once payable or*
>
> *(b) May rescind this contract of sale and thereupon all monies theretofore paid or under the terms of sale applied in reduction of the purchase money shall be forfeited to the Vendor as liquidated damages after payment of Harcourts fees and commissions; or*
>
> *(c) May sue for specific performance of this Agreement; or*
>
> *(d) May without first tendering any transfer to the Purchaser resell the said property either by public auction or private contract for cash or on credit, and upon such terms conditions and stipulations as the Vendor may think proper ... and any deficiency in price which may result on and all expenses of attending to any resale or attempted resale shall be recoverable by the Vendor as liquidated damages the Purchaser receiving any credit for any payment made or applied in reduction of the purchase money. Any excess in prior after deduction of expenses shall belong to the Vendor.*

9. The defendants did not pay the deposit amount, or any other amount to Harcourts.

10. At some point after the agreement was signed, the defendants arranged for a valuation of the property. The plaintiff co-operated with this, thinking – the plaintiff's director Mr Ali says – that the defendants required this for their own purposes, albeit that there was no valuation condition in the sale agreement. The valuation suggested that the property was worth only F$780,000.

11. After the defendants received the valuation they had their solicitors write to Harcourts, on 10 April 2017 advising Harcourts that the defendants had paid $200,000 into the trust account of the defendants' solicitor, and asking for:

i. A valuation report
ii. Engineers certificate
iii. Cash flow
iv. Tenancy Agreement.

There was no reference in this letter to the results of the valuation that the defendants had already obtained. Some weeks later, on 28 April, the defendants solicitors wrote again to Harcourts (copied by email to the plaintiff's solicitor) saying that the defendants were now prepared to pay only $800,000 for the purchase, and advising:

> *Please note that the earlier offer is withdrawn as it was subject to valuation (see letter 10 April 2017).*

12. The plaintiff's solicitors responded to this on 3 May 2017 arguing that the agreement was a binding contract, that the requirement for the consent of the ILTB was not a condition precedent, and that the deposit was payable. It is implicit in this letter that the plaintiff accepted the defendant's termination of the agreement, but – the solicitors argued – that termination was wrongful, and would lead to forfeiture of any deposit paid or payable by the purchaser.

13. Although there was subsequent correspondence between the solicitors, neither party changed their positions, and the sale did not proceed. Later in the same year (2017) the plaintiff sold the property to someone else for $900,000.

The Plaintiff's claim and the defence

14. The plaintiff's claim was commenced by Writ of Summons issued out of the High Court at Lautoka on 19 June 2017. In its statement of claim the plaintiff alleged that there was a concluded agreement for sale and purchase dated 2 March 2017 between the plaintiff and the second defendants as trustees for the first defendant, and that the defendants had wrongfully purported to rescind or withdraw from that agreement. The prayer for relief sought:

i. An order for specific performance (at the time the writ of summons was issued the plaintiff had not yet resold the property).

ii. An order restraining the defendants' solicitors from paying out of their trust account the partial deposit of $200,000 (see paragraph 11 above)

iii. A direction (in the alternative to (ii)) that the defendants pay that amount into Court

iv. Damages (not specified)

v. Interest at 10% on any award of damages (noting here that the sale and purchase agreement provided for a default interest rate of 15%)

vi. Costs

15. In their statement of defence the defendants say:

i. Their agreement to purchase the plaintiff's property was subject to the following conditions agreed to by the defendants and Harcourts as the vendor's agent:

(a) The agreed purchase price of F$1m was *to lock in the sale and was subject to an independent valuation of the plaintiff's property*.

(b) Finance

(c) An engineer's certificate

(d) The consent of the ILTB being obtained as the property title was a *protected lease*.

ii. These conditions were never satisfied, and hence there was no concluded agreement.

iii. Because there was no concluded agreement the deposit never became payable

iv. The plaintiff, via its agent Harcourts, made fraudulent misrepresentations to induce the defendants to sign the agreement, namely that the plaintiff would agree to adjust the purchase price to correspond with the value of the property as determined by an independent valuer.

v. That the sale agreement is illegal and therefore void *ab initio* because the consent of the ILTB was not *first had and obtained.*

vi. The plaintiff had made false and misleading representations concerning the price payable for the plaintiff's property in breach of section 79 Commerce Commission Act 2010 (I assume that this is intended to refer to the Fijian Competition and Consumer Commission Act 2010). The statement of defence does not specify what the allegedly false and misleading representations were.

vii. That the plaintiff's attempt to *extract money from the Defendants Is not permissible as it is an unjust enrichment.*

viii. *The Plaintiff's conduct in enforcing the Agreement is unconscionable.*

The statement of defence does not particularise in what manner the plaintiff is said to be in breach of these statutes or legal principles.

16. The plaintiff has not sought to amend its pleadings, but when the trial began counsel for the plaintiff acknowledged that since the proceedings were filed (in June 2017) the plaintiff had resold the property, and hence no longer seeks specific performance. Furthermore, in the course of giving his evidence the plaintiff's director/CEO Mr Ali made it clear that although the price at which the property was resold was less than the sale price agreed to with the defendants, the plaintiff is not seeking damages on

that basis. Instead the plaintiff is now asking for judgement for $500,000 being the amount of the deposit that the defendants agreed to pay *on execution of the Agreement.* This claim is made not on the basis that that figure represents the plaintiff's loss resulting from any breach of contract by the defendants, but on the basis that the plaintiff has an accrued right under the agreement to payment of the deposit, which – so the argument goes – the plaintiff is then entitled to forfeit on the purchasers' wrongful termination of the purchase. The plaintiff acknowledges that this will result in a windfall gain – effectively meaning that the plaintiff will receive a total of $1.4m for the property that it was willing to sell for $1m. The plaintiff argues that the law relating to forfeiture of a deposit on the sale of land means that it is entitled to benefit from this fortuitous outcome.

