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

CIVIL APPEAL NOs. ABU 043 & 076 OF 2020
[Lautoka Civil Action No. HBC 313 of 2005]

BETWEEN	:	**NATALIE KATZMAN**
		Appellant
AND	:	**BARSTOCK INVESTMENT LIMITED**
		Respondent
Coram	:	**Morgan, JA**
		Andrews, JA
		Clark, JA
Counsel	:	**Ms. V. Lidise for the Appellant**
	:	**Messrs. R. Singh and A. Nand for the Respondent**
Date of Hearing	:	**5 February, 2026**
Date of Judgment	:	**27 February, 2026**

JUDGMENT

Introduction

[1] This is a consolidated appeal against a Judgement of the High Court at Lautoka dated 07 May, 2020 ("The Judgment") wherein the Court dismissed the Appellant's claim for damages against the Respondent for personal injuries and ordered costs against the Appellant to be assessed. The Appellant filed a timely Notice of Appeal against the dismissal of the claim for damages on 12 June 2020 being Civil Appeal ABU 0043/2020, ("the Liability Appeal").

[2] Following the hearing of an application by the Respondent for an assessment of costs, the Court in a Ruling dated 06 August 2020 ordered that the Respondent was entitled to assessed costs in the sum of $37,550.00 together with costs of the Application of $2,000.00 ("the Costs Ruling").

[3] The Appellant filed a timely Notice of Appeal against the Costs Ruling being Civil Appeal ABU 0076 of 2020 on 18 September 2020 ("the Costs Appeal"). During the hearing of interlocutory matters before this Court in the Costs Appeal this Court ordered on 27 August 2021 that the two appeals be heard and determined as a consolidated appeal.

Background

[4] At all material times the Respondent was the owner and operator of a resort known as First Landing Resort and Villas at Vuda, Fiji ("the Resort").

[5] The Appellant, an Australian citizen, checked in to the Resort as a guest with her husband on the 18th January, 2005.

[6] The Appellant alleged that while she was a guest in a room at the Resort she accidentally swallowed several mouthfuls of a liquid contained in a "Fiji Water" bottle that comprised a chemical cleaning agent that had been negligently left in her room by an employee of the Respondent. As a result of the accidental ingestion of the liquid the Appellant alleged that she suffered a number of injuries including a burning sensation in the throat and chest, discomfort in the epigastric, vomiting, diarrhoea and Post-Traumatic Stress Disorder ("PTSD").

[7] The Appellant alleged that her injuries and consequential loss and damage were occasioned by reason of the breach of the common law duty of care owed by the Respondent as the owner of the Resort to the Appellant as a guest of the Resort. The particulars of negligence pleaded by the Appellant in support of the alleged breach of duty of care include storing cleaning liquid in a "Fiji Water" bottle; failing to appropriately label the bottle to indicate that it contained a cleaning liquid; placing that bottle in the Appellant's room in such a manner that any ordinary and reasonable person would assume that the contents of the bottle were in fact that of "Fiji Water";

and in the circumstances failing to discharge the common law duty of care owed to the Appellant as a guest of the Resort.

[8] The Appellant claimed general damages and special damages particularised in her Statement of Claim resulting from the alleged breach of duty of care and consequential injuries.

[9] The Appellant further claimed that the Respondent's conduct outlined above amounted to a false and misleading representation and conduct contrary to Sections 52 and 56 of the Fair Trading Decree and claimed compensation under that decree for such breaches of the Act.

Summary of The High Court Proceedings

[10] Following the alleged incident the Appellant issued a Writ of Summons and Statement of Claim on 26 October 2005 particularising the Appellant's claim as set out above and claiming damages. The Respondent in its Statement of Defence denied the claims made in the Appellant's Statement of Claim and put the Appellant to the strict proof thereof, and in a subsequent Amended Statement of Defence filed with leave of the Court the Respondent asserted further in the alternative that the matters complained of in the Appellant's Statement of Claim were caused or contributed to by the Appellant.

[11] Prior to the hearing of the matter various interlocutory applications and rulings were made to and by the Court relating to the amendment of pleadings and discovery and those rulings are also contested in the Appellant's Grounds of Appeal.

[12] The trial commenced on 11 March 2019 and concluded on 26 November 2019. At the hearing the Appellant called five witnesses namely the Appellant, Dr. Jonathan Adams who testified in respect of the Appellant's alleged PTSD; Dr. Ram Raju who treated the Appellant in Fiji following the incident, Safaira Vurabera, the executive housekeeper employed by the Resort at the time of the incident and an employee from a local bank whose evidence related to interest rates.

[13] The Respondent called one witness namely James Dunn, a director of the Respondent.

[14] Both parties tendered and relied on various documents either introduced through discovery or as exhibits at trial.

[15] After hearing the witnesses, Counsel for the parties, and considering comprehensive written submissions by both parties the Judge delivered his Judgment on 07 May 2020 wherein he ordered as noted above that the Appellant's claim be dismissed with costs to the Respondent to be assessed.

[16] In the Liability Appeal the Appellant seeks an order that the Judgment be set aside and that this Court enter judgment in favour of the Appellant and assess damages in accordance with the Appellant's claims together with costs on an indemnity basis or higher scale or make such other orders as it deems just. The Appellant relied on ten grounds of appeal namely:

> 1. The learned trial Judge erred in law and fact when he concluded that the Appellant had failed to establish on the balance of probabilities that the Appellant had suffered injuries as a result of the Respondent's negligent act when the Appellant had discharged the evidential burden that she had suffered injuries namely:
>
>   (i) Vomiting, diarrhoea, retrosternal burning; and
>   (ii) Post-traumatic stress disorder (PTSD).
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> 2. The learned Judge erred in law and fact when he concluded that the Appellant had failed to establish that Dr. Adams was an expert and rejected his report.
>
> 3. The learned Judge erred in law and in fact when in assessing the totality of the evidence, he disbelieved the Appellant on several aspects of her evidence.
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> 4. The learned Judge erred in law and fact when he dismissed the cause of action for breach of section 56 of the Fair Trading Decree when there was clear evidence supporting the claim.
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> 5. The learned Judge erred in law when on 13 March 2019 he granted the Respondent's application for Leave to Amend Further Amended Statement of Defence filed on 6 Mar 2019, without consideration of the Respondent's failure to provide any reasons for their delay in bringing the application.
>
> 6. The learned Judge erred in law in upholding the Respondent's objection to the documents contained in the Appellant's 3rd Supplementary Affidavit Verifying List of Documents being included in the Appellant's bundle of documents, on the basis

that Appellant required the leave of the Court to file a supplementary affidavit verifying list of documents.

