

MIDLAND BEACH ESTATE LTD v ASHOK BALGOVIND AND REGISTRAR OF TITLES (HBC0377 of 2006L)

HIGH COURT — CIVIL JURISDICTION

5 WICKRAMASINGHE J

1 May 2012

10 **Contract — contracts for sale of land — termination by vendor.**

Corporations — corporate veil — liability of shareholders — whether appropriate to pierce corporate veil.

15 **Equity — fiduciary obligations — fiduciary duty — solicitors — breach of fiduciary duty — where solicitors acting for vendor and purchaser — fraudulent misrepresentation — parties to misrepresentation — remedies — where solicitors the sole directors and shareholders of party — whether contract void ab initio.**

20 **Lawyers — duties and liabilities — solicitor and client — conflict of interest — acting for vendor and purchaser.**

Damages — damages for breach of contract — damages in tort — damages for tort of deceit — aggravated damages.

25 A vendor and purchaser entered into a contract for the sale of land. A firm of solicitors acted for vendor and purchaser in relation to the contract. The principals of the firm of solicitors were the sole directors and shareholders of the vendor. The vendor terminated the contract before the settlement date, claiming breach of covenants, and subsequently sold the land to a third party. The purchaser lodged a caveat which prevented the registration of the land by the new owner. The vendor filed a writ seeking orders for the removal of the caveat and a declaration that the purchaser had no rights to the property.

30 The purchaser counter-claimed, claiming misrepresentation, undue influence, fraud, unconscionable conduct and conflict of interest by and on the part of the vendor, and sought orders that the contract was void ab initio and damages. In the course of the proceedings the vendor refunded the deposit paid by the purchaser. The purchaser pursued the other relief.

35 **Held —**

(1) The solicitors breached their fiduciary duties to the purchaser.

Clarke Boyce v Mouat [1994] 1 AC 428; *Farrington v Rowe McBride* [1985] 1 NZLR 83; *Maguire v Makaronis* (1997) 188 CLR 449, considered.

40 (2) A lawyer's status as an officer of the court, and his or her integral part in the administration of justice, distinguish the lawyer from the ordinary private fiduciary.

Carindale Country Club Estate Pty Ltd v Astill (1993) 115 ALR 112, followed.

(3) The contract contained fraudulent misrepresentations and was void *ab initio*.

45 *Krakovski v Eurolynx Properties Ltd* (1995) 183 CLR 563, followed.

(4) The vendor, through its solicitor, director and shareholder, engaged in unconscionable conduct and undue influence and had a conflict of interest.

(5) It was appropriate to pierce the corporate veil and hold the shareholders of the vendor liable for damages.

50 *Salomon v Salomon* [1897] AC 22; *Gilford Motor Company Ltd v Horne* [1933] Ch 935; *Jones v Lipman* [1962] 1 WLR 832; *Trustor AB v Smallbone (No 2)* [2001]

WLR 1177; *Adams v Cape Industries Plc* [1976] 3 All ER 462; *Antonia Gramaci Shipping Corporation v Stepanovs* [2011] Lloyds Rep 647; *VTB Capital v Nutritex International Corp* [2011] EWHC 3017, followed.

5 (6) The purchaser was entitled to damages for the tort of deceit, damages in tort, damages for breach of contract and aggravated damages. The purchaser was guilty of contributory negligence.

(7) The purchaser was entitled to interest on the deposit at the rate of 10% per annum.

10 *Attorney-General of Fiji Doctor Hubert Elliot v Paul Praveen Sharma*, FJCA Civil Action No 41 of 1993; *Yanuca Island v Peter Elsworth* FJCA Civil Appeal No 85/00, applied.

Abdul Rafiq v Lautoka City Council HBC 101/01L; *Bhagwat Prasad v Nazar Singh & Others* FCA Civil Appeal ABU 2 of 1992A; *Ganga Ram v Grahame & Co* [1975] 21 FLR 158, considered.

15 *Bank of Tokyo Ltd v Karoon* [1987] AC 45; *Creasey v Breachwood Motors Ltd* (1992) BCC 638; *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 1 WLR 852; *Fiji Electricity Authority v C R Engineering and Vinod Patel Company (Lautoka) Ltd* HBC 101/01; *Littlewoods v I.R.C* [1969] 1 WLR 1241; *Ord v Belhaven Pubs Ltd* [1998] 2 BCLC 447; *In 're' Darby*; *Ex parte Brougham* [1911] 1 KB 95; *Shakuntala Devi v Jai Mangal & Shiu Raj* FCA Civil Appeal No ABU 20 82/84; *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786; *Trustor AB v Smallbone (No 2)* [2001] 2 BCLC 436; *Wallersteiner v Moir* [1974] 1 WLR 991; *Woolfson v Strathclyde BC* [1978] UKHL 5, followed.

Purchaser's counter-claim upheld.

25 *No appearance* for the Plaintiff.

Mishra Prakash & Associates for the first Defendant.

Wickramasinghe J.

30 INTRODUCTION

[1] When this matter was taken up for hearing, the plaintiff was not present and unrepresented. I then dismissed the plaintiff's case and ordered the defendant to lead evidence in support of the counter claim.

35 [2] The first defendant, Ashok Balgovind gave evidence and tendered (10) ten documents marked D1 to D 10 contained in exhibit DB.

BACKGROUND FACTS

40 [3] The parties executed an agreement on 15 April 2006, which was terminated by the plaintiff on 26 August 2006 based on breach of covenants. The first defendant counter sued the plaintiff on the grounds of fraudulent misrepresentation, unconscionable conduct, conflict of interest and thus seeking a declaration that the agreement is *ab initio* invalid.

45 [4] The defendant professed that Dr Sahu Khan his trusted friend of long standing, requested him to co-purchase a property and acted as his solicitor for the execution of the agreement. He says he subsequently found that his friend, Dr Sahu Khan who has proprietary interest to the property misled and induced him to execute the agreement.