17. What this position does mean though is that the plaintiff has not presented any evidence or argument about the resale price or any other losses that one might have expected it to incur as a result of the failed sale. For example the Court was not told whether the plaintiff has had to pay commission to Harcourts on the sale, or what other costs the plaintiff has incurred in re-marketing and re-selling the property. On the other hand, the limited and different basis for the plaintiff's claim as it stands now means that defendant has not had the opportunity, or the need, to question the manner in which the new sale was obtained. I understood Mr Ali to acknowledge in his evidence that the property was not re-listed or advertised for sale, and that it was sold under a private arrangement. Mr Ali was not particularly forthcoming on the details of this arrangement, and he was not cross- examined on the issue by counsel for the defendants. There is therefore no basis on which, if I find against the plaintiff on the claim to payment of the deposit, the court can nevertheless award damages to the plaintiff for losses arising on the termination of the agreement – assuming of course that I find the defendants to be in the wrong on that issue. In the event, for the reasons I discuss below, I don't think that a claim to damages would be sustainable by the plaintiff, so it has lost nothing as a result of this change in direction.

The parties' evidence

18. On the face of it the plaintiff's case is straightforward; there is a written sale and purchase agreement that appears to be complete, and is unconditional apart from the issue of the consent of ILTB to the assignment of the lease to the defendants, which was never pursued because of the position that the purchasers took about the status of the agreement. I deal with the issue of the ILTB consent later.

19. The defendants however say that the written agreement does not contain all the terms of the parties' agreement, and that In addition to the terms set out in the agreement they signed were the matters discussed between the second defendants and the Harcourts agent Elix Antonio. It is clear that both of the earlier agreements that the defendants signed, or contemplated signing, contained clauses that made the agreements conditional on getting valuations that were higher than or equal to the agreed purchase price. But the evidence for the defendants on the discussions with Mr Antonio is equivocal. On one hand it seems that the defendants were exasperated that their interest in those two earlier properties was not taken up by the vendors, and felt that Harcourt's was using their interest in those properties to help them conclude negotiations with others for the sale of those properties (i.e. as leverage to help get those other parties across the line). This would provide them with an incentive to

make a more attractive – i.e. unconditional - offer to the plaintiff to ensure that the same thing did not happen a third time. An alternative explanation is that the reported discussions with Mr Antonio are consistent with the defendants' evidence – demonstrated by what they offered or intended to offer in the two earlier transactions - that they were cautious about making an unconditional commitment to purchase without valuations to support the asking price.

20. Mr Ali says, and I accept, that he knew nothing of the discussions that the defendants say they had with Mr Antonio of Harcourts. As far as the plaintiff was concerned, the written form of the agreement it signed contained all the terms of the agreement, and there were no conditions as to valuation, engineer's certification, tenancy details etc. as the defendants assert. This means that for the defendants to establish that these terms are part of the contract, even though they are not included – as one would normally expect them to be – in the agreement, they will have to show, on the balance of probabilities, that these additional matters were agreed to by Harcourts as the plaintiff's agent, and/or that Harcourts' knowledge of those stipulations, or its conduct of the negotiations was binding on the plaintiff in some way.

21. Two problems that the defendants face in attempting to show that there are other terms of the agreement apart from those contained in the written agreement lie in the application of the parole evidence rule, and because of the terms of clause 22 of the sale agreement of 2 March 2017.

22. The parole evidence rule holds that where there is a contract that has been reduced to writing, verbal evidence is not permitted so as to add to or subtract from, or in any way vary or qualify the written contract[1]. Since this principle was articulated in the nineteenth century it has come to be recognised that extrinsic evidence is always relevant and admissible to establish the vital first step without which the rule has no application, i.e. that the written form was intended to encapsulate all the terms of the parties' agreement. If the parties intend their contract to be partly written and partly oral, extrinsic evidence is admissible to prove the oral portion of the agreement. As Russell LJ said in **Gillespie Bros & Co v Cheney, Eggar & Co**[2]

> *... although when the parties arrive at a definite written contract the implication or presumption is very strong that such contract is intended to contain all the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears In the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement.*

23. Clause 22 of the sale agreement provides:

> *22. ENTIRE AGREEMENT*
> *This Agreement forms the whole of the Agreement between the parties respecting the subject matter hereto and no representation warranty or*

[1] **Goss v Lord Nugent** (1833) 5 B&Ad 58, 64.
[2] [1896] 2 QB 59, 62

statement not included or specifically provided for herein shall form part of the Agreement between the parties.

24. The evidence for the defendants was given by the two second defendants, Mr Dunibitu and Mr Bebe, who both took part in discussions with Harcourts agent Mr Antonio, and were the signatories to the sale agreement on behalf of the First Defendant. Both of them gave their evidence through an interpreter, though it was clear in the course of their evidence that they had some familiarity with English. Mr Dunibitu said that when the trustees had been asked by their village to invest some of the money the trust had received from the sale of land owned by the mataqali at Denerau they discussed the purchase of property with Harcourts. All three trustees were present at those initial discussions, and they explained to Mr Antonio that all three of them would need to sign any agreements, as required by the trust deed.

