

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 170 of 2024

BETWEEN: **CHRISTIAN JAGODZINSKI** of 929 Alton RD, Suite 500. Miami Beach, Florida FL 33139, Investor

PLAINTIFF

AND: **LE GROUPE DES INSULAIRES LIMITED** a company having its registered office at Avarua, Rarotonga, Cook Islands

DEFENDANT

For the Plaintiff: **Mr. D. Sharma and Mr. S. M Wally**

For the Defendant: **Mr. R. Singh**

Date of Hearing: **21st May 2025**

Date of Ruling: **8th August 2025**

RULING ON ORIGINATING SUMMONS
(EXPEDITED FORM)

1. These proceedings were instituted by the Plaintiff on the 28th of May 2024 by way of Originating Summons in the Expedited Form, seeking the following orders: -

- a) An Order that the property in Certificate of Title Register Vol. 40 Folio 3931 be sold by way of tender.
- b) An Order that the Sale Tender process be facilitated through the Office of the Chief Registrar of the High Court and to include the following steps:
 - i. Advertisement of the Tender for property in the Fiji Times newspaper on two occasions.

- ii. Setting the conditions for the tenders.
 - iii. Setting a closing date for the tenders within 8 weeks.
 - iv. Opening of the tenders.
 - v. Awarding of the tenders to the highest bidder.
 - vi. Facilitating the sale within 30 days of closing of the tender.
 - vii. Attending to all necessary tax and other statutory approvals.
 - viii. Attending to all settlements.
 - ix. Attending to distribution of all the sale proceeds.
- c) Alternatively, an Order that the Plaintiff and his affiliated entities having debts owed collectively to him by the Defendant be at liberty to tender and can tender for purchase of the said property for deemed valuable consideration either of both cash, as well as an exchange of forgiveness of the sums owed to the Plaintiff and his affiliated entities.
- d) An Order that the Chief Registrar of the High Court of Fiji execute a Transfer of the said property and every other document incidental to the said transfer on behalf of the Plaintiff to enable the registration of the transfer of the successful bidder.
- e) An Order that the Registrar of Titles pursuant to section 168 of the Land Transfer Act be directed to give effect to the Orders made herein.
- f) Costs of this application and any other orders the Court deems just and expedient.
2. The Application is made pursuant to Order 31 of the High Court Rules 1988 and is supported by the affidavit in support of Christian Jagodzinski deposed on the 21st of May 2023 and filed on the 28th of May 2023.

3. The Plaintiff also filed an Ex Parte Motion for substituted service, for the Defendant to be served by way of postal service at their registered postal address. The application was heard and granted on the 30th of May 2024.
4. The Defendants filed the Acknowledgement of Service on the 26th of July 2024.
5. On the 9th of August 2024, the Defendants filed a Summons to Set Aside service of the Originating Summons.
6. On the 11th of December 2024, the Court refused the application and directed the parties to proceed with the substantive matter.
7. Directions were made for affidavits to be filed and the matter was adjourned to the 21st of May 2025 for the hearing of the substantive application.
8. The Defendants filed the affidavit in opposition of Shelley Ann Miller, deposed on the 25th of February 2025 and filed on the 28th of February 2025.
9. The Plaintiff filed the affidavit in response of Kevin Wallace deposed on the 19th of March 2025 and filed on the 20th of March 2025.
10. On the hearing date, the parties made oral submissions and also filed written submissions in support of their respective positions.
11. The matter is now adjourned for ruling on the Originating Summons (Expedited Form).

The submissions for the Plaintiff

12. By way of introduction, the Plaintiff submits that there is a trust called Le Groups des Insulaires Trust, of which the company Les Groupe des Insulaires is a Trustee. John Miller is a director of the Defendant Company and Shelley Miller will succeed him as Director.

13. John and Shelley Miller owned Katafaga Island but transferred it to Les Groupe. John and Shelley Miller then got Les Groupe to transfer an undivided 50% to the Plaintiff on 4th October 2004.