50 [5] The first defendant was the vice president of the Fiji Football Association and an architect by profession. Dr Sahu Khan of Sahu Khan and Sahu Khan, Barristers and Solicitors was the president of Fiji Football Association. Both parties had known each other for over ten years. On or around November 2005,

Dr Sahu Khan had approached the first defendant requesting assistance to find a buyer to sell freehold land; Certificate of Title Nos. 26520, 26520, 265669 and 26679 at Naciri Beach. (Property). The first defendant alleges that all times he was informed both orally and in writing that the property was valued for over
5 USD7 million and the owners were Canadians. When the first defendant was unable to find a buyer, Dr Sahu Khan had then asked the first defendant to purchase the land as a co-purchaser with his cousin Eshad Ali.

[6] Consequent to correspondence and negotiations, the parties entered into a sale and purchase agreement (agreement) on 15 April 2006 where the first defendant
10 co-purchased the land for USD 3.2million. (Exhibit D3) Pursuant to the said agreement, the first defendant paid a deposit of F\$100,000.00. The money had been paid in the name of Dr Sahu Khan and his daughter Sabrina Khan on 1 June 2006 to their private account on Dr Sahu Khan's instructions. (D10). The settlement date on the agreement was 30 November 2006, but the plaintiff
15 terminated the said agreement on 26 September 2006. (D7 annexure D). The statement of claim reveals that it subsequently sold the land to a third party for USD 2.8 million somewhere around 7 November 2006. Meanwhile, the first defendant lodged a caveat, which prevented the registration of the land by the new owners.

[7] The plaintiff then filed a writ seeking orders *inter alia* the removal of the caveat and declaration disclaiming the first defendant's right to the property. The defendant counter-sued the plaintiff on the grounds that the representations made by the plaintiff through its solicitors, shareholders and director, namely Dr Sahu Khan was false, misleading, deceptive, and fraudulent and in breach of s 54 s 55
25 and s 58 of the Fair Trading Decree and consequently the said agreement is null and void and of no effect. In the course of the proceedings the plaintiff refunded the F\$100,000.00 paid by the first defendant but pursued the case on the other relief.

30 *Ex parte* hearing

[8] Inoke J. fixed this matter for hearing on 20 September 2010. On the date of the hearing, Dr Sahu Khan appeared for the plaintiff and informed the Court that Mr H.A. Shah appears for the plaintiff and he was indisposed on that date. On the same date, Dr Sahu Khan consented to release the second defendant who was
35 only a nominal defendant. Thereafter by consent, I re-fixed the matter for hearing on 13th, 14th and 15th of October 2010. The parties again moved for another hearing date and the case was re-fixed for hearing on 22nd, 23rd and 24th of February 2011. On 21 February 2011, the parties moved court to again vacate the hearing dates. On that date, I made orders under O.38 r.2 of the High Court Rules,
40 1988, for the parties to file evidence-in-chief by affidavit, without re-fixing the case. Meanwhile Dr Sahu Kahn was disbarred and the Chief Registrar appointed Krishna and Company as the Receiver.

[9] The matter was then mentioned on 30 September 2011. On that date, an appearance was entered on behalf of the Receiver where the Court was informed
45 that the file was not available. I then made orders to inform the Court by 7 October 2011 whether the file was available. I further ordered a NOAH on the plaintiff, informing the trial date of 19 October 2011 and adjourned the matter before the Master. Ms Natasha Khan by her letter of 11 October 2011 had informed the Receiver that she has instructions to collect Dr Sahu Khan's
50 personal files from the Receiver but further informed that she does not have instructions to appear on behalf of Dr Sahu Khan.

- [10] The Receiver then filed Summons supported by affidavit of Mr Shalend Ram Krishna, seeking leave for declarations *inter alia* that Krishna & Company appointed as Receiver to withdraw as Solicitor for the plaintiff, Midland Beach Estate Ltd. The summons was first served on Natasha Khan's office on 14
5 October 2011 but a clerk refused to accept the documents. Later, on 17 October 2011, the notice was once again served and was accepted along with the case file located by the Receiver, by Natasha Khan & Associates. The Receiver also published a notice in the Fiji Sun dated 14 October 2011 informing the hearing date of 19 October 2011 and the application to withdraw as Solicitor.
- 10 [11] On 19 October 2011, Mr Krishna appeared and informed Court that he had handed over the case records to Natasha Khan Associates. Leave was granted to Mr Krishna to withdraw as solicitors. The plaintiff was not present and unrepresented on the date of hearing, despite the paper advertisement, NOAH, and collecting the file by Natasha Khan & Associate. I therefore dismissed the
15 plaintiff's action and proceeded to hear the first defendant's counter claim.

EVIDENCE

- [12] The first defendant apart from his oral testimony relied on the evidence deposited in the two affidavits filed on 15 December 2006 (D1) and 8 December
20 2007 (D2). It was the first defendant's evidence that he personally knew Dr Sahu Khan, for over 10 years, through his association with him in Fiji Football Association and as a senior legal practitioner. The witness says Dr Sahu Khan requested assistance to sell the property stating that the property belonged to one
25 of his Canadian clients and the land was valued at over USD7 million. The verbal discussions was followed by a letter date 16 November 2005 (D 8) written by Dr Sahu Khan, giving further details of the property comprising of four titles apparently valued at USD7.632 million. The letter states that the property would
30 be sold at USD 4 million. On 3 April 2006, Dr Sahu Khan sent another letter in which he repeated much the same thing as in his previous letter except the selling price was increased to \$4.5 million. (Exhibit D1 annex letter 'B').