7. The learned judge erred in law when he ruled on 15 March 2019 that the leave of the Court was required to file a supplementary affidavit verifying list of documents, when he should have ruled that no leave was required.

8. The learned Judge erred in law and fact when on 15 March 2019 he dismissed the Appellant's application to interpose the evidence of the Appellant with the evidence of Dr. Jonathon Adams.

9. The learned judge erred in law and fact when he dismissed the Appellant's Summons for Further Directions on 22 August 2019.

10. The learned Judge erred in law and fact during the trial when he refused to allow the Appellant to:

    i) tender through Sean Frankie, the records that had been subpoenaed by the Appellant from Bank South Pacific (BSP) on various interest rates on certain dates, which information had been procured by Sean Frankie by virtue of a subpoena *duces tecum*.

    ii) Question Sean Frankie questions on the interest rates for certain dates and for Sean Frankie to produce his answers based on the spreadsheet generated from BSP on the respective dates.

[17] In the Costs Appeal the Appellant seeks an order that the Costs Ruling be wholly set aside in the event that the Liability Appeal succeeds and that the sum of $6,500.00 paid to the Respondent be reimbursed to the Appellant; or alternatively in the event that the Liability Appeal fails and is wholly dismissed that this Court assess costs on the standard basis for amounts not exceeding the higher scale set by Appendix 4, Schedule 1 of the High Court Rules on the following grounds:

1. The learned trial Judge erred in law and fact in the exercise of his discretion when he found that the Respondent was entitled to increased costs in excess of the higher scale set within Appendix 4, Schedule 1.

2. The learned Judge erred in law and fact when he concluded that "it was not in dispute that the items specified in the bill of costs were reasonably incurred."

3. The learned Judge erred in law and fact in his assessment of items 19, 20 and 21 under the bill of costs:

4. The learned trial Judge erred in law and fact in the exercise of his discretion when he assessed costs in the total sum of $37,550 in that his assessment of the individual items in the Respondent's bill of costs was manifestly excessive, particularly in light of the absence of evidence to support several of the items in the bills of costs.

5. The learned trial Judge erred in law and fact in the exercise of his discretion in assessing costs on an increased basis. The learned trial Judge erred in law and fact when he summarily awarded costs of $2,000 in the assessment proceedings, which sum was excessive.

The Liability Appeal

Nature of the Appeal before the Court

[18] Both parties in their submissions refer to Rule 15 of the Court of Appeal Rules 1949 ("the Rules") which provides that an appeal to the Court of Appeal shall be by way of rehearing.

[19] The Appellant makes further reference to Rule 22(3) which gives this Court the power in relation to an appeal to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further order as the case may require.

[20] The Respondent further submits in this respect that Calanchini AP provided guidance in relation to the nature of this Court's powers in a civil appeal in **Nasese Bus Company Limited v Chand**[1] ("The Nasese case") when his Lordship stated:

> *[10] It is also appropriate to comment briefly on the nature of a civil appeal to the Court of Appeal with particular reference to appeal grounds that challenge findings of act.*
>
> *[11] There is an underlying principle that is applied by this Court in the hearing of an appeal. On any appeal from the decision of a trial judge sitting alone, the presumption is that the decision appealed against is right. (See 37 Halsbury (4th Ed) 535). In Colonial Securities Trust Company Limited -v- Massey and Others [1896] 1 QB 38 a majority of the Court of Appeal applied the approach taken in Savage -v- Adam W.N. (95) 109 (ii). Lord Esher MR at page 39 stated:*

[1] [2013] FJCA 9; ABU40.2011 (8 February 2013)

"I have frequently stated this rule; and I think it is well expressed by Lopes L.J. in Savage -v- Adam (supra). The matter is thus stated: "Where a case tried by a judge without a jury comes to the Court of Appeal, the presumption is that the decision of the Court below on the facts was right, and that presumption must be displaced by the appellant. If he satisfactorily makes out that the judge below was wrong, then in as much as the appeal is in the nature of a rehearing, the decision should be reversed: if the case is left in doubt, it is clearly the duty of the Court of Appeal not to disturb the decision of the Court below."

The burden of establishing that the trial judge has erred rests on an appellant, and if the Court of Appeal is not satisfied that the judge was wrong, the appeal will be dismissed.

[12] *The procedure for an appeal to the Court of Appeal is set out in Rule 15 (1) of the Court of Appeal Rules which states that an appeal shall be by way of re-hearing. The words do not mean that the Court of Appeal conducts a hearing "de novo". The parties do not start afresh as they did in the court below nor are the witnesses heard afresh. It means a rehearing of the case on the papers. This Court will consider the material which was before the learned Judge in the court below. The Court will weigh and consider the judgment and then determine whether the judgment was wrong.*

……

[15] *It is now generally accepted that an appellate court will be reluctant to reject a finding of specific fact, particularly where the findings are based on the credibility, manner or demeanour of a witness. On the other hand, an appellate court will far more readily consider itself to be in just as good a position as the trial judge to draw its own inferences from findings of specific facts.*

[16] *The reason for the distinction is the recognition that the trial judge has an advantage in assessing the evidence to arrive at a finding of fact. The trial judge sees the witnesses give their evidence. He has the advantage of observing and listening. This advantage is not enjoyed by an appellate court that has only the record before it. As a result a finding of a specific fact should be rejected only where it can be shown that the trial judge erred in principle.*

[17] *Nevertheless, there are occasions where it will be open to an appellate court to reject a finding of a specific fact. Occasionally, apart from the manner or demeanour of a witness, the logical consistency of the evidence itself will be relevant on an assessment of the evidence. In such a case an appellate court is just as capable of determining whether evidence is logically consistent. Therefore when a finding of fact depends on a matter such as the logical consistency of the evidence rather than the manner of the witness, an appellate court may be more readily willing to reject a finding specific fact.*

[21] The Appellant confirmed in her submissions that the Appellant's grounds of appeal relate principally to the Judge's findings of fact and assessment of lack of credibility of the Appellant and her expert witness Dr. Adams.