25. Mr Dunibitu said that Mr Antonio told them, at the time they were discussing the agreement with the plaintiff, that it was sufficient for two trustees to sign now, and that the third trustee could sign later. He said that the trustees told Mr Antonio that they needed to consult with the mataqali over the proposed purchase, and also needed to discuss the matter with the Trust's consultant and an advisor from ITLB. He said that the trustees felt pressured by Mr Antonio to sign the agreement with the plaintiff. They did not receive a copy of the signed agreement from Harcourts.

26. Mr Bebe said that Mr Antonio had not explained the documents to him and Mr Dunibitu. He also explained that because Mr Antonio was Rotuman, and did not speak iTaukei, all their discussions were in English. He said no-one else from Harcourts – apart from Mr Antonio - took part in the discussion about the agreements. In particular he denies that there was any discussion involving Ms Denise McPhail, the Harcourts' manager, who was called by the plaintiff as a witness to the signing of the agreements.

27. This contradicted Ms McPhail's evidence, which was to the effect that she had explained the documents (both the final and earlier agreements) to Mr Dunibitu and Mr Bebe before they had signed them, in the course of which she encouraged them to get legal advice, and ensured that they understood and were happy with the terms of the agreement. She says that she explained the agreement in English, and Mr Antonio translated into iTaukei. This seems unlikely if Mr Antonio spoke only Rotuman, but regrettably this was not put to Ms McPhail in cross-examination, and emerged only in the course of Mr Bebe's evidence. She recalls that she took part in a discussion with Mr Dunibitu and Mr Bebe, after the agreement was signed by them, in which they talked about installing spa pools at the house following settlement. The defendants' two witnesses deny that this discussion about spa pools took place.

28. Ms McPhail was questioned in cross examination about how her signature appears on the signature page of the final sale agreement. She has signed as witness only in one place (which appears to refer only to the plaintiff/vendor's execution), whereas in one of the earlier agreements her signature as witness appears below the purchasers signatures. In spite of this Ms McPhail insists that she was present when the defendants signed the final agreement, and her signature is intended to signify this, regardless of where it appears on the page.

29. Ms McPhail was the only witness from Harcourts. It is unfortunate that Mr Antonio was not called, or was not available, to give evidence, since he was obviously the agent most closely involved in the discussions leading up to the signing of the final agreement. His evidence may have assisted me in coming to a determination of what happened relating to the signing of the agreement, and the significance or otherwise of the absence of a signature by the third trustee of the first defendant.

30. Following the signing of the agreement the defendants obtained a valuation of the property, and when this indicated a value of $780,000 they sought to renegotiate the price. When the vendor would not agree the purchasers' solicitor purported to cancel the agreement on the basis that it was conditional on valuation, and that condition was not satisfied. At that point the vendor launched these proceedings.

31. The impression that I think the defendants witnesses sought to convey in giving their evidence was that they are inexperienced in business, and only moderately educated senior members of their Mataqali. They used interpreters in Court in giving their evidence and answering questions, and although they both clearly understood some English (both witnesses were present in court during the evidence of the plaintiff's witnesses, and appeared to be following the conduct of the trial) I readily accept that they were and felt at a disadvantage in understanding the English language legal documents that they were being asked to sign. In this respect they would not be very different from the vast majority of lay people who are presented with legal documents; they rely on the people they are dealing with to explain the documents and advise them on whether to sign them or not.

The legal issues

32. Although I have concerns about the extent to which these matters are covered by the pleadings (which I will discuss further in relation to each issue) I propose under this heading to consider the law relating to the following issues:

i. Given the manner in which the sale and purchase agreement has been signed, is there an agreement at all, and if so between which parties?
ii. Assuming that there is an agreement, does that agreement include the terms that - the defendants say - were discussed orally between the second defendants and Mr Antonio of Harcourts?
iii. Assuming that there is an agreement that does not incorporate the oral terms as to valuation etc (if those terms are included in the agreement I think it is clear that the agreement has been properly terminated by the defendants on the basis that the valuation condition was not satisfied), is the plaintiff entitled to payment of the $500,000 referred to in the agreement as a 'deposit'?
iv. Whether the sale agreement is illegal and therefore void *ab initio* because the consent of the ILTB was not *first had and obtained.*
v. Whether the plaintiff has made false and misleading representations in breach of section 79 of the Fijian Competition and Consumer Commission Act 2010
vi. Whether the plaintiff's attempt to *extract money from the Defendants* constitutes – in the circumstances of this case - *unjust enrichment.*
vii. Whether the Plaintiff's conduct is *unconscionable.*

Is there an agreement, and between which parties?

33. This issue is not raised by the pleadings, but was the subject of some evidence from the defendants in the trial (not objected to by the plaintiff). In clause 2 of the statement of claim the plaintiff alleges:

> *The Plaintiff offered to sell and the First Defendant agreed to purchase all of [the Plaintiff's property] for an agreed consideration in the sum of $1,000,000 in full and final settlement.*

In their statement of defence the response to this allegation is:

> *As to paragraph 2 the Defendants say that they agreed to purchase the Plaintiff's property ... subject to certain conditions which are specified as follows: ...*

This would have been the opportunity to deny that the agreement has been properly executed so as to bind the first defendant.

34. It is not clear on what basis a claim is made against the second defendants. The statement of claim does not assert that they intended to purchase the property in their personal capacity (the agreement clearly identifies the purchaser as the Mataqali Cu Development Deed of Trust (whatever that means), and is signed with the common seal of that entity (if it is an *entity*).

35. A copy of the trust deed of the Mataqali Cu Development Trust has been produced in evidence by the defendants. This document indicates that the trust is merely a trust, and is not an incorporated body of any sort. It is signed by the three initial trustees of the trust of whom the second defendants are two. Under clause 10 of the deed of trust the signatures of three trustees are required for any contracts or agreements entered into by the trust. This in turn is to happen only if such contracts or agreements are approved by a resolution of the Working Committee of the trust, or a meeting of the members of the Mataqali.