- [13] The witness says he was unable to find a buyer, whereupon Dr Sahu Khan had told him that his Canadian client had agreed to sell the property to the witness, jointly with Dr Sahu Khan's cousin Eshad Ali, for a very low price of
35 USD3.2 million. Dr Sahu Khan had then informed the witness that once Eshad Ali and the witness purchased the properties, the two of them could jointly find a buyer for much higher price and share the profits. There is no written proof of this conversation except the oral testimony of the first defendant.

- [14] The witness says he was initially very hesitant to purchase the property but agreed to the proposal when he was persuaded with confidence by Dr Sahu Khan
40 that (i) he would assist to secure a buyer for at least USD\$4.5 million; (ii) that they could share the profits and (iii) the fact that Dr Sahu Khan's cousin was a co-purchaser.

- [15] Dr Sahu Khan then drew up a Sale and Purchase agreement; plaintiff as vendor and first defendant and Eshad Ali as joint purchasers. The witness says
45 due to the long association through Fiji Soccer and the trust that he had in Dr Sahu Khan, he had no reason to doubt Dr Sahu Khan or to seek independent legal advice or to carry out a search in the Companies office to ascertain the real Directors and Shareholders of the plaintiff's company.

- [16] The first defendant says he then received a draft copy of the sale and
50 purchase agreement by fax on 11 April 2006. (Copy of the said letter is annexed to DB1 as letter 'C'). The cover letter confirmed that the agreement had already

been signed by Eshad Ali as the co-purchaser and was witnessed by Dr Sahu Khan. The agreement was signed at Holiday Inn, Suva in the presence of the Dr Sahu Khan. Eshad Ali had not been present when he signed the agreement.

5 [17] The first defendant says Dr Sahu Khan instructed him to pay the deposit of F\$100,000.00 into an account with Westpac jointly held by Shabina & Khan which he complied with on 1 June 2006. (D10) The witness says based on mutual trust, he did not question whether the account was a personal or trust account, but later learnt that it was in fact a personal account.

10 [18] Somewhere in late June, July 2006 Dr Sahu Khan, the first defendant, and Mr Ashok Patel, another official of Fiji Football Association, had participated at the Soccer World Cup held in Germany. The first defendant had then mentioned to Mr Ashok Patel that Dr Sahu Khan and he were jointly selling the above-mentioned prime property belonging to Dr Sahu Khan's overseas clients for USD\$4.54 million. Mr Ashok Patel had then informed the witness that Dr
15 Sahu Khan had offered to sell the same properties to him for USD 3 million. It appears that for the first time the conversation with Mr Asok Patel created a doubt in the first defendant, which prompted him to obtain the letter dated 3 December 2005 sent by Dr Sahu Khan to Mr Ashok Patel. The witness says paragraph 10
20 of the said letter which says that Dr Sahu Khan was prepared to go into joint venture with another purchaser, made him aware that Dr Sahu Khan's interests in the said properties was more than just solicitor, client. (Vide letter annexed to D1 annexure 'E'). Paragraph 10 reads:

25 *'Accordingly, to purchase the lands I am quite happy to go on joint venture with any one and I take responsibility of 50% of the purchase price and I have already made arrangement for the same. Whosoever, comes in as the other 50% shareholder name \$1.5 million US I will give in writing that if this property is not sold for at least USD5 million within 12 months then I will pay the joint purchase an additional sum of \$500,000.00US in addition to the purchase price he has paid as a joint purchase and buy his half share back myself for \$2 million US. (Emphasis added)*
30

[19] The suspicion that was aroused by the letter then led the first defendant to obtained independent legal advice, which revealed that Dr Sahu Khan and Shabina Khan were the shareholders and Directors of the plaintiff's company.

35 [20] Vide plaintiff's company Annual Return and Particulars of Directors marked with letters 'F1 & F2' to D1 or D5 (pg 9), the particulars of the present shareholders of the plaintiff are as follows:

[21]

	<i>"Names</i>		<i>No Of Shares</i>
40	<i>Dr Muhammad Shams-Ud</i>	<i>810,840</i>	<i>810,840</i>
	<i>Dean Sahu Khan</i>		
	<i>P. O. Box 179,</i>		
	<i>Ba, Fiji</i>		
45	<i>Miss Shabina Sahu Khan</i>	<i>202,710</i>	<i>202,710"</i>

[21] The witness says it was only then he found out that Dr Sahu Khan was not only the solicitors for the plaintiff but also had proprietary interest in the property and had acted to the detriment to his interest. He believe that the main reason for
50 Dr Khan to have convinced him to enter into a sale and purchase agreement to purchase the four lots was to use his money to pay off the plaintiff's mortgage

debt to Westpac to where the real beneficiaries were Dr Sahu Khan and Shabina Khan. The plaintiff acquired the property in 1990 and the first encumbrance on the four titles was recorded in September 2005 where the plaintiff's had borrowed USD1,064,000.00 providing the four titles as collateral.

5 [22] The first defendant says he then lodged caveats on 26 November 2006 to protect his interest.

LEGAL MATRIX

10 [23] The counter-claim is founded on misrepresentation, undue influence, fraud, unconscionable conduct and conflict of interest.

[24] At paragraph 8, 9 of the *'The reply to the defence and defence to counter claim'* the plaintiff admits the followings facts:

- that the first defendant was informed that the beneficiaries of the property were Canadian clients;
- 15 • the property was collectively valued at USD7.632 million.
- as stated in paragraph 12 of the statement of defence, 'if the first defendant was unable to find a buyer for the price sought by the plaintiff and on or about April 2006, the said Sahu Khan represented to the first defendant that he had spoken to his Canadian clients who agreed that the defendant should jointly purchase the property with his cousin Eshad Ali.

20 [25] The first defendant alleges that Dr Sahu Khan continued to make false representations even after the signing of the agreement as evident in the following correspondence. These correspondence although post agreement, corroborates the first defendant's evidence before this court.