Submissions on Grounds of Appeal

[22] We will now consider the parties submissions on the grounds of appeal.

Grounds One and Three

[23] These grounds raise the following issues/questions which go to the heart of the grounds:-

a) Did the Respondent agree that it owed a duty of care to the Appellant and that it had breached that duty of care

b) Was the Judge correct in finding on the balance of probabilities that there was no conclusive evidence of the Appellant ingesting chemicals and injury caused thereby.

c) Was the Judge correct in finding on the totality of the evidence that the Appellant was an untruthful witness.

[24] We will now consider the parties submissions in respect of these issues/questions.

a) Did the Respondent agree that it owed a duty of care to the Appellant and that it had breached that duty of care

[25] The Appellant contends that it was not in dispute that the Respondent owed the Appellant a duty of care. The Appellant states further that there can be no doubt although not specifically addressed in the Judgment that the question of whether the Respondent breached its duty of care was not "contended."

[26] The Appellant submits that the fact that a cleaning agent mixed with water had been left in the Appellant's room on the date in question was not contested.

[27] The Appellant points out that the Respondent's only witness the Resort manager stated in cross examination that his understanding was that a water bottle with cleaning detergent was left accidentally in the room which the Judge noted in his Judgment.

[28] On the issue of whether the cleaning agent was contained in a Fiji Water bottle the Appellant refers to Police Statements tendered by the Respondent's Housekeeping Supervisor who confirmed that she had mixed the cleaning chemical with water and then gave it to her cleaning staff to clean the floor in the rooms and the housekeeper who cleaned the room before it was occupied by the Appellant where she stated:

> *"I remember that particular day that I was cleaning that room when I told to work quickly and work in Room 216 that's why I forgot about the cleaning detergent because I was in a hurry. That particular chemical is normally put in a particular bottle but that day we were short of spray bottle that's why it was bottled in the Fiji Water bottle."*

[29] That Appellant submits that the above confirms that there can be no doubt the Respondent had breached the duty of care it owed to the Appellant.

[30] The Respondent submits on the other hand that at all times the Respondent denied liability. In particular in its closing submissions it submitted that the evidence adduced in the matter did not show that the Appellant drank any chemical and further that in his Judgment the Judge noted that the Respondent had denied both liability and quantum.

Discussion

[31] The evidence confirmed that the Appellant had occupied Room 210 and her allegation was that she had accidently drunk the cleaning solution when she was in that room.

[32] The Appellant in her submissions stated that the Respondent's own evidence confirmed that the cleaning agent had been mixed by the Respondent with water and packaged in a Fiji Water bottle and "forgotten" inside Room 216 which was subsequently occupied by the Appellant.

[33] We are prepared to accept for the purposes of this appeal that the Appellant's reference to Room 216 in her written submissions referred to above appear to be a typographical error and that she had intended to note the room as number 210.

Conclusion

[34] It goes without saying that the Respondent denied liability throughout the proceedings. Indeed if it had accepted that it owed a duty of care to the Appellant and

that it had breached that duty of care there would have been no need for the Appellant to commence the proceedings.

b) Was the Judge correct in finding on the balance of probabilities that there was no conclusive evidence of the Appellant ingesting chemicals and injury caused thereby.

[35] The Appellant contended that the Appellant had given detailed evidence at the trial of how her life was affected after ingesting the chemical in the Fiji Water bottle and of the health issues she suffered and continued to suffer following the incident and how her functionality in terms of work and social interactions were significantly affected in the years that followed.

[36] This evidence included:

While still in Fiji:-

a) The hurting she experienced immediately after swallowing the liquid.

b) Her undisputed visit to the hospital that evening.

c) That she felt she might die and the stress associated with that thought

d) She had diarrhoea.

e) That she had visited a local doctor namely Dr Raju and received medication.

After returning to Australia:-

a) Being treated by her Australian general practitioner.

b) Seeing a Gastroenterologist and having a gastroscopy/ endoscopy and colonoscopy which determined that apart from a finding of mild oesophagitis there were no adverse finding in relations to the Appellants gastrointestinal tract but that the Gastroenterologist expressed the view that her symptoms of diarrhoea and reflux were a result of stress relating to accidentally ingesting cleaning fluid.

c) Visits to psychiatrists and psychologists.

d) Difficulties in her relationships with her husband and son and difficulties in her social life.

e) Absenteeism at work.

[37] On the other hand, the Respondent submits that there is no conclusive evidence of the Appellant ingesting any chemical as pleaded.

[38] The Respondent refers to paragraphs 4 and 5 of the Appellant's Amended Statement of Claim which state:

> *"4. On or about the 18th day of January 2005, whilst being a visitor and/or guest at the Defendants' Resort, the Plaintiff accidentally swallowed several mouthfuls of an unknown liquid negligently stored by the Defendant in a bottle of "Fiji Water" and negligently placed by the Defendant in her room.*
>
> *5. Subsequently the Defendant by its employees admitted that the "Fiji Water" 500 milliliter bottle from which the Plaintiff drank from, contained a detergent known as "Unique Pine" and was used by its cleaners as a cleaning agent in the rooms."*

[39] The Respondent contends that the Appellant's evidence at trial failed to establish on a balance of probabilities these assertions made in the Statement of Claim. Further the Respondent on this crucial issue of whether the Appellant drank from a 500ml Fiji Water bottle containing chemicals submitted as follows:

> *"(a). Apart from the Appellant's contention that she allegedly drank from a 500ml Fiji Water bottle, there was no evidence of anyone else seeing the 500ml Fiji Water bottle from which the Appellant allegedly drank. The Appellant's evidence was that her husband was in the same room when she allegedly drank from the 500ml Fiji Water bottle. However, the Appellant did not call her husband as a witness to give evidence.*
>
> *(b). There was also a dispute in the evidence as to the colour of the liquid that was allegedly consumed by the Appellant. In the Appellant's own evidence, the Appellant testified that the liquid she allegedly consumed looked like water and that it was clear and that it was not "brownish".*
>
> *(c). On the other hand, the Respondent's Housekeeping Supervisor who the Appellant had called as a witness and who had mixed the chemical with the water for cleaning purposes has stated in cross examination that the chemical was brown when mixed with the water turns brown. The Respondent points out that the Appellant did not re-examine the witness in this regard and submits therefore that the Appellant accepted this fact.*
>
> *(d). The Housekeeping Supervisor also testified that after the incident when she visited the room the Appellant's husband showed her a 1.5 liter Fiji Water bottle the contents of which were colourless and not brown and that she did not see a 500ml Fiji Water bottle in the room.*
>
> *(e). The Respondent submits that the discrepancies in the evidence relating to the Appellant's claim can be summarized as follows:*
>
> *(i) the Appellant was adamant that the liquid she drank was clear when the Housekeeping Supervisor's evidence was that the water turns brown when mixed with the chemical.*