14. The Plaintiff offers the following as key material background facts: -

- a) The company Islander Group of Companies Limited (IGCL) was the vehicle that was used to make substantial improvements on Katafaga Island. Both the Plaintiff and Le Groupe remain 50% shareholders of that company.
- b) The Plaintiff is currently a half owner of Katafaga Island being the property more particularly described in Certificate of Title Reg. Vol. 40 Folio 3931.
- c) The Defendant as successor to the Millers is the other half owner of the island.
- d) The Plaintiff had agreed to invest in IGCL. This was the company which was being used by the parties to develop a Resort and Spa on Katafaga Island.
- e) The Plaintiff signed a Partnership Agreement dated 6th August 2000 with John Scott Miller and Shelley Ann Miller as the Developers.
- f) The Plaintiff invested USD\$6, 000, 000 as he was required to do.
- g) He also lent a further \$500, 000 to IGCL to develop Katafaga Island.
- h) Clause 15.3 of the Partnership Agreement allowed the Plaintiff the right to offer his unencumbered and paid-up shares in IGCL to the developers and they were obliged to buy back his shares together with an interest rate of 5% per annum.
- i) It was agreed between the parties and the Developers that if the developers were unable to purchase the Plaintiff's shares within 3 months, then the Developers were obliged to sell assets to pay the Plaintiff's debt.
- j) On March 10, 2004, the Plaintiff exercised his rights under the Partnership Agreement and offered his unencumbered shares to the Developers for USD\$6, 000, 000 together with an interest at the rate of 5% per annum.
- k) The Plaintiff had also lent USD\$500, 000 to IGCL and he was also entitled to seek payment of this loan together with interest at the rate of 5% per annum.

- l) The Developers did not repay the Plaintiff's investment and loan back within 3 months.
- m) However, on 4th October 2004 Le Groupe transferred an undivided half share in the title to Katafaga Island to the Plaintiff.
- n) The Plaintiff continued to fund further developments on Katafaga Island through IGCL.
- o) The current shareholding of IGCL is as follows:
 - (i) Plaintiff – 1,790,000 shares
 - (ii) John Scott Miller – 250,000 shares
 - (iii) Shelley Ann Miller – 250,000 shares
- p) As at 2021 IGCL had incurred development costs of \$US 16.4 million (\$F 34.9 million) which sum is subject to further interests and costs on the construction of the Katafaga Resort & Spa.
- q) The current position is that both Le Groupe and Mr. Jagodzinski own 50% each of the shares in Katafaga Island and Mr. Jagodzinski has sought a Court Order for the Chief Registrar to independently conduct a sale of the said Island as it falls within the jurisdiction of Fiji.
- r) Mr. Jagodzinski also agrees that Katafaga Island should be sold but he doesn't agree with Ms. Miller's opinion about IGCL. IGCL is also owed a large amount of money for the improvements and development works it carried out on Katafaga Island. IGCL had registered a caveat against CT 40/3931.
- s) The parties have now been in dispute for several years.
- t) The best option is for Katafaga Island to be sold as is where is through a Tender process.
- u) Once Katafaga Island is sold through the Chief Registrar's Office the sale proceeds can be distributed as follows:
 - i. Costs of sale
 - ii. Payment of all statutory dues
 - iii. Payment of all Creditors
 - iv. Balance of proceeds to be divided between the shareholders.

15. The Defendants have submitted that the Plaintiff has mentioned other parties such as John and Shelley Miller, IGCL and the Registrar of Titles without joining them. In response, the Plaintiff submits that the other parties are mentioned by way of background facts, and they do not necessarily have to be added as parties.
16. The Plaintiff also submits that there is no cause of action against the Registrar of Titles, as section 168 of the Land Transfer Act allows the Court to give directions to the Registrar, in furtherance of its own orders.
17. The Registrar is not joined as a party because it will put the Registrar to the expense of filing Court documents and appearing in Court.
18. In the same token IGCL, John and Shelley Ann Miller are not made parties to this action because this action is between the two current owners of Katafaga Island. They are the only relevant parties when it comes down to selling the land.
19. Nothing stops a party from joining if they wish to be heard.
20. Another ground of objection submitted by the Defendant's counsel submits that the usage of the Expedited Form was improper. The Plaintiff refutes this because the words of Order 7 Rule 2 allow Form 4 to be used if so authorised or required.
21. The Plaintiff submits that Form 4 was required because there had to be a return date to enable the Defendant, an overseas resident, to know when the matter would again be called in Court.
22. Normal rules of procedure do not apply to a Defendant that is resident out of Fiji.
23. In any event no prejudice was caused in this case because a Notice of Appointment to hear the Originating Summons was also filed and served regularising it as an Originating Summons.