25 • The letter dated 11 September 2006 (D8) also filed attached to Shabrina Khan's supporting affidavit dated 7 December 2006 as exhibit 'C':

Page 1-Paragraph 1
 "This is especially when we are acting as Solicitors for the Vendors. Our Clients in Canada have already written to us last week and have spoken on telephone."

30 Page 2 - Paragraph 1 and the last paragraph

".....Eshad Ali is up to date with the payment".

".....Eshad Ali is up to date with his payments of this interest"

Page 3

35 "..... As mentioned to you our clients will not extend the time as they are very determined to have the land sold urgently. It was only because of my personal involvement that this low price was agreed upon"

"I do trust, you give the matter the urgency and seriousness that they deserve"

• The letter of 26 September 2006 (attached to Shabrina Khan's supporting affidavit dated 7 December 2006 as exhibit 'D'):

40 Page 1-Paragraph 1

"I regret to inform you that I have Firm instructions from the Beneficiaries of the Property that they have decided to rescind the contract under Clause 13 of the agreement....".

Page 2

45 Accordingly, the vendor is now negotiating to sell the properties to a third party in Canada.

Page 2

(3rd page) Not only you but we have lost substantially. I only pray and hope that the Beneficiaries and their Lawyers will refund part of the monies paid. However, we are entirely in their hands" (emphasis added)

50 Page 3

.....I had informed the lawyers in Canada.....

Agreement

[26] I would like to highlight the following covenants of the agreement, where I will further discuss its relevance and application. (D3 – also attached to Shabrina Khan’s supporting affidavit dated 7 December 2006 as exhibit ‘B’):

5

Paragraph 2

The purchased price shall be paid to Messrs Sahu Khan and Sahu Khan.

Paragraph 15

The Vendor and the Purchaser agree that Messrs Sahu Khan and Sahu Khan, Barristers and Solicitors of Ba to act as Sole Solicitors for the Vendor and the

10

Purchasers in respect of the sale of the Said Lands.”

[27] Exhibit D5, the last Annual Return is ample evidence for me to conclude that Dr Sahu Khan and Shabrina Khan are the shareholders and Directors of the plaintiff company. Admittedly, Dr Sahu Khan acted as solicitor for both seller and the buyers.

15

[28] There is no legal impediment for Dr Sahu Khan to sell the land belonging to the plaintiff company where he is the major shareholder. However, it is axiomatic that Dr Sahu Khan deliberately misled the first defendant to believe that Canadians owned the property. In those circumstances, I am unable to construe the rationale or the motive that prompted Dr Sahu Khan to deliberately lie to the first defendant saying that the land belonged to Canadians. Nor can I infer why the plaintiff offered to sell the land to the first defendant for USD3.2 million when the land was in fact alleged to have been valued at USD7.623 million and finally sold the land for 2.8 million.

20

25

[29] Nonetheless, I have also perused the mortgage bond and the valuation report that was tendered to court by Mr Mishra upon my request. On a perusal of the mortgage bond, I find that all the four properties were encumbered to Westpac Bank. The loan amount was USD1,064,000.00 and the property was collectively valued at USD7.623 million. A reasonable prudent person would only encumber the minimum security to a bank. The first defendant did not call the valuer who carried out the valuation of the land to prove or challenge the authenticity of the valuation report.

30

35

[30] The witness says he never met Eshad Khan the so-called cousin of Dr Sahu Khan despite several requests made to Dr Sahu Khan. He further said his later inquires in and around Ba, revealed that there is no such person and believed that Dr Sahu Khan created the *fictitious persona* for the sole reason of inducing him into signing the agreement. Considering the totality of the evidence and the documents filed by the plaintiff in this case, I am unable to disregard the doubt in the mind of the first defendant. The statement of reply is silent about Eshad Ali and I am also satisfied that the first defendant never met him thus the first defendants belief that Eshad Ali is a fictitious persona may have merit. However, I am unable to make a firm finding on this issue due to lack of evidence.

40

FIDUCIARY DUTY

45

[31] The Solicitor/client relationship is a special relationship of trust and fiduciary duty. Mr Mishra submits that paragraph 15 of the agreement is ample proof of this fiduciary duty of Dr Sahu Khan towards his client and once this is established, the Court will presume there was undue influence unless the Solicitor can prove otherwise.

50

[32] Dr Sahu Khan then has the heavy onus of proof to overcome to show that the document was not infected in anyway by undue pressure or influence and was voluntarily signed with full understanding of its contents. The basis of this

requirement stems from the position of Trust and position as confidante a Solicitor is in a position to exercise dominion and unduly influence over the client.

5 [33] Mr Mishra submits that the Solicitors of Sahu Khan and Sahu Khan had an interest in the sale they induced the defendant to enter into, as they were the only shareholders of the plaintiff. This reduces the impact of the buyer beware rule as the plaintiff's solicitors owed a greater duty to him as his fiduciaries.

10 [34] Mr Mishra also argues that although the defendant is of a mature age, he is an architect and has little knowledge of the law. It is a strong presumption in favour of the defendant and can only be discharged by way of evidence and the plaintiff has not given any to discharge the onus of proof. He was entitled to rely on Sahu Khan & Sahu Khan to protect his legal interest and relied heavily on their fiduciary duty towards him as he was entitled to. Clearly, in this case the plaintiff does not rebut the presumption.

15 [35] In *Clark Boyce v Mouat* [1993] 3 WLR 1021 held that a Solicitor can act for two parties with conflicting interests but he needs to obtain their informed consent so that both are aware that there is a potential conflict between their interests and that it may result in the Solicitor from being disabled to give advice to one party or another. However, in the present case, the Solicitors Sahu Khan & Sahu Khan had interests of their own in the plaintiff company, which ended up in conflict with the defendant.