36. In the absence of some evidence that the first defendant is an incorporated body of some sort I would expect that any contract that it enters into would need to be signed by all the current trustees, or would require some evidence that the person or persons signing the agreement did so with the authority of all the trustees. Had the issue been raised in the pleadings I would certainly therefore have had concerns about whether an agreement that is signed only by two trustees is enforceable against the trust. That might in turn have raised a question about the personal liability of the two trustees who did sign the agreement, although there is no suggestion in the pleadings or in the documents themselves, or in evidence or argument that Mr Dunibitu and Mr Bebe were intending to contract to purchase the plaintiff's property in their own right rather than as trustees of the trust. However since none of these issues have been pleaded I do not need to spend more time on those issues. Even if they had been pleaded they would not have altered the outcome of this case for the reasons that I explain below.

Do the terms of the agreement include the valuation condition and other terms discussed orally between the defendants and Harcourts, and/or has there been misrepresentation or misleading conduct by the plaintiff?

37. I will deal with the second and fifth issues listed in paragraph 32 above together, since there are common themes that arise in both.

38. Given my finding that the plaintiff had no knowledge of any discussions that might have taken place between Mr Antonio of Harcourts and the defendants about the valuation and other conditions that the defendants say were part of the agreement, the only way in which these matters could be included in the agreement for sale and purchase would be if:

    i. The additional terms were agreed to be part of the sale and purchase agreement.

    ii. Harcourts had actual or ostensible authority to agree to these terms on behalf of the plaintiff.

39. There is no evidence to suggest that Harcourts had actual authority to contractually bind the plaintiff in connection with the sale of its property. It is well recognised that the usual role of a real estate agent in the sale of a property, other than by auction, is limited to advising on and taking steps to market the property, helping to negotiate the terms of sale, preparing the sale agreement and collecting the deposit.

40. Apparent or ostensible authority for an agent arises in the following circumstances:

> *Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such authority*[3].

41. In his decision in **Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd**[4] Lord Diplock expanded on this principle as follows:

> *An 'apparent' or 'ostensible' authority … is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority or not.*

[3] Bowstead & Reynolds on Agency 17th Ed (2001) para 8.013
[4] [1964] 2 QB 480, at 503

42. For this doctrine to apply, there must be a representation by the principal by words or conduct, and the contracting party must have relied on that representation. Again there is no pleading, and no evidence or argument from the defendants that either the plaintiff or Harcourts represented in any way that Harcourts had authority to contract as agent for the plaintiff, or indeed had any role in the sale different from the usual relationship between a real estate agent and its principal as referred to above. Nor is there any pleading or evidence that the defendants relied on anything said by Harcourts as representing that Harcourts had authority to bind the plaintiff in contract. The defendants signed an agreement for sale and purchase to which the plaintiff (not Harcourts as the plaintiff's agent) was the other contracting party. In these circumstances it would be particularly difficult for the defendants to show that they nevertheless had reasonable grounds to believe, and did believe, that Harcourts was authorised to contract orally as agent for the plaintiff over the 'supplementary' conditions relating to valuation etc. that the defendants say they relied on.

43. But apart from the question of whether the agreement was subject to valuation and other conditions, there is also the allegation by the defendants that the plaintiff was in breach of s79 Fijian Competition and Consumer Commission Act 2010. The statement of defence says that this conduct occurred *concerning the price payable for the subject property* but is no more specific than that. Moreover, the issue of breach of the Act is raised as a ground of defence to the plaintiff's claim, and not as a counterclaim, or as the basis for an argument that the sale agreement is ineffective. Even if I were to conclude that there has been a breach of the Act as alleged, it is not clear what the defendants say the consequences of that breach should be.

44. Section 79 of the Act states (to the extent it seems applicable here):

> ***79 False or misleading representation and other misleading or offensive conduct in relation to land***
>
> *(1) A person shall not, in trade or commerce, in connection with the sale or grant, or the possible sale or grant, of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land—*
>
> *(a) ...*
>
> *(b) make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put or the existence or availability of facilities associated with the land; or*
>
> *(c) ...*

45. Section 132 of the Act extends the liability for false or misleading claims to the principal, where that conduct is by an agent. The section provides:

> ***132 Liability of employer, agent and employee***
>
> *(1) ...*

(2) Every principal or employer shall be answerable for the acts or omissions of his or her manager, agent or employee in relation to the matters provided for by this Act and any regulations or orders made thereunder, and if any manager, agent, or employee commits an offence against any of the provisions of this Act or of such regulation or orders, the principal or employer shall also be guilty of such offence and shall be liable to the penalties provided therefore under this Act or, as the case may be, such regulations or orders, unless he or she proves that the offence was committed without his or her consent, and connivance and that he or she took all reasonable steps to prevent its commission.

46. In the absence of a properly pleaded allegation specifying the conduct complained of with sufficient particularity to give the plaintiff a reasonable opportunity to understand and reply to what is alleged against it, or to distance itself from any misconduct on the part of the agent I am not prepared to find that the plaintiff here is guilty of or liable for a breach of the Act. The defendants might have but chose not to join Harcourts as a third party and make their allegations against the people of whose conduct they were complaining. Taking into account the inadequate pleadings on this issue, coupled with the absence of crucial witnesses and a lack of clear evidence, I am not persuaded that there has been a breach of section 79 of the Act as alleged.

Is the sale and purchase agreement void ab initio without the consent in writing of the lessor [the ITaukei Land Trust Board) being first had and obtained?

