IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 086 of 2019
[In the High Court at Suva Case No. HBC 352 of 2019]

BETWEEN : **KEOLAPATI LAGAN** as Administratix of the Estate of **RAM LAGAN**

01st Appellant

PRAKASH LAGAN

02nd Appellant

AND : **LATCHAN HOLDINGS LIMITED**

Respondent

Coram : **Prematilaka, RJA**
Andrews, JA
Andrée Wiltens, JA

Counsel : **Ms. S. Dean for the Appellant**
Mr. N. Lajendra for the Respondent

Date of Hearing : **07 May 2025**

Date of Judgment : **29 May 2025**

JUDGMENT

Prematilaka, RJA

[1] The High Court judge has captured the nature of the action filed by the plaintiff-respondent ('respondent') against the 01st and 02nd defendant-appellants ('appellants') as follows:

> *2. 'The plaintiff, in its statement of claim states that on 8th July,2014, it entered into a Sale and Performance Agreement,(SPA) with the late Ram Lagan,(RL) to*

purchase his rights in Native Lease no. 29608, CT Register, Vol 36, Folio 3580 (freehold property) and chattels for a sum of $498,466.67. On 28th July,2014, the late RL executed an instrument of transfer of his two thirds share of freehold property and his half share of the Native Lease, in consideration of the sums of $266,666.67 and $5,000. The value of the chattels is $226,800.00.The first defendant is the wife and Administratrix of the estate of the late RL. The plaintiff seeks an order for specific performance of the SPA.

3. *The defendants, in its statement of defence state that the plaintiff induced the late RL to enter into the "alleged" SPA and counter claim that the SPA be rescinded and declared null and void and for several orders referred to later in my judgment.*

[2] The appellants have moved the High Court to strike out the statement of claim on the grounds that it does not disclose a reasonable cause of action and is an abuse of process. By the Ruling made on 09 April 2019[1], the High Court judge *inter alia* declined to strike out the respondent's summons subject to costs of $3,000.00.

[3] The appellants thereafter sought leave to appeal the said Ruling of 09 April 2019 which included an order for $7,500 as security for costs to be paid by them. The appellants also sought a stay of the said interlocutory Ruling pending appeal. By the second Ruling on 02 October 2019[2], the High Court judge refused leave to appeal and stay of the proceedings and ordered costs of $1,000.00.

[4] The appellants then sought leave to appeal from the Court of Appeal against the Ruling of the High Court on 09 April 2019 and a stay of proceedings in the High Court. Almeida Guneratne, JA (as His Lordship then was) by his Ruling on 27 March 2020[3] allowed leave to appeal and a stay of proceedings in the High Court until a final determination of the appeal.

[5] The appellants urged the following grounds of appeal before this court:

'i. The Learned Judge erred in law in dismissing the striking out application considering that the Learned Judge could review the evidence of the illegal

[1] **Latchan Holdings Ltd v Lagan** [2019] FJHC 320; HBC352.2015 (9 April 2019)
[2] **Latchan Holdings Ltd v Lagan** [2019] FJHC 997; HBC352.2015 (2 October 2019)
[3] **Lagan v Latchan Holdings Ltd** [2020] FJCA 35; ABU086.2019 (27 March 2020)

consideration and the enforceability of the alleged Sale and Purchase Agreement pursuant to Order 18 Rule 18 (1) (d) and the inherent jurisdiction of the Court.

ii. The Learned Judge erred in law in dismissing the striking out application considering that the evidence available before the Learned Judge showed that the alleged Sale and Purchase Agreement was void for lack of certainty of consideration i.e. the Mortgage Document and vagueness of the description and hence clearly unenforceable.

iii. The Learned Judge erred in law in failing to exercise his discretion in not allowing the preliminary determination to be made as to the validity of the Sale and Purchase Agreement made on the 8th July 2014 between Late Ram Lagan and Latchan Holdings Limited considering the capacity of the parties executing the Sale and Purchase for the Purchaser and the Vendor, the validity of the consideration being the executed Mortgage provided by the Purchaser and the lapse of time for settlement when the said Application was before the Learned Judge for determination.

iv. The Learned Judge erred in law in allowing the application for security for costs and for a payment of $7,500.00 as security considering the fact that the 1st Defendant is a citizen of Fiji and is the last registered proprietor as the Administratrix in the Estate of Ram Lagan in the properties being an undivided two third share in Certificate of Title 3580 and an undivided half share in Native Lease No. 29608 over which the Plaintiffs are seeking specific performance hence there was no risk to recovery of costs by the Plaintiffs in the event that costs were ordered against the Defendants who were resident oversees.

v. The Learned Judge erred in law in ordering costs in the sum of $3,000.00 against the defendants considering that the application for Setting Aside of the Ex-Parte orders and application for second caveat were inter-related and were made due to the plaintiff's actions rather than the defendants and given that the estate was not earning any income.

vi. The Learned Judge's decision is wrong and erroneous and tantamounts to a wrongful exercise of discretion having regard to all the facts and circumstances of the case and evidence on the whole.'