20 [36] In *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 where a solicitor had advised a client to invest money in a company which was also his client. The Court said:

25 *"A Solicitor's loyalty to his client must be undivided. He cannot properly discharge his duties to one whose interests are in opposition to those of another client. If there is a conflict in his responsibilities to one or both he must ensure he fully discloses the material facts to both clients and obtains their informed consent to his so acting."*

30 [37] This case clearly falls within the special category of cases and the onus of proof on the plaintiff to show the document was signed without any undue influence has not been discharged.

35 [38] In the case of *Maguire & Tansey v Makaronis* (1997) 188 CLR 449, the High Court of Australia held that a mortgage in favour of Solicitors was liable to be set aside as a result of the solicitors breach of fiduciary duty in entering into the mortgage without ensuring informed consent of the clients to their interest.

40 [39] Mr Mishra submits that there was no informed consent of the defendant as to their interest. I disagree with him on that point as paragraph 15 clearly sets out that Sahu Khan and Sahu Khan will act for both parties. However, I admit that due to the trust in the solicitors and the fraudulent misrepresentation the solicitors breached the fiduciary duty.

MISREPRESENTATION

45 [40] There are several misrepresented statements, either as utterances or written by Dr Sahu Khan prior to the actual execution of the said agreement.

[41] Part of clause 2 of the counter-claim sets out the non disclosed statements as follows:

- 50 a) *The principals of Sahu Khan and Sahu Khan Solicitors were also the shareholders and directors of the plaintiff company.*
b) *Did not advise the first defendant that there could be possible conflict of interest between the plaintiff and the first defendant by virtue of the fact that*

Sahu Khan and Sahu Khan were acting as Solicitors for both the plaintiff as vendors (of which they were shareholders and directors) and the first defendant as a purchaser.

- 5 c) *Failed to advise the first defendant to seek independent legal advice before signing the said sale and purchase agreement.*
- d) *Exerting undue influence on the first defendant in securing the signature of the first defendant on the agreement by having the said agreement pre-signed by the purported co-purchaser (Eshad Ali) and duly witnessed by Sahu Khan and Sahu Khan before securing the signature of the first defendant.*
- 10 e) *Falsely representing to the defendant that the beneficial owners of the plaintiff company were Canadian citizens without at any time disclosing who they were and implications of such sale by foreign owners may have in terms of Land Sales Act of Fiji and Reserve Bank and Income Tax Act of Fiji.*
- f) *Falsely representing to the first defendant that once the agreement was signed the said Sahu Khan will jointly with the first defendant look for potential buyers for the properties for a price in excess of USD4.5 million and to equally share any surplus profit.*
- 15 g) *Causing the first defendant to pay the sum of FJD\$100,000.00 purported to be a deposit for the said lands into the personal bank account of Sahu Khan and Shabina Sahu Khan.*
- 20 g) *Failed to disclose the true identity of the co purchaser (Eshad Ali) or details of any payments made by him in relation to the purchase.*

[42] The first defendant asserts that he found comfort by the long-standing friendship with his lawyer friend Dr Sahu Khan. The representations that was given by Dr Sahu Khan that his own cousin will be the co-owner and that he will assist to sell the land and share the profits had further persuaded the first defendant to execute the agreement. Due to this comfort, he had not obtained independent legal advice.

[43] No sooner the first defendant found out about the false representations he refused to perform the agreement. It therefore appears that the false statements made by Dr Sahu Khan affected the first defendant.

[44] I am convinced that Dr Sahu Khan was fully aware the representations were false. I am also satisfied that declaring, CT 26520 as a land belonging to vendor when it manifestly belonged to Shore View Ltd, including the said land in the valuation report knowingly it did not belong to the plaintiff, obtaining a loan at the eleventh hour when the property was offered for sale, not permitting the first defendant to meet Eshad Ali thereby causing reasonable suspicion in the first defendant's mind about his existence, disclosing Canadians owned the land, were made deliberately with the intention of committing a fraudulent act i.e., fraudulently inducing the first defendant to enter into the contract. In terms of clause 15¹ of the agreement, Messrs Sahu Khan and Sahu Khan, also acted as solicitors for both parties. The courts in Fiji had in several authorities denounced this detrimental practice. To make matters worse, the sole directors and shareholders of the plaintiff were none other than the two lawyers of Messrs Sahu Khan & Sahu Khan, i.e. Dr Sahu Khan and Shabina Sahu Khan, clearly conflict of interest.

50 1. 15. *The Vendor and the Purchaser agree that Messrs. Sahu Khan and Sahu Khan, Barristers and Solicitors of Ba to act as Sole Solicitors for the Vendor and the Purchasers in respect of the sale of the Said Lands."*

[45] Messrs Sahu Khan & Sahu Khan who undertook to provide legal advice to the first defendant had a fiduciary duty to make a full disclosure of all material facts whether such facts were not the subject of specific queries. The fiduciary relationship also reposed trust and confidence in the mind of the first defendant.

5 Dr Sahu Khan as the fiduciary had a legal obligation to act for the benefit and interest of the first defendant to enable the first defendant to make a fully informed decision before executing the contract on the terms that were being offered to him by the fiduciary. The first defendant says he later found out that section 6 of the Land Sales Act required mandatory compliance of obtaining the
10 Ministers consent before the transaction was completed if the sellers were foreign nationals, but Dr Sahu Khan did not disclose the requirement to him. Manifestly Dr Sahu Khan acted detriment and to the interest of the first defendant and abused the trust both as fiduciary and on friendship.

[46] Fraud is often entwined with the concepts of moral culpability. Fraudulent
15 misrepresentation is found when the representation is made (i) knowingly or (ii) without belief of its truth or (ii) recklessly, careless whether it is true or false. 'To succeed in fraud, a representee must prove, *inter alia* that the representor had no honest belief in the truth of the representation in the sense in which the representor intended it to be understood'. *Krakowski v Eurolynx Properties Ltd*
20 (1995) 183 CLR 563.