24. In any event if a person feels that a wrong form has been used, then it is an irregularity and under Order 2 Rule 2 of the High Court Rules, that irregularity will not nullify a proceeding.
25. However, any person who wishes to raise an irregularity must comply with Order Rule 2 and before taking any further step they must file a Summons seeking to set aside the proceedings on the alleged irregularity.
26. The Defendants have not filed any such summons seeking to set aside the Originating Summons for irregularity.
27. The Plaintiff has set out how he came to own a 50% share of Katafaga Island and he has also deposed that the parties are now in dispute and have been in dispute for some time now, and one of the options is for the land to be sold.
28. The Plaintiff has therefore sought orders pursuant to Order 31 Rule 1 for sale of a property and under Order 31 Rule 2, the Court can set out the manner in which the property is to be sold.
29. The Plaintiff cites the case of Chandra vs Chandra HBC 238 of 2017 where the Court made the following observations: -

“7. In these circumstances, it is necessary to examine whether this Court has the power in terms of Order 31 of the High Court Rules to order the sale of the land or interests therein and distribute the sale proceeds. Order 31 states that where in *any cause or matter relating to any land* it appears necessary or expedient for the purposes of the cause or matter that the land or any part thereof should be sold, the Court may order that land or part to be sold, and any party bound by the order and in possession of that land or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the Court may direct. Land is defined to include any right or interest in land. Order 31 (2) of the High Court Rules empowers the court to give necessary directions to carry out such sale.

8. Counsel for the Plaintiff referred to the case Pagenstecher v Estate Management Services Ltd, where mention was made to the Supreme Court Practice of the UK (1988), which dealt with the scope of Order 31, which was applicable in the UK. In that case, the High Court struck off the action on the basis that the Court did not have the power to sell off properties that were *not the subject matter of the action*; the properties in that action belonged to a third party. Therefore, that decision is not helpful to the matter before Court.

9. In a number of cases – which were not brought to the attention of Court –relief has been granted to litigants under Order 31 of the High Court Rules in appropriate circumstances. The Court of Appeal in Vimal Construction and Joinery Works Ltd v Vinod Patel and Company Ltd, affirmed an order by the High Court for the sale of properties of a director of the appellant under Order 31 of the High Court Rules in proceedings for the winding up of a company. It was contended in that case that winding up proceedings was not a cause relating to “land” and, therefore, the court did not have jurisdiction in the matter. However, the Court of Appeal, held, *inter alia*, that the summons sought for the sale of land and, therefore, it was a cause relating to land. In Sunil Dutt and another v Public Trustee Corporation Ltd and another, the Court held it was expedient to order the sale of the co-owned property and distribution of the net sale proceeds among the plaintiffs and the estate of a deceased. The High Court stated that Order 31 allowed the Court to take control of the sale of property, if that is necessary and expedient to do so, and that in such an action, a plaintiff was required to prove on a balance of probabilities that such a sale was necessary. In Hem Raj v Ravinesh Dinesh Prasad, the plaintiff alleged that the defendant unjustly enriched himself from rental income received from property co-owned by the parties. The High Court was of the view that it was expedient to order the sale of the property as the only remedy available to the plaintiff was to obtain an order for the sale of the property and for division of the proceeds of sale. In Bibi v Raza, the High Court dealt with an originating summons relating to orders sought in terms of the Married Women’s Property Act. The summons was later amended to include a prayer under Section 119 of the Property Law Act. The plaintiff claimed that the property was registered in the name of both, the plaintiff and the defendant. The court was of the view that the best and least complicated manner in which to finally settle the issue was to direct a sale of the matrimonial home for the best price that could be obtained. These were cases where the matters related to land, and the court, in each of those cases, considered it expedient that the subject land should be sold.

10. The main relief claimed by the Plaintiff is for the sale of the land and for the sale proceeds to be distributed among the parties, and for a declaration that the Plaintiff is entitled to a share of the property. In her Originating Summons, the Plaintiff relies on Order 31 of the High Court Rules to procure an order for the sale of the land and for distribution of the proceeds of sale. The Plaintiff has, in her supporting affidavit, agreed to buy out the Defendant’s share. In the alternative, she has proposed that the Defendants buy out the interest of her husband’s estate in the property. Any relief granted by this Court will necessarily be subject to the rights of the lessor of the property, Housing Authority, which has not been made a party to these proceedings.