01st, 02nd and 03rd grounds of appeal

[6] The essence of these grounds is fundamentally based on the application of Order 18, Rule 18(1) of the High Court Rules. The respondent sought as the main relief specific performance of the Sale-Purchase Agreement (SPA) between the parties. The appellants submit that their striking out application was premised on both O18, r.18(1)(a) (not

disclosing a reasonable cause of action) as well as O18, r.18(1)(d) (abuse of process). Therefore, I shall first examine the law relating to the application of O18, r.18(1):

Order 18 Rule 18

'18.-(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

(a) it discloses no reasonable cause of action or defence, as the case may be; or
(b) it is scandalous, frivolous or vexatious; or
(c) it may prejudice, embarrass or delay the fair trial of the action; or
(d) it is otherwise an abuse of the process of the court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1) (a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.'

No reasonable cause of action or defence

[7] It is trite law that the power given to strike out under O.18, r.18 is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances[4], striking out a statement of claim as disclosing no reasonable cause of action is a summary power, which should be exercised only in plain and obvious cases and 'a reasonable cause of action' means a cause of action with some chance of success [5], striking out a pleading or, part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to, discloses no arguable case[6] and the jurisdiction to strike out an endorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, and only in plain and obvious cases that are clear beyond doubt[7].

[4] **Carl Zeiss Stiftung v Rayner & Keeler Ltd** (No 3) [1970] Ch 506
[5] **Drummond-Jackson v British Medical Association** [1970] 1 W.L.R. 688; [1970] 1 All ER 1094
[6] **Walters v Sunday Pictorial Newspapers Limited** [1961] 2 All ER 761
[7] Megarry V.C. in **Gleeson v J. Wippell & Co.** [1971] 1 W.L.R. 510 at 518

[8] In **Dey v Victorian Railways Commissioners,** (1948-49) CLW 62 at pg 84 -85, Latham CJ said:

> *..the summary procedure.. was appropriate only to cases which were plain and obvious, so that any master or judge could say at once that the statement of claim was insufficient, even if proved, to entitle the plaintiff for what he asked...If, as a result of argument, the court reaches a clear decision which could not be altered by any evidence which could be adduced at the trial, then it is proper in the interests of both parties to dismiss the action instead of allowing the parties to incur completely useless expense.*

[9] From **CIVIL PROCEDURE Volume 1- THE WHITE BOOK SERVICE 2017 (SWEET & MAXWELL)** at page 81 paragraph 3.4.2 on **'Statement of case discloses no reasonable grounds or defending the claim..'** the following helpful statements of law could be extracted on the scope of O.18, r.18 (1) (a):

(i) Statements of case which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides[8].

(ii) A claim or defence may be struck out as not being a valid claim or defence as a matter of law[9].

(iii) It is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact[10].

(iv) A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence[11].

(v) An application to strike out should not be granted unless the court is certain that the claim is bound to fail[12].

(vi) Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from sticking it out without first giving the party concerned an opportunity to amend[13].

[8] **Harris v Bolt Burdon** [2000] L.T.L, February 2, 2000, (CA)
[9] **Price Meats Ltd v Barclays Bank Plc** [2000] 2 All E.R. (Comm) 346, Ch D
[10] **Farah v British Airways**, The Times, January 26, 2000, CA referring to **Barrett v Enfield BC** [1989] 3 W.L.R. 83, HL; [1999] 3 All E.R. 193
[11] **Bridgeman v McAlpine Brown** 19 January 2000, unrep. CA
[12] **Hughes v Colin Richards & Co** [2004] EWCA Civ 266; [2004] P.N.L.R. 35, CA
[13] **Soo Kim v Youg** [2011] EWHC 1781 (QB)

[10] Almeida Guneratne, JA had articulated in his Ruling the appellants' position as follows:

