IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 113 of 2015

BETWEEN : **APISALOME SAVU** of Natalau, Sabeto, Nadi, Fiji Islands, Farmer as the administrator in the estate of Tikiko Qoro deceased.

PLAINTIFF

AND : **ATISH NARAYAN** of Nadi, Fiji Islands, Driver.

1st DEFENDANT

AND : **CARPENTERS SHIPPING** of Nadi Town, Nadi, Fiji Islands.

2nd DEFENDANT

(Ms) Adi Vika Durutalo for the Plaintiff.
(Ms) Vikaili Buli for the Defendants.

Date of Hearing : - 15th July 2016.
Date of Ruling : - 25th November 2016.

RULING

(A) INTRODUCTION

(1) The matter before me stems from the Summons filed by the Defendants pursuant to Order 25, Order 24, rules 7, 10, 12 and Order 26, rules 1, 5, 6 of the High Court Rules and the inherent jurisdiction of the Court seeking the grant of the following Orders;

> *(a) The Plaintiff within 14 days disclose by affidavit copies of receipts and/or invoices for medicine, clothing, spectacles and any other expenses that was incurred by the deceased's mother as a dependant for the period of three years prior to the accident pertaining to Mr Tikiko Qoro which the Plaintiff, is or has at any time been in his*

possession, custody or power and if he parted with them, when he parted with any of them and what has become of them ***AND FOR A FURTHER ORDER*** *that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendants;*

(b) *The Plaintiff within 14 days disclose by affidavit copies of all receipts and/or invoices for expenses particularised under special damages as claimed in the pleadings which the Plaintiff, is or has at any time been in his possession, custody or power and if he parted with them, when he parted with any of them and what has become of them* ***AND FOR A FURTHER ORDER*** *that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendants;*

(c) ***AND FOR A FURTHER ORDER*** *to file and deliver interrogatories and that the Plaintiff do answer the interrogatories in the form annexed to the affidavit of Arvendra Kumar by way of affidavit by filing and serving a copy thereof to the Defendants within 14 days from the service of the Order to be made hereon upon.*

(d) *An award of costs in favour of the Defendants on a full solicitor/client indemnity basis.*

(2) The Summons is supported by an Affidavit sworn by "Arvendra Kumar", the Insurance Officer, of Sun Insurance Company Limited, the Third Party Insurer of the Second Defendant.

(3) The Summons is contested by the Plaintiff. The Plaintiff filed an Affidavit in Opposition, sworn on 05th May 2016, opposing the application for Specific Discovery and request for answers to the interrogatories. Regrettably, the Defendants did not file an "Affidavit in Reply".

(4) The Plaintiff and the Defendants were heard on the Summons. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff and the Defendant filed a careful and comprehensive written submission for which I am most grateful.

(B) THE FACTUAL BACKGROUND

(1) What is this case before me? What are the circumstances that give rise to the present application?

(2) On 16th July 2015, the Plaintiff issued a Writ against the Defendants claiming damages pursuant to Compensation to Relatives Act, Cap. 29 and the Law Reform (Miscellaneous Provisions) (Death and Interest) Act, Cap. 27.

(3) The Plaintiff is the brother and administrator of the estate of Tikiko Qoro who died due to a motor vehicle accident on 17th July 2013.

(4) The First Defendant is an employee of the Second Defendant.

On 17th July 2013, at about 0305 hours, the deceased was crossing the Queens road, Waimalika, Nadi, when motor vehicle registered number DR-825, being driven by the First Defendant in the course of his employment and owned by the Second Defendant came into collision with the Plaintiff.

(5) The thrust of the Plaintiff's claim is that the Deceased died as a result of the First Defendant's negligence whilst in the course of his employment with the Second Defendant.

(6) The Plaintiff has sought relief for special damages, general damages, loss of earnings (both past and future), damages under Compensation to Relatives Act and the Law Reform (Miscellaneous Provisions) (Death and Interest Act). The Plaintiff seeks the relevant relief based on a loss of dependency.