[47] In the instant case, the plaintiff through Dr Sahu Khan, I am convinced for the aforesaid reasons that he fraudulently induced the first defendant to believe that the plaintiff owned all four properties when in fact one property did not
25 belong to it and secondly made representations that the land belonged to Canadians when at all times he had full knowledge that it was a fraudulent statement. Thirdly, a land not belonging to the plaintiff was included in a valuation thereby fraudulently enhancing its value. Dr Sahu Khan clearly breached his fiduciary duties as the solicitor of the first defendant. I therefore
30 conclude that the agreement executed by the first defendant contained fraudulently misrepresented statements, not made independently by the first defendant. Therefore, I find that the agreement is *ab initio* invalid.

[48] The defendant convinces me for the same reasons that I have set out above that Dr Sahu Khan and plaintiff through Dr Sahu Khan are also liable for
35 unconscionable conduct, undue influence, and conflict of interest as alleged. However, as I have already found that the agreement dated 15 April 2006, is *ab initio* invalid I do not wish to give detailed reasoning on them.

Piercing the Company veil

40 [49] Mr Mishra submits that the plaintiff company, i.e. Midland Beach Estate Ltd is a private company carrying on its business in its company name. He says that the property is now sold to a third party thus, he is not seeking specific performance.

[50] Mr Mishra submits that the major shareholder of the company Dr Sahu
45 Khan used the company as a façade to perpetrate the fraud therefore the court must pierce the corporate veil and award aggravated damages to the first defendant, holding the shareholders also liable. The claim is set out in paragraph 16 (d) read with paragraph (D) of the relief.

[51] As said in the seminal decision *Salomon v A Salomon & Co Ltd*; *A*
50 *Salomon & Co Ltd v Salomon* [1897] AC 22, it is a well-established principle of company law that a company is a separate and distinct legal entity different from

its shareholders. The company has its own *locus standi* as a legal entity. The liability of the shareholders is therefore Ltd to the extent they have contributed to the company's capital. Thus, the company acts as a shield to protect the assets of the shareholders from personal liability. Due to these rooted principles, the courts are cautious in piercing or lifting the corporate veil.

[52] The two oft cited decisions; *Gilford Motor Co Ltd v Horne* [1933] Ch 935; and *Jones v Lipman* [1962] 1 WLR 832, the court pierced the veil of incorporation and considered the rights and duties of the plaintiff as the rights or liabilities of its shareholders. The courts have in several instances endeavoured to lift the corporate veil, by considering the theory of economic reality and doctrine of control but the judicial dicta seems to prefer an orthodox approach. *In re Darby*; *Ex parte Brougham* [1911] 1 KB 95. *Littlewoods Mail Order Stores Ltd v McGregor (HM Inspector of Taxes)* [1969] 1 WLR 1241, 1254; *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786 at 802 (Diplock LJ); *Wallersteiner v Moir* [1974] 1 WLR 991.

[53] Sir Andrew Morritt VC in *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177 at 23 said:

'in my judgment the court is entitled pierce the corporate veil' and recognize the recipient of the company as that of the individual (s) in control of it if the company was used as a device or façade to conceal the true facts, thereby avoiding or concealing any liability of those individual (s)'.

[54] In *Adams v Cape Industries plc* [1991] 1 ALL ER 929 the court held that the corporate veil may be lifted when a company is set up for fraudulent purposes or when it is established to avoid existing obligations. In *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 1 WLR 852 Lord Denning MR examined the overall business operation as an economic unit i.e., considering the corporation as a separate legal form. Lord Goff, in *Bank of Tokyo Ltd v Karoon* [1987] AC 45 agreed with Lord Denning's above dicta. In *Woolfson v Strathclyde BC* [1978] UKHL 5 the House of Lords approached the issue based on 'totality of circumstances' - confined to the facts of the case. However in *Adams v Cape Industries (supra)*, *CREASEY V BREACHWOOD MOTORS LTD* (1992) BCC 638, *ORD V BELHAVEN PUBS LTD* [1998] 2 BCLC 447, **TRUSTOR AB V SMALLBONE (NO 2) [2001] 2 BCLC 436** seems to view that corporate veil should not be lifted simply because justice requires it.

[55] In *Antonia Gramaci Shipping Corporation v Oleg Stepanovs* [2011] Lloyds Rep 647 Justice Burton dealt with piercing of the company veil extensively in his decision. In this case, there were several one ship corporate defendants with 63 chartering transactions interposed between the plaintiffs and third parties to siphon of profits from the Plaintiff. The defendant and four other beneficial owners of the company had masterminded the scheme and the Corporate Defendants were merely used as vehicles. Justice Burton discusses extensively the law in paragraphs 18 to 20 of his judgement and concluded in paragraph 20 that piercing the corporate veil although an exceptional course is possible and in fact does not need to be pleaded or shown to be necessary to give relief to the claimant.

[56] His Lordship stated as follows:

"The concept of necessity is not a fetter upon such a claim. It does not need to be pleaded or proved in limine. Piercing the veil is an exceptional course, not a 'routine adjunct to any claim brought against a company for dishonest assistance or knowing receipt' per Norris J in Law Society v Isaac [2010] EWHC 1670 (CH) at para. 40); but

it is not a requirement for such a claim, at a time when the outcome of the proceedings is unknown, for it to be shown to be necessary. “

5 [57] Justice Burton completed his reasoning by stating at paragraphs 26 and 27 that there is ‘no good reason of principle or jurisprudence why the victim cannot enforce the agreement against both the puppet company and the puppet who, all the time, was pulling the strings.I accept ...the puppeteer can be made liable, as a party to the contract, but that as a matter of public policy he cannot enforce the contract’.