11. The Court’s power to direct a sale of a land or any right or interest in such land in terms of Order 31 arises in a cause or matter relating to any land and where it appears necessary or expedient to order such a sale. In this case, the dispute relates to the land as do the reliefs. The meaning of the verb “relate” is to “*make or show a connection between*”. The Black’s Law Dictionary, describes the adjective as, “*Connected in some way; having relationship to or with something else*”. “Cause” is interpreted to include, any action, suit or other original proceeding between a plaintiff and defendant; “matter” includes every proceeding in court not in a cause. It is the opinion of this Court that this cause is related to land, and the Court is vested with the jurisdiction to make appropriate orders in terms of Order 31 of the High Court Rules. The Court takes cognizance of the absence of any relief seeking a partition of the property. This was raised by counsel for the Defendant during oral submissions. The Plaintiff has not explained why it did not seek this course. However, it is the view of this Court that the power to order the sale of any land is unaffected by the absence of relief seeking a partition of the land. Order 31 vests the Court with sufficient authority and flexibility to make such orders as are necessary to mete out justice if a co-owner of land is unable to benefit from such land. A contrary reading of the provision is likely to negate the purpose for which it has been enacted by the legislature.

12. In view of the nature of the dispute, and there being no likelihood of a resolution of the affair, an order for the sale of the interest in the land and for the proportionate distribution of the sale proceeds appears to be the most pragmatic and just solution on offer. Order 31 of the High Court Rules allows the Court to make such orders as are necessary to achieve that end. However, the declaration sought by the Plaintiff that she is entitled to a share of the income derived from the property will not be granted; this is a matter that is in dispute, and cannot be adjudicated without evidence being led.”

30. The Plaintiff also cited the case of Hem Raj vs Ravinesh Dinesh Prasad [2019] FJHC 700; HBC 269 of 2015 (16th July 2019) where the Court made the following orders: -

“THE ORDERS OF THE COURT

1. It is ordered that the property be sold subject to the following terms and conditions.
2. Within 30 days from the date of this judgment the plaintiff must appoint a valuer to value this property.
3. If the parties cannot agree to a valuer the court will appoint a valuer after consulting the parties.
4. Upon receipt of the valuation report the plaintiff must call for tenders and sell the property to the highest tenderer. The selling price should not be less than the valuation given by the valuer.
5. It is also ordered that the proceeds of the sale to be distributed as per the entitlements under the Certificate of Title 9138.
6. If any of the parties refuses or fails to execute the transfer the Chief Registrar of the High Court is hereby empowered to execute the same.
7. The defendant is at liberty to make an offer to purchase the property.
8. The plaintiff is entitled to recover \$2000.00 as costs of these proceedings from the proceeds of the sale.”

31. The Plaintiff submits that all orders that he now seeks have previously been granted by the Court. He submits that the Chief Registrar can conduct the sale and the Chief Registrar can also sign any Transfer documents. This does not stop either side from making an offer to purchase the others’ share out.

32. The Defendants submit that there is a potential conflict of interest as Messrs. R Patel may have acted previously for the Defendant. The Plaintiff submits that no evidence has been provided, and this point is unmeritorious.

33. The Plaintiff submits that the Court should order the sale because of the current differences between the parties – the Plaintiff and the Millers, who are the alter egos of

the Defendant. The relationships have deteriorated to such an extent that it has now become untenable for them to do business together or to hold the said property together.

34. From the affidavit evidence, the parties both agree that the sale should proceed but the Defendant does not agree that the Chief Registrar is able to run the sale of a multi-million island which needs to be exposed to a global market of possible buyers.

35. The Plaintiff on the other hand submits that the Chief Registrar can handle the sale of the island. The office of the Chief Registrar has conducted numerous sales in the past and facilitate the process.

36. In Sundarjee vs Sundarjee [FJHC] 150; HBC 129 of 2023 (25th March 2025) the High Court in Suva made the following orders

D. **“FINDING**

32. The Court finds on the balance of probabilities that the Plaintiff has made out a case to warrant the grant of orders sought in the Originating Summons filed on 24 April 2023 on the basis outlined.

33.