> *(ii) no one saw the Appellant drink the water mixed with the chemical. The Appellant's husband who was present in the room when the Appellant allegedly consumed the mixed liquid did not testify.*
>
> *(iii) the 500ml Fiji Water bottle from which the Appellant allegedly consumed the mixed liquid was not seen by anyone and no reports were presented to explain the contents of the bottle and*
>
> *(iv) The Housekeeping Supervisor was shown a 1.5 liter Fiji Water bottle (with clear liquid) and did not see a 500ml Fiji Water bottle in the room."*

[40] Given these discrepancies the Respondent submits the Judge was correct to find that there is no evidence to suggest that any chemical was stored in a 500ml bottle in the Appellant's room and that it was hard to believe that the Appellant drank chemical stored in a 500ml Fiji Water bottle.

[41] The Respondent concludes that in respect of this issue that there is no evidence to prove on a balance of probabilities that the Appellant ingested any chemical from a 500ml Fiji Water bottle in her room on 18 January 2005 and therefore the Respondent cannot be liable for the consequences of the alleged digestion.

c) ***Was the Judge correct in finding on the totality of the evidence that the Appellant was an untruthful witness.***

[42] The Appellant notes that the Judge found that the Appellant's evidence was that she said she drank three to four mouthfuls of chemical which was allegedly stored in a 500ml Fiji Water bottle.

[43] The Appellant contends that the Judge misdirected himself when he focused on the size of the bottle.

[44] The Appellant submits as follows:

> *"60. Although the Appellant did not identify the size of the Fiji Water bottle, it was only in cross examination when perhaps under pressure she agreed with Respondent's counsel that the bottle was a 500m1 bottle. It is respectfully submitted that his lordship misdirected himself when he focussed on the size of the bottle rather than on the facts which were independently corroborated by Safaira Vurabere, PW5 the executive housekeeper employed at the Resort.*
>
> *61. Those corroborated facts, were:*

(i) that the bottle was a Fiji Water bottle;

(ii) that both she and Maggie Devon who attended the Appellant's room were given the opportunity to smell the contents of the bottle. She confirmed that after smelling it that it was Unique Pine. She was in a position to do so as she had mixed it with water earlier that day. (See page 1083 - Vol 4, Principal Record). When pressed under cross examination that she did not smell the contents of the bottle, she confirmed that she had smelt it. (Page 1089 - Vol 4, Principal Record)

62. It is submitted, that the size of the bottle is irrelevant. The most material facts were, firstly, whether there was a bottle in the room in the first place, of which there can be no question, and secondly, that the contents of the bottle contained Unique pine, which again was confirmed by Ms. Vurabere in her oral testimony and the police statement of Leba Lutumailagi tendered by the Respondent.

63. In considering the totality of the evidence on the material facts referred to above, it is submitted, that it was not reasonable for his lordship to discredit the Appellant's testimony simply on the basis of a non-material fact such as the size of the bottle."

[45] The Appellant further submitted that the Judge was unreasonable in finding that the fact that the Appellant failed to spit out the liquid when she identified that it had a strong smell and tasted like Vicks was hard to believe and thereby affected her credibility.

[46] The Appellant also submitted that whilst it was not unreasonable to expect that someone accidentally ingesting an "unidentified liquid" would attempt to spit it out if not already swallowed or attempt to induce vomiting intentionally it is submitted the reaction of an individual in such a situation is a subjective view and will defer from person to person and will depend on the specific circumstances.

[47] The Appellant had testified that everything felt slow after she drank the liquid and that she thought she was going to die and was therefore under mental and psychological stress. Her reaction was her own and not necessarily how others might react in a similar situation. It is submitted that her reaction in this regard cannot be a reasonable basis for the trial judge to disbelieve her testimony on the question of whether she ingested the liquid in the Fiji Water bottle.

[48] The Appellant also refers to two further findings of fact which it is submitted appears to have "significantly" impacted the Judge's conclusion of the lack of credibility of the Appellant's evidence namely in the Judges statement that the Appellant had found

her "dream job" without evidence to back this up and accepting Mr. Dunn's evidence that the Appellant was seen by him to be having a good time at the Resort and attending to resort activities at the resort after that incident when this was discredited in cross-examination which it is submitted determined that this was hearsay.

[49] The Appellant concludes her submissions in respect of this issue as follows:

> *"85. In totality, the Appellant respectfully urges the Court to consider that the trial judge fell into error when he considered the Appellant an untruthful witness when the weight and consistency of the entirety of the evidence reflects otherwise. His lordship placed an inordinate and excessive level of importance on the size of the Fiji Water bottle which formed the primary basis in concluding that the Appellant was not a believable witness. At best, the size of the bottle was a peripheral or non-material matter, insufficient on its own to discredit the totality of the Appellant's testimony.*
>
> *86. His lordship made errors of fact in his conclusion that the Appellant was seen to be having a good time after the incident, when Mr. Dunn's evidence was based on hearsay and there was no evidence to support this finding. Furthermore, his lordship considered the incidence of the Appellant vomiting at the Lautoka hospital an act of concealment by her, when this was never put to her in cross examination, nor is it supported by the evidence.*
>
> *87. The Appellant respectfully prays that there are sufficient grounds for the Court to interfere with and overturn the decision of the trial judge and find that the Appellant gave credible and cogent evidence that she had ingested the chemical mixed with water contained in a Fiji Water bottle which had been left in her hotel room. Secondly, that as a consequence of her ingestion, the Appellant has suffered significant injuries in the form of the consistent vomiting, diarrhoea, burning in the mouth, abdominal cramps, stress, depression and PTSD she was subsequently diagnosed with."*