47. Regrettably this defence too is lacking in particulars. It is not clear from paragraph 26 of the statement of defence on what basis (statutory, common law or otherwise) it is said that an agreement for sale and purchase might be illegal and void because the lessor's consent was not obtained. Section 12 of the iTaukei Land Trust Act 1940 provides:

12 Consent of Board required to any dealings with lease

(1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his or her lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void, provided that nothing In this section shall make it unlawful for the lessee of a residential or commercial lease granted before 29 September 1948 to mortgage such lease.

48. In the absence of more clarity in their pleading I assume that the defendants argue that this section requires the consent of the ILTB to be obtained before any agreement can be signed for the sale or purchase of iTaukei land, and that the absence of prior consent means that the transaction is illegal and therefore unenforceable. That is

certainly the position for the sale of land in Fiji to a non-resident. For such a proposed transaction section 6 of the Land Sales Act 1974 applies. That section states:

> *No non-resident or any person acting as his or her agent shall without the prior consent in writing of the Minister responsible for land matters make any contract to purchase or to take on lease any land, ...*

49. There is an obvious difference in the wording of section 12 of the iTaukei Land Trust Act and section 6 of the Land Sales Act. The latter section makes it clear that even a contract to purchase land is prohibited without the prior consent of the Minister, and has been applied by the courts as meaning that any agreement in which the requirement to obtain the Ministers consent is found to be a condition subsequent is illegal and invalid. See for example the decision of the Court of Appeal in **Port Denerau Marine Ltd v Tokomaru Limited** [2006] FJCA 27 and its analysis of the earlier cases under the Land Sales Act.

50. But if the wording and intent of section 6 Land Sales Act is to be interpreted in this way, the different wording of section 12 of the ITaukei Land Trust Act arguably means something different. I say 'arguably' because section 12 was in force many years before the Land Act passed in 1974, and it has long history of interpretation. It may be that in spite of its different wording, the interpreted and applied meaning of s.12 has the same or similar effect as section 6 of the Land Act, and noting the year in which the Land Act was passed (1974), it may indeed be the case that the wording of section 6 is a deliberate attempt to replicate the interpreted meaning of section 12 to produce the same effect. But this case is not concerned with section 6 of the Land Act.

51. In its decision in **Harnam Singh & Bakshish Singh v Bawa Singh** (1958) 6 FLR 31 the Court of Appeal (per Lowe CJ)made the following comments in response to the argument that any agreement that was subject to the section (essentially the same in 1958 as it is now) to which the Board's consent was not obtained was void ab initio:

> *It could not have been null and void ab initio because it seems apparent from section 12 which says, inter alia,*
>
> *'it shall not be lawful to alienate or deal with the land ... whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head-lessor first had and obtained.'*
>
> *That, in my view indicates without doubt that it is anticipated that there must be a "written dealing ", or an agreement to deal with the land in question, which is required to be submitted for consent. Were it not so an absurd position would arise whereby a written agreement, being null and void and so being a complete nullity from the time it was executed could not be submitted to the Board at all. It would also create the absurdity that, if a testator left to a beneficiary an interest in his sublease of Native land the relevant portion of the Will would be null and void from the date of death of the testator. I have no doubt that the words in section 12 "shall be null and void" mean "shall be inoperative unless and until the consent of the Board is obtained" in so far as*

the agreement in the instant case is concerned, and of course any other similar agreements to deal with native lands. If I am right, I am unable to see that the penal section, 26, can apply as there is no "act done, or attempted to be done, contrary to the provisions of this Ordinance" by the mere entering into an agreement for sale of native land. The agreement in my opinion has created no illegality at all. It is a necessary preliminary in obtaining the essential consent before the land is actually disposed of, if the agreement falls within the provisions of section 12.

I am fortified in my view by the wording of subsection (2) of section 5 of the Ordinance:

"All instruments purporting to transfer, charge or encumber any native land or any estate or interest therein to which the consent of the Board has not been first given shall be null and void."

That section is clear and unambiguous and needs no further comment as to its effect. It also supports my opinion that, under section 12, such an instrument is merely inoperative until consent is given and is not null and void ab initio.

(the underlining is mine).

52. In **DB Waite (Overseas) Limited v Wallath** [1972] 18 FLR 141 the Court of Appeal again looked at the validity and enforceability of an agreement for which no consent of the (then) Native Land Trust Board to the sale was ever given. In particular, the Court was asked to decide whether the sale and purchase agreement had sufficient validity, notwithstanding the absence of the requisite consent, that the plaintiff/purchaser was entitled to the return of its deposit, and to damages, following the vendor's refusal to settle. In doing so the Court referred to its previous decision in **Harnam Singh** (supra) and to the decision of the Privy Council - on appeal from Fiji - in **Chalmers v Pardoe** [1963] 3 All ER 552, but said (per Gould VP):

*At first sight it seems to be a reasonable and straight forward solution to say that, as no stage of illegality had been reached before repudiation took place the parties could rely upon the agreement as regulating their legal rights. It is only with reluctance that I have concluded that this would be to draw more from the inference based upon **Chalmers v. Pardoe** (supra) which I have suggested above, than is justifiable. True, the judgment implicitly approved the statement that there must of necessity be some prior agreement in all such cases. But, though the Privy Council did not quote this part of the judgment in **Harnam Singh's** case, that judgment went on to say that such an agreement would be inoperative until such consent had been given. The Privy Council cannot therefore be taken as saying that a binding and enforceable agreement would be lawful. Having regard to the wording of section 12, "it shall not be lawful, for any lessee . . . to alienate or deal with the land. . . . whether by sale, transfer or sublease or in any other manner whatsoever. I am impelled to the conclusion that an operative agreement for sale must be a contravention of the section. Such an agreement creates an interest in land in the purchaser and must therefore amount to a dealing in land.*