- (i) The Plaintiff has met the threshold for Order 31 of the *High Court* Rules 1988. The Court’s power to direct a sale of a land or any right or interest in such land in terms of Order 31 arises in a cause or matter, relating to any land, where it appears necessary or expedient to order such sale. In *Chandra*, as in this instance, the dispute relates to land (CT 6011 and 11088), and so are the relief sought by the Plaintiff.
- (ii) The discordant, acrimonious relations between the parties that arose in the management of Sundarjee Bros (Aust) Pty Ltd, has also affected the relationship of the parties, as joint owners of 2 local properties in Fiji, to the extent that the Defendants have deprived the Plaintiff of any role in the management of tenancies on the properties and/or deriving a share of the benefit which he is entitled to.
- (iii) A sale of the local properties given the circumstance described in paragraphs 31(i) and (ii) would be for the benefit of all parties. It would remove an issue currently causing animosity between the parties and will allow either one party or all of them to be paid if the properties were sold.
- (iv) The Court adopts the finding of the Court in *Chandra v Chandra* – Civil Action HBC 238 of 2017, that the power to order the sale of any land is unaffected by the absence of relief seeking a partition of the land. Order 31 vests the Court with sufficient authority and flexibility

to make such orders as are necessary to mete out justice, if a co-owner of land is unable to benefit from such land. A contrary reading of the provision is likely to negate the purpose for which it has been enacted by the legislature.”

37. The Plaintiff therefore seeks orders in terms of the Summons filed in this matter.

The submissions for the Defendant

38. The Application was commenced by way of an Originating Summons in the Expedited Form (Form 4) and the Defendant submits that the form of the application is incorrect. The proper application was to have used Form 3 of the High Court Rules 1988.

39. In Citizen’s Constitutional Forum vs President of the Fiji Islands [2001] 2FLR 127, Justice Fatiaki stated as follows: -

“Plainly, unless 'authorised or required' under the Rules, no party to civil proceedings in the High Court may use the expedited originating summons and in this, regard counsel's attention is drawn to 'footnote 3' to para.131 of Halsbury's Laws of England (4th end.) Vol.37 and by way of examples Order 17 r.3(3) & Order 80 r.9(3) of the High Court Rules 1988 which clearly require the use of the expedited FORM.

In this case, in the absence of the usual reference to the authorising Rule on the face of the applicant's NOTICE OF ORIGINATING SUMMONS one can only assume that the applicant's former solicitors have irregularly and unilaterally adapted the expedited procedure to the prejudice of the defendants and that ought not to be countenanced or sanctioned by this Court:”

40. The Defendant further submits that Order 31 does not apply in this matter and cites the case of Dutt vs Din [2019] FJHC 725; HBC 41 of 2014 (22 July 2019) where the Court stated: -

“9`Order 31 allows the court to take control of sale of property if that is necessary and expedient to do so. Plaintiff in such an action should prove on balance of probability such sale is 'necessary' or 'expedient'. The first requirement is that there should be pending cause or matter.

10. There is no dispute between the parties that second Defendant had instituted an action, against the first Plaintiff in his capacity as administrator, of estate of Ram Din. This was an action by way of writ of summons for removal of first Plaintiff as administrator and other orders, which I would deal later.

11. Supreme Court Practice (UK) 1988 (White Book) (Vol1) p 505 under 31/1/1 dealt with Order 31 which is analogous to Fiji provision under identical provision. Scope of Order 31 in following manner;

“Scope of Order- This Order relates to sale of land including any interest in or right over land, orders for sale or other property being made under O.29,r.4. It is designed to make the procedure more flexible and so enable the Court to retain as much or as little control over a sale as it thinks necessary in the particular case.”

41. The Defendant submits that there must be a “cause or matter” that must exist before this power to order a sale can be exercised. If no such underlying legal basis was established, the Court lacked the jurisdiction to grant the order sought (Tah Poh Beng vs Choo Lee Mei [2014] SGHC 163.)
42. The Defendant submits that the Courts in the United Kingdom, Singapore and in Fiji have determined that a court only has jurisdiction to deal with an application under Order 31 Rule 1 for sale of the property if there is an “existing cause or matter relating to land.”
43. In this matter there is no existing cause or matter relating to the land. The application itself is premised on obligations under a Partnership Agreement which Le Groupe is not a party to and for alleged debt owed to Mr. Jagodzinski and/or his affiliated “entities” (who are not party to these proceedings).
44. The Defendant therefore respectfully submits that the Application cannot succeed and must be dismissed.
45. The Defendant submits that the affidavit deposed by the Plaintiff Mr. Jagodzinski, does not disclose any relevant facts for the Court to find that it is “necessary and expedient” to order the sale of the Property.
46. At paragraph 6 of his affidavit, Mr. Jagodzinski states that he signed a Partnership Agreement with John Scott Miller and Shelley Ann Miller on 6 August 2020. Le Groupe was not a party to this agreement and as such, owed no obligation to Mr. Jagodzinski. The principle of privity of contract will apply.