[50] The Respondent in response submitted as follows:-

> *"50. Based on the reasons provided in the Judgment, particularly at paragraph 104 of the Judgment (see Volume 1 of 5 of the Principal Records, page 44), the learned Trial Judge considered the totality of the evidence and highlighted the inconsistencies and the improbabilities in the Appellant's evidence to conclude that the Appellant was an untruthful witness.*
>
> *51. The inconsistencies and improbabilities in the Appellant's evidence are shown in the Court Records, and a few examples are:*
>
> *(a) the Appellant claimed that she drank the alleged chemical from a 500m1 Fiji Water bottle. The first 3 people who attended to the Appellant after the alleged consumption were the Appellant's husband, Ms Maggie Davon and Ms Vurabera. Out of these 3 people, the Appellant only called Ms Vurabera to give evidence in Court. Ms Vurabera's*

evidence was that she was only shown a 1.5 litre Fiji Water bottle when she stood outside the Appellant's room on 18 January 2005. She did not see a 500m1 Fiji Water bottle which the Appellant claimed she consumed the chemical from (see Volume 4 of 5 of the Principal Records, page 1089);

(b) the Appellant alleged that the liquid she drank was water mixed with Unique Pine (see Volume 4 of 5 of the Principal Records, page 890) which was "like water, clear" (see Volume 4 of 5 of the Principal Records, page 891). However, Ms Vurabera, who regularly dealt with water mixed with Unique Pine, testified in Court that the colour of the water will turn brown when Unique Pine is mixed with water (see Volume 4 of 5 of the Principal Records, page 1087);

(c) the Appellant gave evidence that she drank 4 big mouthfuls of the liquid and then realised that tasted like Vicks. This was highly improbable since Ms Vurabera testified that if Unique Pine is stored in a water bottle then it will have a smell and a person would get such a smell as soon as they open the cap of the bottle (see Volume 4 of 5 of the Principal Records, page 1089). The Appellant further testified that she did not spit or gargle after consuming the alleged chemical, which is highly improbable if the Appellant's assertion is to be believed that the liquid had a taste like Vicks if the liquid in the 500m1 Fiji Water bottle from which the Appellant allegedly drank did have any water mixed with Unique Pine, then based on the evidence, it is highly likely that the Appellant would have noticed its smell when She opened the bottle or when she took the first mouthful of the liquid (if she did at all);

(d) although the Appellant stated that the liquid tasted like Vicks, the Appellant testified that she did not stop or spit out the liquid because she had no reasons to spit it out (see Volume 4 of 5 of the Principal Records, page 965). Given her own evidence that the liquid tasted like Vicks, it is highly improbable for the Appellant to drink 4 big mouthfuls of a liquid which the Appellant thought was water but tasted like Vicks without spitting it out at least after the first or second mouthful that she drank (fi she drank at all);

(e) while the Appellant's narrative had been that she experienced symptoms like vomiting and diarrhoea after allegedly ingesting a chemical from a 500m1 Fiji Water bottle, the Appellant admitted that she did not tell her doctors, particularly her GP, Dr Srinivasan, that she vomited immediately after taking Mylanta at the Lautoka Hospital (see Volume 4 of 5 of the Principal Records, page 995). The Appellant also admitted that she did not tell Dr. Pokorny, who conducted the endoscopy, about taking Mylanta at the Lautoka Hospital and vomiting after that (see Volume 4 of 5 of the Principal Records, page 998). This was significant because it was the Appellant's own evidence that from the time she allegedly ingested the chemical, the first time she vomited was after she was given the "white liquid" which she described as Mylanta at the Lautoka Hospital (see Volume 4

of 5 of the Principal Records, page 971). This evidence increased the probability that if the Appellant did suffer from vomiting, diarrhoea and other symptoms, then it would have likely been: caused by the "white liquid" which she consumed at the Lautoka Hospital. Dr Raju had testified that consuming Mylanta caused side effects such as vomiting and diarrhoea;"

[51] The Respondent concluded that:

> *"52. The learned Trial Judge made a finding that there could not have been a 500ml bottle in the Appellant's room with any chemical (paragraph 72 of the Judgment, see Volume 1 of 5 of the Principal Record, page 40). We respectfully submit that this finding of fact is based on the logical consistency of the evidence provided at trial, as the learned Trial Judge concluded that there was no evidence to suggest that there was a 500m1 bottle in the Appellant's room with any chemical in it. Given that is the case, any complaints of any injuries suffered thereafter could not have logically arisen due to any fault of the Respondent, so the Respondent cannot be logically held liable for any negligence if there was no 500m1 Fiji Water bottle with any chemical in it for the Appellant to consume from in the first place.*
>
> *53. Based on the totality of the evidence and the inconsistencies and improbabilities highlighted above, we respectfully submit that it was open to the learned Trial Judge to find that the Appellant as an untruthful witness and disregard evidence that were inconsistent and/or improbable."*

Discussion

[52] It is clear from the High Court Record that the Appellant did not adduce any corroborative evidence of her ingestion of any chemical. The only evidence was her own testimony. Counsel for the Appellant conceded this at the hearing before this Court. She also conceded that the Gastroenterologist did not find any harm caused by ingestion of a chemical after his examinations.

[53] The Appellant submits that the Judge misdirected himself when he focused on the size of the bottle and placed an inordinate and excessive level of importance on the size of the bottle. This submission is unsustainable.

[54] It was the Appellant's case as set out in the Statement of Claim that she drank from a 500ml Fiji Water bottle. The Appellant's Counsel acknowledged that she confirmed this fact in cross-examination but may have done so under the stress of cross-examination. This contention is also unsustainable.

[55] Further it was the Appellant's evidence that her husband was in the room when she ingested the chemical however he was not called as a witness. The housekeeper who allegedly left the Fiji Water bottle containing the chemical in the room was also not called as a witness.

[56] As noted above the Appellant submitted that the Judge was unreasonable (without explaining how) in finding that it was hard to believe that the Appellant failed to spit out the liquid when she identified that it had a strong smell and tasted like Vicks and that this affected her credibility. We do not agree. We consider this to be a reasonable finding in the circumstances of this case. With regard to the Judge's reference to the Appellant finding her "dream job" the Appellant has taken this comment out of context. The comment was made in respect of the credibility of Dr Adams, not the Appellant.