> *For these reasons, if the present agreement is to be regarded as lawful it must be accepted that, so far as it touches the land at least, it was not in operation. That is not to say that the respondent could not have proceeded against the appellant for the enforcement of the implied promise to apply for the consent of the Native Land Trust Board.*

and per Marsack JA:

> *The preliminary agreement contains all the essential ingredients of an agreement for the sale and purchase of land; and if it is to be regarded as completely effective from the time of signing it must be held to be a dealing in land and consequently, under section 12, unlawful, null and void. But it has been authoritatively decided that the preliminary agreement does not in itself convey an interest in land; and therefore, in my opinion, it must be that the preliminary agreement is inchoate in its character and would remain incomplete, and not fully effective, until the Board's consent had been given.*

and commenting on the judgement of the (then) Supreme Court commented:

> *It cannot, I think, be said that the Agreement is "not unenforceable," i.e. enforceable. Until the consent of the Native Land Trust Board is obtained, full effect cannot be given to the agreement, to the extent that it is an agreement to transfer the leasehold land. Section 12 makes it abundantly clear that such an agreement, if completely effective, is unlawful null and void without the consent of the Board first had and obtained. <u>It may be that some rights 'inter parties' are created by the agreement, but in the absence of the consent of the Native Land Trust Board the agreement to transfer the land is definitely unenforceable</u>.*

Again, the underlining is mine.

53. The Fiji Court of Appeal (including two of the judges who later sat in **Waite** – (Gould VP and Marsack JA) had previously looked at the same issue in **Singh v Sumintra** [1970] 16 FLR 165. In that case Marsack JA dissented on the basis of his view of the facts, but the reasoning was the same. As the Vice President in his decision observed:

> *If an agreement is signed and held inoperative and inchoate while the consent is being applied for I fully agree that it is not rendered illegal and void by section 12. Where then, is the line to be drawn? I think on a strict reading of section 12 in the light of its object, an agreement for the sale of native land, would become void under the section as soon as it was implemented in any way touching the land, without the consent having been at least applied for.*

54. These decisions make it abundantly clear that:

i. in so far as an agreement deals (i.e. is itself or is the basis for actions that constitute a dealing) with the transfer of an interest in land, it is unenforceable and of no effect without the Board's consent.

ii. In so far as an agreement does not effect or actually give rise to a dealing in land, it remains valid and effectual, and any contractual obligations that do not themselves constitute a dealing, are valid and enforceable.

55. It seems that whether in a particular case an agreement is 'inoperative and inchoate', or 'illegal and void' is only able to be determined on a case by case basis depending on the facts. Gould VP in **Waite** suggests that the obligation to apply to the Board for consent might be enforceable, but clearly the ultimate decision in **Waite** (the purchaser was entitled to recover its deposit, but was not entitled to damages for the vendors failure to perform the sale contract) means that while money paid can be recovered (it may be more accurate to express this in terms of the recipient of money received pursuant to the agreement having no basis to resist a claim for repayment following termination), damages arising from non-performance of the land sale cannot be claimed.

56 In the present case a claim for specific performance could therefore not succeed without the ILTB's consent to the assignment. But the plaintiff is not now seeking specific performance, nor is it now seeking damages for breach of contract – i.e. losses said to arise from the defendants' failure to complete the purchase. Instead what the plaintiff (which now accepts that the sale agreement is at an end) is seeking is payment of the deposit that was payable by the defendants immediately on execution of the agreement.

57 It should not be overlooked that the primary purpose of a deposit is not as a payment on account of the purchase price (i.e. consideration for the transfer of the land), but as an earnest paid by the purchaser to induce the vendor to contract with him. In **Soper v Arnold** (1889) 14 App Cas 429, 435 Lord Macnaghten described a deposit in this way:

> *Everybody knows what a deposit is. … The deposit serves two purposes – if the purchase is carried out it goes against the purchase money – but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not.*

and in similar observations in **Howe v Smith** (1884) 27 Ch. D 89, @ 95 Cotton LJ said:

> *What is a deposit? The deposit as I understand it, and using the words of Lord Justice James, is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then according to Lord Justice James, he can have no right to recover the deposit.*

and more recently in **Workers Trust Bank v Dejap Investments** [1993] 2 All ER 370, 373 the Privy Council (Lord Browne-Wilkinson) ruled:

Even in the absence of express contractual provision, [a deposit] is an earnest for the performance of the contract; in the event of completion of the contract the deposit is applicable towards payment of the purchase price; in the event of the purchaser's failure to complete in accordance with the terms of the contract, the deposit is forfeit, equity having no power to relieve against such forfeiture.

58. Cases concerned with deposits mostly deal with forfeiture of a deposit that has already been paid. But what is also clear is that because of the function that a deposit serves, payment of a deposit is an essential element of the contract, and can be enforced even if the contract under which the deposit is payable is no longer in effect. The rationale for this is that the vendor's right to payment of the deposit is a right that accrues immediately (unless the contract provides otherwise – such as payment falling due when the contract becomes unconditional). Cancellation of the agreement does not necessarily, depending on the circumstances of the termination, and what the terms of the contract say is to happen in those circumstances, vitiate a right that has already accrued.