47. The Company is not Le Groupe, the Company is IGCL, a separate legal entity. The assets of IGCL did not include Katafaga Island because IGCL did not and does not own Katafaga Island.
48. Mr. Jagodzinski lent money to IGCL, not to Le Groupe, the Defendant in this matter, Le Groupe is therefore not required to repay anything to Mr. Jagodzinski.
49. The Defendant respectfully submits that Mr. Jagodzinski has not provided any evidence that would allow the Court to determine that it is necessary and expedient for the property to be sold.
50. Order 31 does not apply as there is no existing cause or matter relating to land. The Plaintiff has failed to establish any substantive legal basis for invoking Order 31 and as such, the Court lacks jurisdiction to grant the relief sought in the Application.
51. The Defendant submits that Order 31 is a procedural provision that does not confer original jurisdiction to order the sale of a property in the absence of an underlying cause of action. The Plaintiff has failed to establish any substantive legal basis for invoking Order 31, and as such the Court lacks the jurisdiction to grant reliefs sought in the Application.
52. In conclusion the Defendant submits that the Application should be dismissed.

Additional submissions by the Defendant

53. The Defendant then filed and served submission in reply on the 19th of June 2025 and submits that the application before the Court should be dismissed for the following reasons: -
- a) The Summons is procedurally incorrect as the expedited form is used.
 - b) Order 31 of the High Court Rules does not apply in these circumstances.
 - c) In any case:
 - Le Groupe is not a party to the Partnership Agreement and does not have any obligations towards Mr. Jagodzinski in relation to any debt.

- Mr. Jagodzinski does not allege in his affidavit that he lent money to Le Groupe. In fact, he deposes that he lent money to Islander Group of Companies, which is a separate legal entity.

d) The Application is an abuse of Court Process.

54. The Plaintiff has sued the Defendant, Le Groupe Des Insulaires Limited and in the affidavit in support, Mr. Jagodzinski contends that the Millers and Le Groupe are the developers under the Partnership Agreement.

55. The partnership Agreement only refers to the Millers as the Developers. Le Groupe is not a party to this Partnership Agreement and does not have any obligations towards the Plaintiff.

56. The Millers are not a party to this action.

57. The Millers and the Plaintiff have been in dispute, not Le Groupe. Le Groupe is a separate legal entity from the Millers. Solomon vs Solomon & Company Ltd [1897] AC 22 has established the legal principle that a company is a separate legal entity, and the Company is not in law the agent of the subscribers or trustees for them.

58. This principle was reiterated by the High Court in the case of Kumar vs Mani [2018] FJHC 973; Civil Action No. HBM 8 of 2018 (12th October 2018): -

“13. What is meant by the phrase “**Corporate Veil**”?

A legal concept that separates the personality of a corporation from the personalities of its shareholders, and protects them from being personally liable for the Company’s debts and other obligations.

A company once incorporated becomes a separate legal entity or personality and the liability of the members are said to be limited. This is the principle enshrined in “Solomon v Solomon & Co. Ltd” (1897) A.C. 22, where the House of Lords affirmed the principle that the company was a separate legal person, can own property, sue and be sued in its own corporate name. Therefore, the company is distinct from its members, whose liability is limited to the amount paid in their shares and they are not liable for any of the company’s debts.

The logic of separate personality and limited liability was not tested to its full extent until the late 19th century as exemplified by the case of “**Solomon**” (*supra*).

One of the most significant effects of separate corporate personality based on the “Solomon” principle is that members are not personally liable for the debts of the corporation. The company owns the property and not its shareholders.”

59. In his submissions, and also in his affidavits, the Plaintiff makes several allegations to non-parties: -

- The Plaintiff lending \$500, 000 to Islander Group of Companies Limited;
- The Plaintiff investing USD\$6, 000, 000 under the Partnership Agreement with the Millers.
- The repayment of his investment by the Millers under the Partnership Agreement; and
- The dispute with the Millers.