> *'[3] ……that the entering into the said agreement (to begin with) had been procured by inducing the original party (R L) and therefore the said agreement be declared null and void……that the SPA was un-enforceable for the reason that the consideration was illegal (....., the subject matter of the 'SPA' was undivided land and the part of the land being owned by the Native Community leaders, there had been "no consent by them in that regard.").*
>
> *[4] Mr Sharma for the Appellants .....referred to the learned Judge's reliance on O18, R18 (1)(a) when he held the view that, the said order "cannot be invoked to truncate the procedure laid down in the High Court Rules for a trial" followed by the learned Judge's reference to O18 R18(2)..... finally holding that, "in my view, the defendants have not made out that there is no reasonable cause of action and the Statement of Claim is an abuse of process."…'*

[11] The High Court judge in dealing with the position that the statement of claim discloses no reasonable cause of action has identified the basis of the appellants' challenge as follows:

> *'1. Gardiner Whiteside, a trustee of the estate of the late Ram Logan (RL) countersigned an "illegal mortgage document", as Company Secretary of the plaintiff with Rohit Latchman, a Director, who has been charged in the Magistrate's Court, on 3 counts of an undischarged bankrupt acting as a Director. Gardiner Whiteside failed to act in the best interest of the estate and secure the farm properties and livestock in the properties, but acted in the best interest of the plaintiff company.*
>
> *2. B Solanki, solicitor represented the plaintiff company for the "undated alleged" SPA and acted for the late RL, in conflict of interest, in preparing the mortgage document. He failed to obtain the consent of the undivided 1/3 owner's share of the freehold property for the mortgage.*
>
> *3. The first defendant, as executrix of the deceased's estate revoked the SPA, as the 60 days settlement period had expired. FIRCA has cancelled the capital gains tax certificate based on the gross undervaluation of the properties.'*

[12] Then, the trial judge summarized the respondent's position regarding the appellants' allegations as follows:

> *'Rohit Latchan on behalf of the respondent has stated that he signed the SPA, pursuant to a Company resolution. The mortgage was prepared by Solanki lawyers, on the instructions of the late RL. The late RL entered into the transaction*

at his own will. The SPA was witnessed by Mr D.Toganivalu, an independent solicitor. The transfer was witnessed by Ms V Narayan, an independent solicitor. The order of adjudication against him was rescinded by the Magistrates' Court and he was acquitted by the Magistrates' Court of the charge of criminal trespass of the properties. It appears that the Supreme Court on 29 August 2024[14] had set aside the Magistrates court order and directed that pursuant to section 15(1) (f) of the Sentencing and Penalties Act conviction against Rohit Latchan for 'undischarged bankrupt acting as a director' be not recorded but affirmed the aggregate fine of $500.00. The plaintiff company lawfully obtained possession of the properties. He purchased 1/3rd share of the freehold property with another. Gardiner Whiteside has no financial interest and was appointed by the late RL with knowledge of his position in the plaintiff company.'

[13] The High Court judge had then summarized the submissions of respective counsel in the following words:

> *'9. ……..Mr. Sharma, counsel for the defendants submitted that the SPA is unenforceable for the reasons that the consideration is illegal, the subject matter of the undated SPA is undivided and the capital gains tax certificate has been cancelled, due to the gross undervaluation of the land.*
>
> *10. Mr Lajendra, counsel for the plaintiff in reply submitted that the pleadings raise conflicting issues. Three solicitors will testify on the mental capacity of the late RL and the alleged conflict of interest. Evidence will be lead to controvert the contention that the properties were undervalued and Rohit Latchman was incapable of executing documents.'*

[14] Having considered all of the above, the High Court judge formed the view that the pleadings clearly disclosed triable issues and noted, that the affidavit in support contained 23 attached documents and the reply had 06. The affidavit in response had 08 documents annexed. He also had taken the view that O.18, r. 18(1)(a) cannot be invoked to truncate the procedure laid down in O.18, r.18(2) for a trial. The Judge had concluded that the appellants have not made out that there is no reasonable cause of action or the statement of claim is an abuse of process.

[15] Almeida Guneratne, JA agreed with the learned High Court Judge's view that, this matter is not one that could be determined otherwise than by way of a trial and further remarked

[14] **Latchan v State** [2024] FJSC 28; CAV0005.2023 (29 August 2024)

that it is not that, the respondent's claim did not disclose a cause of action and/or that it amounted to an abuse of process of Court but the procedure adopted was misconceived. What Almeida Guneratne, JA thought as the wrong procedure is that the respondent invoked the jurisdiction of the High Court by Originating Summons instead of – by way of Writ of Summons. Unfortunately, this conclusion is incorrect, for it is common ground that the respondent initiated the proceedings by way of Writ of Summons.