[57] Further the Appellant submitted that the Judge had erred in accepting the evidence of the Respondent's witness Mr. Dunn that he had seen the Appellant having a good time at the Resort after the incident when this evidence was discredited as hearsay in cross-examination. A review of the transcript shows that in examination in chief Mr. Dunn stated that he had observed the Appellant at the restaurant and attending cultural events. In cross-examination he agreed that he had not personally seen the Appellant watching a "Meke" and that he was advised of this by staff, but he wasn't cross-examined on her other activities at the Resort which he said he observed. In any event, we are not persuaded that this evidence "significantly" impacted the Judge's conclusion on the lack of credibility of the Appellant.

[58] Another aspect of the evidence which is significant in respect of these issues was the colour of the liquid in the bottle. The Appellant had pleaded and testified that the liquid in the bottle was clear. On the other hand, the Housekeeping Supervisor who was called as a witness by the Appellant testified that the chemical used for cleaning by the Resort, when mixed with water, turned brown. The Supervisor when shown a 1.5 litre bottle of Fiji Water by the Appellant's husband after the incident confirmed that the liquid in the bottle was clear. She did not see a 500ml bottle of Fiji Water in the room. This witness did confirm in her evidence that when she smelt the contents of the 1.5 litre bottle it smelt like the chemical the Resort used for cleaning. Although this witness confirmed that she smelt the cleaning liquid in the bottle shown to her she

was clear that the bottle was a 1.5 litre bottle and that the liquid in the bottle was clear and not brown. Furthermore she could not confirm that the liquid was in a 500ml bottle as claimed by the Appellant.

[59] Counsel for the Appellant confirmed at the hearing of this appeal that it was the Appellant's own case that she drank colorless liquid but that their own witness the Housecleaning Supervisor confirmed that the cleaning chemical when mixed with water was brown. Counsel agreed that she did not re-examine the witness on this aspect of the evidence. This evidence therefore is unchallenged.

[60] The Judge found as a fact that there was no evidence to suggest that there was any chemical in a 500ml Fiji Water bottle in the Appellant's room. We are not persuaded that this finding was not open to the Judge, on the totality of the evidence. We also find that based on the inconsistencies in the evidence highlighted above it was open to the Judge to conclude that the Appellant was an untruthful witness and to disregard her evidence.

Conclusion

[61] We note the observations of this Court in the ***Nasese*** case. We have also considered the authorities that the Appellant has invited us to consider on these grounds in her submissions. We have reviewed the pleadings, the transcript of evidence and the Judgment and considered the submissions of both parties. We find in answer to the issues/questions a) and b) in paragraph [23] above that the appellant has not established that the Judge erred in finding on the balance of probabilities that there was no conclusive evidence of the appellant ingesting chemicals and any injuries caused thereby. We also find that the appellant has not established that the Judge erred in finding on the totality of the evidence that the Appellant was an untruthful witness.

[62] We consider the Judgment to be comprehensive and logical in its consideration and conclusions of these issues. The appellant has not established that the Judge erred in principle. We do not find any logical inconsistency in the Judge's assessment of the evidence. We have considered all the evidence and do not consider that the conclusions of the Judge were wrong. For the reasons stated above Grounds One and Three of the Appellant's Grounds of Appeal fail.

Ground Two

Was the Judge correct in finding that the Appellant did not establish that Dr. Adams was an expert

[63] The Judge's findings in this regard are at paragraphs 48, 49 and 50 of the Judgment where the Judge states as follows:

> *"[48] The plaintiff called Dr Adams to give expert evidence. Undoubtedly, he was called as an expert witness, not as fact witness who testifies to his own personal observations when diagnosing, examining and treating the plaintiff.*
>
> *[49] Dr Adams did not present any document including the registration with AHPRA or certificates of his degree in medicine and training in psychiatry, to demonstrate that he is an expert suitable to give-expert evidence in this matter. The court cannot take legal notice of his expertise. Even his AHPRA registration number is not mentioned in his CV. It is, therefore, doubtful whether his is currently practising in Australia. He claimed to be a consultant psychiatrist.*
>
> *[50] It is the obligation of the party calling an expert to give evidence that the witness is an expert and he or she has the necessary expertise to help the court. I accept the defendant's submission that Mr Adams had failed to establish that he is an expert. On the evidence, I find that the plaintiff has failed to establish that Mr Adams is an expert and he possesses necessary expertise to assist the court in the matter. I can reject his report and evidence on this ground alone. However, for the sake of completeness, I feel obliged that I need to comment on his credibility."*

[64] The Appellant submits that Dr Adams gave extensive evidence of his qualifications and experience sufficient to render him an expert in the field of psychiatry and that the Judge erred in failing to state his reasoning as to his rejection of this oral testimony of Dr Adams regarding his qualifications and experience apart from the absence of independent verification.

[65] The Respondent on the other hand submitted that Dr Adams admitted that health practitioners in Australia need to be registered with the Australia Health Practitioner Regulatory Agency (AHPRA) in order to practice as a psychiatrist in Australia however his CV did not state that he was registered with (AHPRA) in 2018 when he prepared his report.

Discussion

[66] Both parties referred to this Court's decision in **Kumar v Krishna**[2] where it was noted as follows:

> *"[73] It is the duty of the court to assess the value of evidence that is admitted and to draw the necessary inferences from it. A witness is entitled to only state the facts from his observations and knowledge. An expert witness may express an opinion, however, it is the duty of the judge to be satisfied that the expert possesses the knowledge and skill in respect of the particular matter on which his opinion is sought, and the judge must then arrive at his independent opinion. There must be neither suspicion nor undue deference to expert opinion, nor an indiscriminate adoption of expert opinion. The function of the court is not to abdicate its duty to decide."*

[67] In the Judgment the Judge was correct to observe that *"…it is the obligation of the party calling an expert to give evidence that the witness is an expert and he or she has the necessary expertise to help the Court."*[3]

[68] In the hearing of the appeal the Court proposed to Counsel for the Appellant that it was basic that an expert must be qualified to present expert evidence. Counsel responded that she had no quarrel with that proposition but that there was no challenge to Dr Adams' testimony of his competence, skill and experience at the trial.

[69] This is not correct. There was prolonged cross examination by Defence Counsel at the trial regarding his qualifications and experience in his CV and the lack of independent certification thereof.