60. These allegations were presented by way of background information. The defendant submits that on the contrary, these form the basis for the sale of the property. If the court were to grant the reliefs sought, the rights and interests of IGCL and the Millers (as shareholders of IGCL) who are not parties to these proceedings, would be directly affected because:

- They have not been heard
- The purported debt, if any would be time barred under the Limitation Act, and this action seems to be an attempt to circumvent the requirement that a Court is required to declare that a debt is owed. The Defendant contends that the Plaintiff is attempting to mislead the Court and abuse the Court’s process to recover the purported debts, which are obviously time barred.
- The Plaintiff’s decision not to include other parties from the proceeding gives rise to serious concern of non-joinder. It is a fundamental principle of natural justice and procedural fairness that a party whose legal rights or obligations may be

affected by a court order should be given an opportunity to be heard. By failing to join IGCL and the Millers, the Plaintiff has denied them this opportunity.

61. The Defendant cites the case of Four-Wheel Drive Sales Pte Ltd vs Fiji Revenue and Custom Service [2020] FJHC 643; Civil Action No. HBC 91 of 2020 (14 August 2020)

“(05) Therefore, unless ‘authorised or required’ under the Rules, no party to Civil proceedings in the High Court may use the expedited Originating Summons.

(06) In this case, the absence of the usual reference to the authorizing rule on the face of the originating summons clearly shows that the plaintiffs have irregularly and unilaterally adopted the expedited procedure to the prejudice of the defendant which ought not to be countenanced or sanctioned by this court.”

62. The Defendant submits that the Plaintiff was not entitled to adopt the Form 4 – Expedited Form. Order 31 of the Rules does not authorise or require its use, the proper procedure in these circumstances was to proceed by way of Form 3.

63. The Defendant maintains that Order 31 is not appropriate for this case as the Plaintiff has not demonstrated that such a sale would be shown to be necessary or expedient and the first requirement is that there must be a pending cause or matter.

64. The Defendant cites the Singaporean case of Tan Poh Beng vs Choo Lee Mei [2014] SGHC 163 emphasised that Order 31 is a procedural, not a substantive jurisdiction. The Court held that without a pending cause or matter, that is, an existing legal claim or proceeding, it lacked jurisdiction to order a sale even if the sale is “necessary or expedient.”

65. The Defendant respectfully submits that the Plaintiff’s application is procedurally flawed, substantially unsupported and legally misconceived. The Plaintiff’s dispute is not with Le Groupe, but with third parties who are not before the Court, namely the Millers and IGCL. The Plaintiff’s attempt to obtain a benefit by lumping other purported debts against the Defendant.

66. The Plaintiff has failed to demonstrate any basis on which the Court could find that it is ‘necessary and expedient’ to order the sale of the Property. There is no evidence that Le Groupe owes any obligation to the Plaintiff under the Partnership Agreement or otherwise and the Plaintiff claims concerning loans and investments relate to IGCL and the Millers, neither of whom are parties to these proceedings.

67. The Defendant asks that the application be dismissed with costs.

Analysis

68. Order 31 of the High Court Rules 1988 provides as follows: -

“Power to order sale of land (O.31, r.1)

1. Where in any cause or matter relating to any land it appears necessary or expedient for the purposes of the cause or matter that the land or any part thereof should be sold, the Court may order that land or part to be sold, and any party bound by the order and in possession of that land or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the Court may direct.

In this Order, “land” includes any interest in, or right over, land”

69. The Plaintiff and the Defendants each hold a 50% share in Katafaga Island.

70. The Plaintiff submits the following as the cause of action leading to the current application in Court: -

- i. The company Islander Group of Companies Limited (IGCL) was the vehicle that was used to make substantial improvements on Katafaga Island. Both the Plaintiff and Le Groupe remain 50% shareholders of that company.
- ii. The Plaintiff is currently a half owner of Katafaga Island being the property more particularly described in Certificate of Title Reg. Vol. 40 Folio 3931.
- iii. The Defendant as successor to the Millers is the other half owner of the island.
- iv. The Plaintiff had agreed to invest in IGCL. This was the company which was being used by the parties to develop a Resort and Spa on Katafaga Island.