[16] Following up on that erroneous view, Almeida Guneratne, JA had said that the appellants' opposition to the respondent's Originating Summons was justified on the High Court Judge's own view that the matter could only be determined by way of a trial. This is the reason for leave to appeal and stay order to be granted by Almeida Guneratne, JA on 27 March 2020 so that the Full Court may go into the matter.

[17] The respondent by way of a letter had on the same day brought it to the notice of court this unfortunate mistake but Almeida Guneratne, JA had thought that the matter must be resolved by the Full Court. As a result, the stay of proceedings in the High Court had continued for more than 05 years. The Counsel for the respondent submitted that at least one of his witnesses namely Mr. D. Toganivalu, the independent solicitor who witnessed the SPA had passed away causing prejudice to his case.

[18] Upon a perusal of the written submissions filed on behalf of the appellants particularly paragraph 6.6 consisting of 24 subparagraphs on factual narratives such as that the late Ram Lagan was on his death bed and incapacity of Rohit Latchan, it becomes apparent that those are matters of real evidence to be proved in court at a trial proper and cannot be determined on affidavit evidence alone. They involve evidence both oral and documentary, interpretation of documents, arguments, and application of law as highlighted in the written submissions.

[19] Similarly, the respondent's written submissions also contain several opposing factual narratives which too have to be ventilated at a trial.

[20] The Supreme Court decision in **Pati v Wati** [2023] FJSC 31; CBV0020.2019 (31 August 2023) seems to have decided on a crucial point taken up by the appellants that the subject matter of this case - HBC 352/2015, did form part of the testator's (the late Mr. Ram Lagan) estate and therefore could not be part of the SPA. I shall take the liberty to highlight a few most relevant paragraphs which are self-explanatory, where the Supreme Court determined the point against the appellants:

> *'[27] In the Respondents view, there was no doubt as to the reason the deceased did not include the two properties the subject of the High Court proceedings in HBC 352/2015 in his Will. The simple fact was that on the day of his executing his Will, 8 July 2014, he had already entered into an Agreement for Sale and Purchase (ASP) with a 3rd party in respect of both properties, which he followed up by executing the transfer documents on both, on 28 July, 2014.*
>
> *[56] Both the High Court and Court of Appeal, having considered and weighed the language of Clause 3 of the Will and importantly, the meaning and intention of the testator, and furthermore taking into account extrinsic evidence, concluded that the shares of the testator in CT 3580 and NL 29608 the subject matters of HBC 352 of 2015, did not form part of the testators estate. The legal interests in them had been transferred by the testator prior to his death.*
>
> *[57] ……However as the Court had concluded above, the transfers had already conveyed the legal interests to the third party notwithstanding that they had not been registered. It is the intention of the testator that is relevant, not the action of the Administratrix.*
>
> *[59] ……. It seems logical that the only possible reason why the testator had not specifically included his shares in the properties the subject of HBC 352 of 2015, in his Will, is because he was selling them and had begun the formalities by signing the Agreements for Sale and Purchase, on the same day he made his will.*
>
> *[79] This Court, together with the courts below, have determined firstly that the shares in the two properties, the subject matter of the High Court proceedings in HBC 352/2015, do not form part of the testator's estate, for reasons explained above. ……..and that the shares in the two properties (CT 3580, and NL 29605), in the courts' interpretation of the will as above, no longer formed part of the estate.'*

[21] Thus, the Supreme Court has decided that the late Mr. Ram Lagan had not included the subject matter of the High Court proceedings in HBC 352/2015 in his Will because he knew that he had already entered into an SPA on the same day he made his will. Thus, the subject matters of HBC 352 of 2015, did not form part of the late Mr. Ram Lagan's estate.

[22] Thus, in my view, the High Court judge's view that the strike out application based on *'no reasonable cause of action disclosed'* under O.18, r. 18(1)(a) could not be sustained is the correct decision in all circumstances of this case.

Abuse of process

[23] The appellant also complains that the Judge had failed to consider O.18, r.18(1)(d) that the respondents' action was an abuse of process. The following propositions could be discerned from **CIVIL PROCEDURE Volume 1- THE WHITE BOOK SERVICE 2017 (SWEET & MAXWELL)** at page 82 paragraph 3.4.3 on **'Statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings'** to understand the scope of O.18, r.18(1)(d):

(i) *Although the term "abuse of the court's process" is not defined in the rules or practice direction, it has been explained in another context as "using that process for a purpose or in a way significantly different from its ordinary and proper use"*[15].