10 [58] I also considered carefully the details reasoning given by Arnold J in the case of *VTB Capital v Nutritex International Corp et al* [2011] EWHC 3107 (Ch) where he considered the historic development of the doctrine examining various authorities on the point (paragraphs 65 to 102). In the case after given detail reasoning his Lordship held that the facts in that case did not warrant piecing the corporate veil.

15 [59] However, I find that the judicial dicta resonates minimum two instances where the courts have not been hesitant to pierce the corporate veil. i.e., fraud or using the alter ego doctrine. If the corporate is used as a facade or a vehicle to defraud, then the courts have not been hesitance to lift the corporate veil. So as when the corporate is the alter ego of the fraudster then the courts have pierced or lifted the corporate veil to look beyond the legal fiction and consider the reality of the situation.

20 [60] The equitable remedy of piercing the corporate veil is fluid. Therefore, in my view the court must examine the evidence in totality before piercing the corporate veil.

25 [61] Dr Sahu Khan is clearly the alter ego of both the plaintiff company and the law firm Messrs Sahu Khan and Sahu Khan. I have already concluded that Dr Sahu Khan had perpetrated the fraudulent act to induce the plaintiff to execute the agreement. As the first defendant’s solicitor, Dr Sahu Khan had an overriding duty to protect his interest and advise him accordingly. I have no doubt that Dr Sahu Khan the alter ego of the plaintiff and he, as the dominant shareholder, abused the corporate form of the plaintiff to advance his own interest by using the plaintiff company as vehicle to persuade the first defendant to execute the agreement. As Russel J. said in the case of *Jones v Lipman* (supra) it appears to me that Dr Sahu Khan used the plaintiff as a ‘device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity. In the circumstances, I am convinced that this is a fit case for me to pierce the corporate veil and conclude that the shareholders of the plaintiff’s company liable for damages.

40 **CAVEAT EMPTOR**

[62] When Mr Mishra made oral submissions before me, I requested him to provide justification as to why I should not apply the doctrine of ‘*caveat emptor*’ or ‘buyer beware’ to the facts of this case. I am thankful for the comprehensive submissions made by Mr Mishra both orally and written.

45 [63] Mr Mishra submits that the defendant is only an architect and that he retained his friend and solicitor Dr Sahu Khan to guide him with legal advice.

[64] Mr Mishra submitted that a surveyor will advise on boundaries and associated matters; an engineer will advise on the structural strength of any buildings and so on. It is a Solicitor who will do title and company searches and look into such associated legal matters. Here Sahu Khan & Sahu Khan acted for

both the Vendor and Purchaser and the Purchaser relied on his Solicitors to protect him as the agreement itself expressly said they would act for him (Clause 15).

5 [65] Under the DOCTRINE of *caveat emptor*, the BUYER could not recover from the Vendor for defects on the PROPERTY that rendered the property unfit for ordinary purposes. The only exception was if the Vendor actively concealed latent defects or otherwise made material misrepresentations amounting to fraud.

[66] In the case of *Bhagwat Prasad v Nazar Singh & Others* FCA Civil Appeal ABU 2 of 1992A the doctrine was discussed (although not explicitly mention it
10 by name) as follows:-

“...This fact alone should have put the Appellant on guard bearing in mind (a) that the Deposited Plan 4212 (Ex 10) was shown to him, (b) that the lot being sold to him was described in the Agreement by reference to the Deposited Plan which was exhibited
15 in the Court below by consent and (c) that DP 4212 clearly shows a right of way running along the whole length of Lot 1 sold to the Appellant. The Appellant contracted to get an area of one rood as shown in D.P. 4212 and he got one rood and he cannot now be heard to be complaining that he ought to have received 1 rood 12.8 perches notwithstanding the fact that he signed an Agreement prepared by an experienced solicitor. In this appeal the Appellant admits that he relied on Mohan Singh as far as
20 the boundaries were concerned rather than check with the plan (see paragraph 3(b) of the Grounds of Appeal).”

[67] In *Shakuntala Devi v Jai Mangal & Shiu Raj* FCA Civil Appeal No ABU 0082 of 1984 at 9 the Court of Appeal quoted Viscount Sankey of the House of
25 Lords had authoritatively had held in the case of *Regal (Hastings) Ltd v Gulliver* (note) [1942] 1 All ER 378 at 381:

“In my view, the respondents were in a fiduciary position and their liability to account does not depend upon proof of *mala fides*. The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the
30 interests of those whom he is bound to protect. If he holds any property so acquired as trustee, he is bound to account for it his *cestui que trust*.”

[68] The lawyer’s status as an officer of the court, and her or his integral part in the administration of justice distinguish the lawyer from the ordinary private
35 fiduciary. In *Carindale Country Club Estate Pty Ltd v Astill* (1993) 115 ALR 112 at 117 Drummond j said:

“this distinction is reflected in the importance which Australian and New Zealand court attach to the legal profession’s duty to conduct its business in such a way as to maintain and enhance public confidence in the administration of justice. In this context
40 it has been judicially observed that “the integrity of the legal profession and the perception of that integrity by the public is in large measure a consequence of the fidelity which a legal practitioner shows to his client and conduct which has a tendency to jeopardise that perception to faithful commitment to the interests if the client should be prevented.”

45 DAMAGES

[69] The counter claim sets out a claim for damages based on punitive or exemplary damages and interest from 1 July 2006 until full payment.

General Damages

50 [70] Mr Mishra says that the plaintiff through Sahu Khan & Sahu Khan terminated the agreement and sought removal of the defendant’s caveat, which he had placed to preserve his right to specific performance when he found out about

the dishonesty and conflict of interest of his Solicitors. To minimize his damage he removed his caveats and preserved his right to take the present claim for damages.