59. A vivid example of this principle in action is the decision of the New Zealand Court of Appeal in **Garratt v Ikeda** [2002] NZLR 577 in which the vendor cancelled a sale agreement because of the purchaser's delay in fully paying the deposit (time for payment of which was said – in the contract – to be essential). Following termination the vendor forfeited the instalments of the deposit already paid by the purchaser, and made a claim against the purchaser for the unpaid balance of the deposit. The case did not involve the issue of illegality that has been raised here, but the Court did have to decide on the effect of section 8(3) of the (New Zealand) Contractual Remedies Act 1979, which provides that:

when a contract is cancelled … :

(a) so far as the contract remains unperformed at the time of cancellation, no party shall be obliged or entitled to perform it further.

(b) So far as the contract has been performed at the time of the cancellation, no party shall, by reason only of the cancellation, be divested of any property transferred or money paid pursuant to the contract.

The Court of Appeal held that this section did not prevent the plaintiff in that case, post cancellation of the contract, from enforcing the payment of the balance of the deposit. Even though the contract had been cancelled because of non-payment of the deposit, the Court held that the right to that payment had already accrued, and the vendor was entitled to enforce that right.

60. If, as the Court of Appeal has suggested in **Waite** (see the underlined portion of the judgment of Marsack J in paragraph 52 above), some rights 'inter parties' may be created by the present agreement notwithstanding the illegality that prevents it from being enforceable in so far as it relates to a transfer of land. If, as the New Zealand Court of Appeal found in **Ikeda,** accrued rights survive the termination of the contract, it follows I think that accrued contractual rights and obligations that are not themselves an 'alienation of or dealing with land' remain valid and enforceable.

While in **Ikeda** the contract became unenforceable – in so far as rights had not already accrued or it was unperformed - as a result of cancellation, this does not seem to me, in principle, any different from certain rights being unenforceable because of illegality. As the Fiji Court of Appeal in **Harnam Singh** and in **Waite** have suggested (seemingly condoned by the Privy Council in **Chalmers** v **Pardoe** in the case of the former decision), rights and obligations that are untainted by the illegality remain enforceable. In this case that means that the plaintiff is entitled to enforce the right provided for in the agreement to immediate payment of the deposit, notwithstanding the fact that without the ILTB consent the agreement was 'null and void' in so far as it constituted or effected a dealing in the land, and so could not be used as the basis for a claim for damages arising from the failure of the purchaser (in this case) to complete the transaction.

Is this genuinely a deposit, or is enforcing it really a penalty, or unconscionable?

61. That however is not an end to the matter. The cases dealing with payment and forfeiture of deposits also make it very clear that to be a genuine 'earnest for the performance of the contract' the deposit must be 'reasonable'. To the extent that the amount of the deposit is unreasonable it is regarded as a penalty, which is unenforceable. The Privy Council in **Workers Trust Bank** (supra) at p.373, immediately following the passage quoted above notes:

> *However, the special treatment afforded to deposits is plainly capable of being abused if the parties to a contract, by attaching the label 'deposit' to any penalty, could escape the general rule which renders penalties unenforceable.*

The Board held that the following passages in two earlier cases accurately recorded the law on this subject:

i. the obiter comments of Denning LJ in **Stockloser v Johnson** [1954] 1 All ER 630 at 638:

> *Again, suppose that a vendor of property, in lieu of the usual ten per cent deposit, stipulates for an initial amount payment of fifty per cent of the price as a deposit and part payment, and later, when the purchaser fails to complete, the vendor re-sells the property at a profit and, in addition, claims to forfeit the fifty per cent deposit. Surely the court will relieve against the forfeiture. The vendor cannot forestall this equity by describing an extravagant sum as a deposit, any more than he can recover a penalty by calling it liquidated damages.*

ii. In **Linggi Plantations Ltd v Jagaathesan** [1972] 1 MLJ 89 on appeal from Malaysia the Privy Council commented on what was a 'reasonable' deposit thus:

> *It is also no doubt possible that in a particular contract the parties may use language normally appropriate to deposits properly so called and even to forfeiture which turns out on investigation to be purely colourable and that in such a case the real nature of the transaction might turn out to be the imposition of a penalty, by purporting to render forfeit something which is in*

truth part payment. This no doubt explains why in some cases the irrecoverable nature of a deposit is qualified by the insertion of the adjective 'reasonable' before the noun. But the truth is that a reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law …

62. In the present case the sale agreement provides for a 'deposit' payment of $500,000 or 50% of the purchase price, and that is the amount that the plaintiff now seeks. No evidence has been presented to suggest why this might be a reasonable deposit in this case, either in terms of the common practice in Fiji, or the anticipated loss to the vendor should the purchaser default. Indeed, such evidence as there is (i.e. the evidence of the subsequent re-sale by the plaintiff/vendor following termination of the agreement) suggests that the vendor's loss on resale would have been adequately covered by the usual 10% deposit.

63. Because the defendant had not raised in its pleadings the issue of whether the amount of the deposit is a penalty I invited counsel for both parties to address the matter in their closing submissions, including the issue of whether the court is obliged to disallow a claim for payment of what is clearly a penalty even if it is not pleaded. This might have included submissions on whether and if so how the plaintiff might have been disadvantaged in its claim by the failure to plead this as a defence. One obvious disadvantage that the plaintiff can claim to have suffered as a result of this issue is that, if the matter had been raised in the defendants' statement of defence the plaintiff may have chosen, instead of relying solely on its claim for payment of the deposit, to also or instead continue with its alternative claim for damages arising from the defendant's failure to complete the purchase.