(ii) *The categories of abuse of process are many and are not closed……The court has power to strike out a prima facie valid claim where there is abuse of process. However, there has to be an abuse, and striking out has to be supportive of the overriding objective. It does not follow from this that in all cases of abuse the correct response is to strike out the claim. The striking out of a valid claim should be the last option. If the abuse can be addressed by a less draconian course, it should be*[16].

[15] **Attorney General v Barker** [2000] 1 F.L.R.759, DC, per Lord Bingham of Cornhill, Lord Chief Justice

[16] **Reckitt Benkiser (UK) Ltd v Home Pairfum Ltd** [2004] EWHC 302 (Pat); February 13, 2004, unrep. (Laddie J) - claimant's application to have defendant's counterclaim in trade mark case struck out, so far as it related to threats, dismissed; see also **Taylor v Nugent Care Society** [2004] EWHC 302 (Pat); [2004] F.S.R. 37 - claimant bringing individual action when group litigation order in place.

[24] The main categories of abuse of process are vexatious proceedings, attempts to re-litigate decided cases, collateral attacks upon earlier decisions, pointless and wasteful litigation, improper collateral purpose, delay, and other forms of abuse (for example to bring an ordinary claim proceedings which should normally be brought by judicial review in order to take advantage of longer limitation period in ordinary claims). Needless to say, that the respondent's action does not fall into any of these categories.

[25] Applying the legal principles aforesaid, I do not think that respondent's action could be called an abuse of court's process and the appellants' argument based on that limb in terms of O.18, r. 18(1)(d) is bound to fail.

04th ground of appeal

[26] Security for costs is covered under Order 23 Rule 1 of the High Court Rules. It is as follows:

'SECURITY FOR COSTS
Security for costs of action, etc. (O.23, r.1)

1–(1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court-

(a) That the Plaintiff is ordinarily resident out of the jurisdiction, or

(b) That the Plaintiff (not being a Plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or

(c) Subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or its incorrectly stated therein, or

(d) That the Plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,

then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the Plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.

(2) The court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.'

[27] The reasons for ordering $7,500.00 as security for costs to be paid by the appellants are given at paragraphs 37- 44 of the impugned Ruling.

[28] Order 23 Rule 1 of the High Court Rules is expressly concerned with security for costs being ordered against plaintiffs. If a defendant brings a counterclaim, the legal position does change and in respect of that counterclaim**,** the defendant does become a plaintiff in substance and in law**.** Order 23 Rule (3) specifically provides for a situation like that which is not restricted to proceedings on a counterclaim but would apply to a plaintiff or a defendant equally as the case may be as described in O.23, r.1(1) & r.1(2). Order 23 Rule (3) is as follows:

> *'(3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.'*

[29] When a defendant files a counterclaim, he is asserting a separate cause of action against the plaintiff. In doing so, the defendant becomes a plaintiff in the counterclaim, and the original plaintiff becomes a defendant to the counterclaim. This procedural shift has legal consequences, including the possibility of the counterclaimant being ordered to provide security for costs including in respect of the counterclaim. Courts have held that a defendant who counterclaims can be ordered to provide security for costs in relation to the counterclaim**,** just as a plaintiff could for the main claim because a counterclaim is effectively a claim initiated by the defendant and the rationale for security for costs applies equally: if the counterclaimant is outside the jurisdiction or impecunious, and the plaintiff is at risk of not recovering costs, then security for costs may be just.

[30] In the summons for security for costs, the respondent had urged that the appellants provide security for costs in a sum of $20,000, since they are not residents of Fiji and the second appellant owns only CT No. 22624 on the basis that the appellants will not be able to pay costs, in the event an adverse order is made against them at the conclusion of the hearing.

[31] The words of Sir Nicolas Brown Wilkinson VC[17] as cited by Byrne J[18] are equally applicable to a defendant:

> *'The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgment for costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a plaintiff who lacks funds. The risk of defending a case brought by a penurious plaintiff is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiffs resident within the jurisdiction.'*

[32] The amount of security for costs ordered to be given is in the discretion of the court, which will fix such sum as it thinks just to do so, having regards to all the circumstances of the case. It is not the practice to order security for costs on a full party and party, still less on an indemnity basis. In the case of a plaintiff resident out of the jurisdiction the more conventional approach is to fix the sum at about two-thirds of the estimated party and party costs up the stage of the proceedings for which security is ordered, but there is no hard and fast rule.[19]

[33] As the High Court judge has said the action is that of enforcement of a SPA. The appellants are admittedly resident overseas and the trilogy of affidavits filed in respect of the summons for striking out indicates that the trial will be drawn out. Thus, it is clear that the order for security for costs is not merely based on the appellants' ordinary residence oversees but other factors as well. In the circumstances, I do not see a convincing reason to interfere with the Judge's discretion where he made order that the appellants deposit a sum of $ 7,500.00 to court, as security for costs.