5 [71] Vide annexure C attached to the supporting affidavit of Shabina Sahu Khan (D7), the property was resold for USD 2.8 million on 22 November 2006. On that date, the exchange rate was FJD 1 to USD 0.59178 and a copy of the Historical Exchange rate table is attached and marked 7 to the submissions, Mr Mishra.

10 [72] Mr Mishra says in a similar case *Ganga Ram v Grahame & Co* [1975] 21 FLR 158 (168) the court awarded third of the purchased price as damages and accordingly moves \$930,000.00 as damages. (One third of USD 2.8 million). He also states that verbal agreement with Dr Sahu Khan is to share profits by half therefore states the first defendant is entitled to USD 465,000.00. I find that in *Ganga Ram's* case (supra) the court awarded damages for breach of contract. He 15 further seeks that damages be paid in United States dollars and in support cites *Yanuca Island v Peter Elsworth*, FJCA Civil Appeal No 85 of 2000 decision and *Attorney- General of Fiji Doctor Hubert Elliot v Paul Praveen Sharma*, FJCA Civil Action No 41 of 1993 where losses were paid in Australian dollars.

20 [73] In the alternative, the first defendant seeks substantial damages for breach of section 126 of the Fair trading Decree and seeks damages under section 127(1).

25 [74] Mr Mishra submits that a client is entitled to rely on the representation of his lawyers and argues that had the plaintiff and its directors acted in good faith and if his client were not misled, the first defendant would have made a good profit with his contacts and acumen. Mr Mishra therefore submits that there is a strong element of aggravation when one considers breach of fiduciary duty and the way the defendant has been treated by the plaintiff and Dr Sahu Khan.

30 [75] Halsbury Laws of England, Fourth Edition, Volume 12, Damages, page 472, Paragraph 1189, states as follows:

“Aggravated damages are designed to compensate the plaintiff or his wounded feelings; they must be distinguished from exemplary damages which are punitive in nature and which may only be awarded in a limited category of cases.”

35 *(Rookes v Barnard* [1964] AC 1129 at 1221 et seq.; [1964] 1 All ER 367 at 407 et seq.)”

[76] I readily accept Mr Mishra's submissions that either the first defendant executed the agreement as a business venture in order to make reasonable profit by resale or by development, therefore the defendant is entitled for aggravated 40 damages to compensate the plaintiff for his wounded feelings.

[77] I have already held that the agreement made premised on fraudulent misrepresentation is *ab initio* invalid. The first defendant is therefore entitled to damages in the tort of deceit.

45 **Damages for breach in tort**

[78] In my mind, the defendant is entitled to damages in tort and for breach of contract. I have emphasized on the distinction, as damages in tort and damages in contract are calculated in different bases. Whilst damages in tort seeks to return 50 the plaintiff to the position occupied prior to the commission of tort, damages in contract seeks to place the plaintiff in a position that would have placed the aggrieved party had the contract was performed.

[79] The first defendant is entitled under damages of tort and breach of contract to a refund of the deposit of \$100,000.00 and any resulting consequential loss such as interest. However, the plaintiff had already refunded the deposit money thereby placing him in his original position.

5 **Damages for breach in contract**

[80] The defendant had to make the payment only on 30 November 2006. However, before the due date the plaintiff terminated the contract on 26 September 2006 (exhibit D of DB7)

10 [81] Clearly the termination is wrongful that give rise to damages.

[82] Mr Mishra submits that the first defendant was serious about the purchase. He had altered his financial position. The first defendant was entitled to the fruits of his agreement but was deprived of the legitimate opportunity of making a decent profit. No doubt, he was attempting to make a profit and thus entered into
15 the agreement.

[83] However as I said earlier the defendant also had a duty to be more vigilant relating to the relationship with Eshad Ali. In terms of the agreement, he had taken financial responsibility to fulfill to the plaintiff along with Eshad Ali. The defendant is an architect by profession, a more learned man than a reasonable
20 man on the street. He is a professional and must be treated differently and I am therefore not inclined to use the reasonable prudent person yardstick when computing damages. I will apply the caveat emptor doctrine and consider the defendant was negligent in his dealings relating to Eshad Ali.

25 [84] In the circumstances, I will award USD 50,000.00 as damages for breach of contract.

INTEREST ON THE DEPOSIT MONEY

[85] The plaintiff by way of settlement entered on 18 December 2006 agreed
30 *inter alia* at paragraphs 5, 6 and 7:

5. *In the event settlement of the sale to Bhanabhai Investment Ltd is not affected on or before the 31st day of December 2006 the first defendant shall be at liberty to register caveats against the above relevant titles.*
6. *All the above are absolutely without prejudice to the rights and liabilities (if
35 any of the parties to be this action.*
7. *The action to take its normal cause and if the court holds that the first defendant was not entitled to the refund of the said sum of \$100,000.00 then he shall refund the said sum to the plaintiff immediately.*

[86] The first defendant paid the \$100,000.00 on 1 June 2006 (D10). The claim
40 for interest in the statement of defence is from 1 July 2006 and it appears to me that the month of July is a typographical error. The money was returned in end of December 2006. First defendant is claiming interest for 6 months at the rate of 10%. The parties at paragraph 2(c) of the agreement agreed payment of interest at 10%. Accordingly, I award interest at the rate of 10% for six month i.e.
45 \$5000.00. The first defendant is also entitled to interest at 10%pa until the full sum is paid.

[87] Mr Mishra seeks costs at indemnity basis and cites *Abdul Rafiq v Lautoka City Council Lautoka and Fiji Electricity Authority v C R Engineering and Vinod Patel Company (Lautoka) Ltd*, HBC 101 of 2001.

50 [88] I have considered the principles to award costs on indemnity basis and hold that the first defendant must be paid costs on the indemnity basis.

[89] Orders accordingly.

Purchaser's counter-claim upheld.

5

Michael Wells
Solicitor

10

15

20

25

30

35

40

45

50