64. However, any decision relating to these pleading issues also needs to recognise that the plaintiff only announced in the course of the trial, i.e. when the plaintiff's director was giving evidence - and without seeking to amend its statement of claim - that it was abandoning its claim for specific performance, or alternatively for damages, and was instead seeking judgment for payment of the 'deposit' amount provided for in the agreement. Although counsel for the defendant did not object at the time to this late change of direction, there can hardly be a complaint by the plaintiff about any absence of pleading to an issue that was not raised as a basis of claim until after the trial commenced. Furthermore – and this may be an explanation for the last minute change of direction by the plaintiff – the decision in **Waite** referred to above makes it clear that a claim for damages that depends for its legitimacy on an agreement for sale, cannot succeed if that agreement does not have the prior approval of the ILTB under section 12 of the ITaukei Land Sales Act. In the present case no such approval has been sought, let alone granted, so any claim by the plaintiff for damages for breach of the agreement could not possibly succeed.

65. Having given both parties the opportunity to comment, I am satisfied taking into account the matters referred to above, that there is no procedural disadvantage to the plaintiff that should prevent me from dealing with the penalty issue on its merits.

66. In the **Workers Trust Bank** case already referred to the Privy Council rejected the argument that the fact that it was common practice in Jamaica to require deposits of

between 15 – 50% of the purchase price meant that, in that case, a 25% deposit was reasonable. The Privy Council decision (at p374/d) contains the following comment:

> *In order to be reasonable a true deposit must be objectively operating as 'earnest money' and not as a penalty. To allow the test of reasonableness to depend upon the practice of one class of vendor, which exercises considerable financial muscle, would be to allow them to evade the law against penalties by adopting practices of their own.*
> *However … it is more difficult to define what the test should be. Since a true deposit may take effect as a penalty, albeit one permitted by law, it is hard to draw the line between a reasonable permissible amount of penalty and an unreasonable, impermissible penalty. In their Lordships' view the correct approach is to start from the position that, without logic but by long continued usage … the customary deposit has been 10%. A vendor who seeks to obtain a larger amount by way of forfeitable deposit must show special circumstances which justify such a deposit.*

67. In the case before the Privy Council the Board was not persuaded by the evidence submitted that sought to justify demand for a deposit of 25%. I am even less persuaded that a 50% deposit is ever able to be justified. Certainly the plaintiff did not attempt to provide evidence that showed that in this particular case a 50% 'earnest' by the purchaser was reasonable and necessary to persuade the vendor to enter into a contract with the purchaser. In all the circumstances I hold that the 50% 'deposit' is a penalty, and as such is not subject to forfeit by the vendor.

68. Having reached a similar conclusion in **Workers Trust Bank** the Privy Council went on to consider whether the court had jurisdiction to and should , in that case, order the vendor to repay all but 10% of the deposit paid, thus restoring the forfeited sum to an amount that was a 'reasonable' deposit. Assuming that this approach was accepted it would have meant, when applied to the present case, that the plaintiff is entitled to judgement against the defendants for 10% of the purchase price, which would then be forfeit to the plaintiff. But the Board firmly rejected this approach in the following terms(p376/e):

> *Their Lordships are unable to agree that this is the correct order. The bank has contracted for a deposit consisting of one globular sum, being 25% of the purchase price. If a deposit of 25% constitutes an unreasonable sum and is not therefore a true deposit, it must be repaid as a whole. The bank has never stipulated for a reasonable deposit of 10%; therefore it has no right to such a limited payment. If it cannot establish that the whole sum was truly a deposit, it has not contracted for a true deposit at all.*

I am satisfied that the same reasoning applies here. Although that case involved an application for relief by a purchaser seeking repayment of a deposit already paid, whereas in this case the vendor is seeking to enforce payment of a deposit amount by the purchaser post cancellation, the principle is the same. Having demanded (apparently because it could- and without any attempt to justify the amount specified) payment of a deposit amount which has been ruled to be a penalty and therefore is irrecoverable, the plaintiff is not entitled to have the court relieve it of the consequences of its opportunism. To do so would simply provide an incentive for

other vendors (and their agents) to try the same approach, in the hope that the purchasers would not have the resources or knowledge to resist, or – where the 'deposit' has already been paid - to demand repayment.

69. This case provides a vivid example of why penalties are disallowed, and why deposits in excess of 10% are usually regarded as a penalty. I have outlined in paragraph 16 above the windfall gain that the plaintiff would enjoy from this failed contract if it was entitled to succeed in its claim. The idea that the court might countenance and assist that outcome is fanciful.

Conclusion

70. My findings therefore are as follows:

i. There was a sale and purchase agreement entered into between the plaintiff as vendor and the second defendants in their capacity as trustees of the Mataqali Cu Development Trust (but not in their personal interests).

ii. The agreement was on the basis of the written agreement produced in evidence. There were no additional oral terms, and there has been no misleading or deceptive conduct by the plaintiff.

iii. Because no application was ever made to the ILTB for consent to the proposed sale, the agreement was void and unenforceable under s12 ITaukei Land Sales Act as an agreement for sale of land, and no claim for damages for breach of the agreement is sustainable.

iv. Although a claim for payment of the deposit would have been sustainable (notwithstanding the illegality of the agreement), the excessive deposit amount means that the deposit stipulated for in the agreement was a penalty rather than a genuine deposit, and so the deposit is irrecoverable.

v. In view of these conclusions it has not been necessary to decide the defences of unjust enrichment or unconscionable bargain, which in any case were not adequately pleaded.

71. The claim is dismissed. The defendants are entitled to costs, to be fixed on a party and party basis.

HIGH COURT OF FIJI LAUTOKA

A.G. Stuart
Judge

At Lautoka this 30th day of January 2020

SOLICITORS:

Plaintiff: Siddiq Koya Lawyers, Nadi
First & Second Defendants: Anil J Singh Lawyers, Nadi