[70] Counsel for the Appellant agreed that it was an oversight not to present verification of Dr Adams' qualifications and experience at the trial but repeated that there was no challenge to his testimony about his skill and experience (which as noted above is not correct.) In any event Dr Adams' skill and experience had to be established as a prior qualification to give evidence. At the very least evidence should have been tendered to confirm that he was registered with AHPRA.

[2] [2022] FJCA 128; ABU0068.2016 (30 September 2022)
[3] Para 49 of the Judgment

[71] Dr Adams had admitted at the trial that he needed to be registered with AHPRA in order to practice as a psychiatrist in Australia however his CV did not confirm that he was registered with AHPRA at the time he made his report.

[72] In the circumstances the Appellant has not established that the Judge erred in finding that the Appellant did not establish that Dr. Adams was an expert and in rejecting his report and evidence.

[73] As per **Kumar v Krishna** referred to above it was the duty of the Judge to be satisfied that the expert possesses the knowledge and skill in respect of the particular matter and the Judge correctly discharged this duty.

Conclusion

[74] For the reasons set out above this ground also must fail.

Grounds 4 to 10 inclusive

[75] In view of our finding in respect of Grounds One and Three we need not consider Ground Four. As Grounds 5 to 10 inclusive do not have any bearing on the outcome of this appeal we do not consider it appropriate to give consideration to these grounds.

Appeal against the Costs Ruling

[76] The Appellant appealed against the Costs Ruling on the following 5 grounds:-

> 1. The learned trial Judge erred in law and fact in the exercise of his discretion when he found that the Respondent was entitled to increased costs in excess of the higher scale set within Appendix 4, Schedule 1 in that his lordship incorrectly evaluated the applicable factors pursuant to Order 62 Rule 13 in determining whether the Respondent's costs had been reasonably incurred, when his lordship:
>
> (i) concluded that the Appellant made a number of interlocutory applications "on the basis that damage was continuing" [page 6, para18] when there was no evidence to support this;
>
> (ii) concluded that the delay in the matter was largely attributed to the Appellant [page 6, para 19] when the record of the proceedings reflects that the delay in the proceedings were influenced by circumstances beyond

the control of the Appellant as well as the Respondent's own application for an adjournment of the trial;

(iii) took into account irrelevant matters or placed excessive consideration on what his Lordship deemed to be matters that added to "the complexity of the proceedings" [page 6, para 20].

2. The learned Judge erred in law and fact when he concluded that "it was not in dispute that the items specified in the bill of costs were reasonably incurred" [page 7, para 23] when the Appellant's affidavit in opposition at paragraph 11 reflected that the statement of account in the Respondent's affidavit did not provide particulars to explain the basis upon which the costs claimed were incurred.

3. The learned Judge erred in law and fact in his assessment of the following items under the bill of costs:

(i) Item 19 - Instructions for preparing for trial inclusive of instructions for preparations of brief, when there was no evidence before the Court to support the particulars relating to this item;

(ii) Item 20 - Attendance at trial of an action or proceeding per day, when the Court included the trial date of 23 November 2018 when on 23 November 2018, the court had determined that there would be no costs and did not reserve costs or determine that costs would be in the cause.

(iii) Item 20 - Appearance at Court mentions and hearings, in respect of which the Court assessed the sum of $10,250 when there is no provision for this item under Appendix 4, Rule 1.

(iv) Item 21 - Brief fee to extra barrister or solicitor in respect of any proceeding is certified for per day ($600 per day on higher scale), when there was no evidence to justify the claim for $600 per day which was manifestly excessive given that additional solicitor was a junior associate.

4. The learned trial Judge erred in law and fact in the exercise of discretion when he assessed costs in the total sum of $37,550 in that his assessment of the individual items in the Respondent's bill of costs was manifestly excessive and particularly in light of the absence of evidence to support several of the items in the bills of costs.

5. The learned trial Judge erred in law and fact in the exercise of his discretion in assessing costs on an increased basis. The learned trial Judge erred in law and fact when he summarily

awarded costs of $2,000 the assessment proceeding, which sum was excessive.

[77] The Appellant abandoned Gound 3(ii) above at the hearing of the appeal.

Ground One

[78] With respect to Ground 1 the Appellant submits:

> *"158. A material consideration in the chronology of the proceedings that his lordship appears to have had no regard for, was that fact that slightly more than a year after the claim was initiated the 2006 coup occurred and that latter in 2009 the Constitution was abrogated. The effect this had on the judicial system, resulting in overall delay as judicial appointments were terminated and reappointments took place slowly over a period of years, is a matter that can be judicially noticed.*
>
> *159. The first trial dated was fixed for 22 and 23 November 2010, but this was adjourned by the Court (See page 831 - 832, Vol 4, Principal Record). The next trial date assigned was for 1 and 2 August 2011 but this was also adjourned on the application for the Respondent. (See page 833 - 834, Vol 4, Principal Record). The third trial date fixed was for the 6 - 10 August 2018. The Appellant sought an adjournment on account of Mr. Myar's unavailability. The application was not opposed by the Respondent and was granted by the Court. The trial was then fixed for 23 & 26, 29 and 30 November 2018. It is at this point that the issue of leave being required to file supplementary affidavit was first raised resulting in the adjournment of the trial at the request of the Appellant. His lordship held that costs would be in the cause (Page, 850, Vol 4, Principal Record). Considering the history relating to the assigned trial dates and their vacation, all the delay, cannot be laid squarely at the feet of the Appellant. A material factor in the adjournment of the trial dated set for November 2018 had to do with the Appellant's position regarding the supplementary list of documents.*
>
> *160. In terms of the interlocutory applications made by the Appellant, they were only in relation to the amendment of the Statement of Claim, of which did not necessitate a full hearing in the same way the Respondent's application did. All other applications that were made related to or arose out of the Respondent position, which the judge agreed with on the issue of whether leave was required to file a supplementary AVLD."*

[79] With respect to the remaining grounds the Appellant submits:

> *"162. The Respondent's did not annex a bill of costs in their supporting affidavit. In their Summons at pages 29 - 31, Costs Record, the set out the costs they were seeking in the total sum of $73,250. The Appellant's overall position with regard to the sum claimed under*

the various heads is that several were not supported by any evidence.