[34] Therefore, in my view the 04th ground of appeal cannot succeed.

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[17] **Porzelack KG v Porselack (UK) Limited,**[1987] 1 All ER 1074 at pgs 107-1077
[18] **Furuuchi Suisan Company Limited v Hiroshi Tokuhisa and Others**, (Civil Action No. 95 of 2009
[19] **Halsbury's Law of England,** (4th Edition) Vol. 37 para 307

05th ground of appeal

[35] The appellants are challenging the order for costs summarily assessed in a sum of $3,000 in the impugned Ruling. Awarding of costs is governed by Order 62 Rule 3 of the High Court Rules. It stipulates that:

> *'3.–(1) This rule shall have effect subject only to the following provisions of this Order.*
>
> *(2) No party to any proceedings shall be entitled to recover any of the costs of those proceedings from any other party to those proceedings except under an order of the Court.*
>
> *(3) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.*
>
> *(4) The amount of costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis where–*
>
> *(a) an order is made that the costs of one party to proceedings be paid by another party to those proceedings, or*
> *(b) an order is made for the payment of costs out of any fund, or*
> *(c) no order is required, unless it appears to the Court to be appropriate to order costs to be taxed on the indemnity basis.'*

[36] A court has 'absolute and unfettered' discretion *vis-à-vis* the award of costs but such discretion 'must be exercised judicially'[20]. The question is always 'whether the facts and circumstances of the case in question warrant making an order for payment of costs other than by reference to party and party'[21].

[37] The Court of Appeal previously elaborated awarding of 'costs' succinctly[22]:

> *'[19] ……However, as mentioned in Rule 3 of the High Court Rules referred to above, again the awarding of costs is entirely in the hands of the judge. Such*

[20] **Trade Practices Commission v. Nicholas Enterprises** (1979) 28 ALR 201, at 207.
[21] **Colgate-Palmolive Company and Colgate Palmolive pty limited v. Cussons Pty Ltd** [1993] FCA 536; (1993) 46 FCR 225, at 234, per Sheppard, J
[22] **Professionals West Realty (Fiji) Ltd v Facciola** [2012] FJCA 93; ABU0017.2011 (30 November 2012), see paragraph 22 for a detailed discussion on awarding of costs.

> *discretion vested in court always being exercised in a judicious manner. As mentioned earlier in this judgment, one way of ascertaining whether the judge had looked at the issue judiciously is to look at the reasons attached to the conclusions that he had arrived at.'*

[38] Upon a perusal of the Ruling being challenged, I do not see the High Court Judge having engaged in a detailed discussion on the circumstances that led him to award the costs of $3,000.00 which he assessed summarily. However, given the number of summonses filed by the appellants and respondent; 03 by the appellants (two of which were dismissed) and one by the respondent (which was allowed) and his observation that the appellants were attempting to truncate the procedure laid down in the High Court Rules by various summonses, I think the summarily assessed costs of $3,000.00 cannot be categorized as unreasonable.

[39] Therefore, I am not inclined to uphold the 05th ground of appeal.

06th ground of appeal

[40] The appellant under this ground of appeal is attempting to recycle or re-argue the same arguments made under the 01st - 03rd and 04th grounds of appeal which I have already dealt with. Thus, I hold that the 06th ground of appeal is frivolous.

Andrews, JA

[41] I have read and agree with the judgment of Prematilaka, RJA.

Andrée Wiltens, JA

[42] I agree.

Orders of the Court:

1. Appeal is dismissed.
2. Appellants shall jointly and severally pay $5,000.00 as costs of this appeal to the respondent within 21 days hereof.
3. The High Court is directed to hear and dispose of this case within 06 months from the next mention date in the High Court by giving preference to the trial in this action.
4. The parties are directed to co-operate with the High Court to achieve Order 3.

The Hon. Mr. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

The Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL

The Hon. Mr. Justice Gus Andrée Wiltens
JUSTICE OF APPEAL

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