- v. The Plaintiff signed a Partnership Agreement dated 6th August 2000 with John Scott Miller and Shelley Ann Miller as the Developers.
- vi. The Plaintiff invested USD\$6, 000, 000 as he was required to do.
- vii. He also lent a further \$500, 000 to IGCL to develop Katafaga Island.
- viii. Clause 15.3 of the Partnership Agreement allowed the Plaintiff the right to offer his unencumbered and paid-up shares in IGCL to the developers and they were obliged to buy back his shares together with an interest rate of 5% per annum.
- ix. It was agreed between the parties and the Developers that if the developers were unable to purchase the Plaintiff's shares within 3 months, then the Developers were obliged to sell assets to pay the Plaintiff's debt.
- x. On March 10, 2004, the Plaintiff exercised his rights under the Partnership Agreement and offered his unencumbered shares to the Developers for USD\$6, 000, 000 together with an interest at the rate of 5% per annum.
- xi. The Plaintiff had also lent USD\$500, 000 to IGCL and he was also entitled to seek payment of this loan together with interest at the rate of 5% per annum.
- xii. The Developers did not repay the Plaintiff's investment and loan back within 3 months.
- xiii. However, on 4th October 2004 Le Groupe transferred an undivided half share in the title to Katafaga Island to the Plaintiff.
- xiv. The Plaintiff continued to fund further developments on Katafaga Island through IGCL.
- xv. The current shareholding of IGCL is as follows:
 - Plaintiff – 1. 790, 000 shares
 - John Scott Miller – 250, 000 shares
 - Shelley Ann Miller – 250 000 shares
- xvi. As at 2021 IGCL had incurred development costs of \$US 16.4 million (\$F 34.9 million) which sum is subject to further interests and costs on the construction of the Katafaga Resort & Spa.

- xvii. The current position is that both Le Groupe and Mr. Jagodzinski own 50% each of the shares in Katafaga Island and Mr. Jagodzinski has sought a Court Order for the Chief Registrar to independently conduct a sale of the said Island as it falls within the jurisdiction of Fiji.
- xviii. Mr. Jagodzinski also agrees that Katafaga Island should be sold but he doesn't agree with Ms. Miller's opinion about IGCL. IGCL is also owed a large amount of money for the improvements and development works it carried out on Katafaga Island. IGCL had registered a caveat against CT 40/3931.
71. It is clear from the above fact scenario that the Plaintiff's main dispute is with IGCL and John Scott Miller and Shelley Ann Miller, pursuant to the Partnership Agreement to develop Katafaga Island.
72. There does not appear to be any direct obligations between the Plaintiff and the Defendant. Any financial or other obligations due to the Plaintiff are to separate legal entities, not to the Defendant.
73. Both parties rely on the authority of Dutt vs Din [2019] FJHC 725; HBC 41 of 2014 (22 July 2019) where the Court stated: -
- "9'Order 31 allows the court to take control of sale of property if that is necessary and expedient to do so. Plaintiff in such an action should prove on balance of probability such sale is 'necessary' or 'expedient'. The first requirement is that there should be pending cause or matter.*
74. In this case I find that there is no pending cause between the parties – Christian Jagodzinski and Le Groupe Des Insulaires Limited. Any claims by the Plaintiff are against persons or entities who are not part of these proceedings.
75. I therefore find that the Plaintiff has failed to establish on the balance of probabilities that such an order for sale is either necessary or expedient.
76. Since the substantive question is now answered, there is no need to make any further rulings with respect to the objections raised by the Defendants, with respect to the form of the initiating documents.

77. The question of whether these proceedings should have been initiated by way of Form 3 or form 4 is now rendered moot by the above findings that the order for sale should be refused.

78. We now turn to the question of costs. As costs follow the event (Order 62 Rule 3 (3) High Court Rules), the Defendants are entitled to costs.

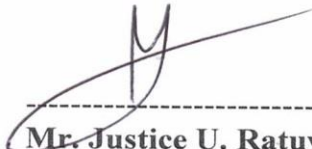
79. I award the Defendant costs summarily assessed at \$2, 000.

This is the Ruling of the Court: -

- 1. The application to order a sale of the property in Certificate of Title Register Vol. 40 Folio 3931 by way of tender is refused.**
- 2. The other ancillary reliefs sought in the Summons are also refused.**
- 3. The Plaintiff will pay the Defendant costs summarily assessed at \$2, 000, one month to pay.**

There is a right of appeal





Mr. Justice U. Ratuville
Puisne Judge

cc: - **R. Patel Lawyers**
- **Munro Leys**