163. In particular they sought the sum of $600 for a junior solicitor for the conduct of the trial per day. There was no basis for the Court to make an award at this rate for a junior solicitor.

164. Importantly under Appendix 4 Rule 1 of the High Court Rules there is no provision for a sum for mentions or hearings. The Court when taxing costs is bound by the scope of the Rules.

165. The Appellant submits that the imposition of the sum of $2,000 for the costs hearing was manifestly excessive given that this was a hearing as opposed to a trial for which costs in the sum of $2,000 are generally awarded.

166. Should this honourable Court be minded to consider and agree with these submissions, the Appellant submits that an award of not more than half of the sum granted is appropriate."

[80] The Respondent in response to the Appellant's submissions on Ground One first points out that in determining costs the Judge exercised a wide judicial discretion and referred to a Ruling of this Court in **Griffith v McGrath**[4] where Prematilaka RJA sitting as a single judge noted:

> *"[34] Costs are by statute and by rules of court in the discretion of court. The starting point is the general rule that costs follow the event and, therefore, the successful party ought to be paid its costs by the unsuccessful party. That general rule would apply unless there are cogent reasons to depart from it. The judge has a large discretion as to costs. However, that discretion must be exercised judicially i.e. in accordance with established principles and in relation to the facts of the case."*

[81] The Respondent submits that the Judge's findings in the Costs Ruling can only be disturbed if this Court considers that there has been an error in law or in principle. It is submitted that there has been no such error.

[82] The Respondent notes that the Judge in exercising his discretion considered the circumstances of the case and the complexity and the delay in the matter.

[83] The Respondent refers to several instances in the Court Record relating to adjournments and interlocutory applications to illustrate that the delay was largely attributed to the Appellant. We have considered these examples and agree with the Respondent.

[4] [2025] FJCA 45; ABU0063.2024 (24 March 2025)

[84] The Respondent also referred to several offers of settlement made by the Respondent to the Appellant based on the principles in **Calderbank v Calderbank**[5] in an effort to bring the matter to an end and avoid unnecessary costs which offers it submits were reasonable.

[85] In view of the above it is submitted that the Judge did not err in awarding costs.

[86] With respect to Grounds 2, 3 and 4 above the Respondent submits that it was not correct to say that Respondent did not annex a bill of costs in its supporting affidavit as the Respondent did provide a statement of account which reflected the legal costs. Further the Respondent submitted that in any event, there was no need for the Respondent to provide an itemised bill of costs since the assessment was carried out on a standard basis and not on an indemnity basis.

[87] The Respondent further submits with respect to Ground 3 (iv) above that the ground is baseless as the Appellant did not adduce any evidence to establish that the additional solicitor was a "junior solicitor" or that any lower sum was warranted based on her experience. In the end in any event the Court awarded a significantly lower sum than that sought by the Respondent.

[88] The Respondent further contends that the Judge did not err in awarding costs for mentions and hearing as Item 20 of the scale of costs at Appendix 4 of the High Court Rules allows for this.

[89] Lastly the Respondent contends that the Appellant has not established how the Judge erred in law or in principle in summarily awarding costs for the hearing of the assessment of cost in favour of the Respondent in the sum of $2,000.00 as contended by the Appellant.

Discussion

[90] This Court in **Yanuca Island Ltd v Markhan**[6] when considering an appeal concerning the exercise of a Judge's discretion in awarding costs stated:-

[5] [1975] 3 All ER 333
[6] [2005] FJCA 67; ABU0092.2004S (11 November 2005)

> *"[41]. Although a Judge does have an unlimited discretion in making a gross sum award of costs under O.62 r.7(4)(b), it is well recognised that the discretion must be exercised in a judicial manner. Referring to the English equivalent of the rule in question, Purchas LJ, delivering the judgment of the English Court of Appeal in Leary v Leary [1987] 1 All ER 261, 265 said:*
>
> *"The unlimited discretion given by Ord 62,r.9 must be exercised in a judicial manner. How the powers are to be used varies widely from case to case and each case must be considered on its own merits. It is easy to envisage cases where a Judge could be said to have acted unjudicially: e.g. by clutching a figure out of the air without having any indication as to the estimated costs; receiving such an estimate without the details being made available to the other side; or refusing a request to hear submissions on such a schedule if the party against whom the order is to be made makes, on reasonable grounds, an application to be heard."*
>
> *[42]. Purchas LJ referred with approval to the statement by Stevenson LJ in **Alltrans Express Ltd v CBA Holdings Ltd** [1984] 1 All ER 685, another English authority dealing with the exercise of a Judge's discretion in relation to costs, where His Lordship (p.690) said:*
>
> *"It seems to me that this court is in the same position as it is on any appeal against the exercise of the court's discretion. We must be very careful not to interfere with the judge's exercise of the discretion which has been entrusted to him. We can only do so if he has erred in law or in principle, or if he has taken into account some matter which he should not have taken into account, or, and this is an extension of the law which is now I think well recognised, if the Court of Appeal is of opinion that his decision is plainly wrong and therefore must have been reached by a faulty assessment of the weights of the different factors which he has had to take into account."*

[91] We have considered the Judge's Ruling in respect of costs and the parties submissions and do not consider that in terms of the authority cited above the Judge has erred in law or principle or has taken into account some matter which he should not have taken into account. Nor are we of the opinion that the decision is plainly wrong.

Conclusion

[92] For the reasons stated above we are of the view that the Appellant's grounds of appeal against costs must fail.

Outcome

[93] Having considered the parties submissions the Court has concluded for the reasons set out above that:-

a) Appeal ABU 043/2020 against Liability should be dismissed.

b) Appeal ABU 076/2020 against Costs should be dismissed.

[94] The Court makes the following Orders:

Orders of the Court

1. *Appeal ABU 043/2020 is dismissed and the Judgment of the High Court dated 07 May 2020 is affirmed.*

2. *Appeal ABU 076/2020 is dismissed and the Ruling of the High Court dated 06 August 2020 is affirmed.*

3. *The Appellant is ordered to pay costs to the Respondent in respect of both appeals summarily assessed in the total sum of $4,000.00 within 21 days.*

Hon. Mr. Justice Walton Morgan
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL

Hon. Madam Justice Karen Clark
JUSTICE OF APPEAL

Solicitors
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Munro Leys for the Respondent