(7) The Defendant's contention is that the collision occurred as a result of the deceased's negligence (whether sole or contributory). Furthermore, the Defendants asserted that the accident was inevitable as the deceased suddenly and without warning crossed the road.

(C) THE LAW

1. Against this factual background, it is convenient to indicate something of the relevant law.

2. Rather than refer in detail to the various authorities, I propose to set out, with only very limited citations what I take to be the principles in play.

Provisions relating to **"Specific Discoveries"** are contained in **Order 24, rule 7** of the High Court Rules.

Order 24, rule 7 provides;

Order for discovery of particular documents (O.24, r.7)

7.-(1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not than in his possession, custody or power, when he parted with it and what has become of it.

(2) An order may be made against a party under this rule not withstanding that he may already have made or been required to make a list of documents or affidavit under rule 2 or rule 3.

(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified or described in the application and that it relates to one or more of the matters in question in the case or matter.

Discovery can be sought at any stage of a proceeding even after a judgment or order in an action has been made. [See; **Singh v Minjesk Investment Corporation Ltd & Anor**, High Court Civil Action No:- HBC 148 of 2006, **Korkis v Wer & Co**. (1914) LT 794.]

Courts have a wide jurisdiction to order discovery and inspection.

In **Singh v Minjesk** (*supra*) Master J. Udit canvassed the applicable principles and case law authorities in some detail. From his analysis, what emerges clearly is that the onus initially is on the applicant to establish the following by way of affidavit evidence:

(i) *Identify clearly the particular document or documents or class of documents that he seeks from to be discovered by the opposing party (see Order 24 Rule 7 (1).*

(ii) *Show a prima facie case that the specific document or class of documents do in fact exist or have existed (see Order 24 Rule 7 (1)).*

(iii) *Establish that these documents are relevant in the sense that they relate to the matter in question in the action. In other words, the information in the document must either directly or indirectly enable the applicant either to advance his own case or to damage the case of his or her adversary. Alternatively, it is sufficient if the information in the document is such that it may fairly lead to a train of enquiry which may have either of these consequences. The relevance of a document is to be tested against the issues and/or questions raised by the pleadings (see **A.B. Anand (Christchurch) Ltd v ANZ Banking Group Limited** (1997) 43 FLR 22 30 January 1997).*

*It is important to note that whether or not any particular document is admissible or inadmissible is immaterial to its discoverability. It is enough if the document is likely to throw some light on the case (see **Volume 13 paragraph 38 of Halsbury's Laws of England – 4th Edition) page 34** cited in **Singh v Minjesk***

(iv) *Show that these documents were in the physical possession, custody (i.e. the mere actual physical or corporeal holding of the document regardless of the right to its possession) or power (i.e. the enforceable right to inspect it or to obtain possession or control of the document from one who ordinarily has it in fact) of the opposing party (see Order 24 Rule 7 (3)).*

In **Westside Motorbike Rentals (Fiji) Limited v Toganivalu Civil Action No, 55 of 2008** Master Tuilevuka (as he was then) said;

> *"[7]. Discovery can be sought at any stage of a proceeding even after a judgement or order in an action has been made (see **Singh v Minjesk Investment Corporation Ltd & Anor- High Court Civil Action No. HBC 148 of 2006** where Master Udit cited Korkis –v- Wer & Co. [1914] LT 794 as authority for this position).*
> *[8]. The following principles emerge from **Singh v Minjesk Investment Corporation Ltd & Anor- High Court Civil Action No. HBC 148 of 2006.** The onus initially is on the applicant to establish the following by way of affidavit evidence:*
>
> *(i)* ***identify clearly** the particular document or documents or class of documents that he seeks from to be discovered by the opposing party (see **Order 24 Rule 7 (1)).***
>
> *(ii)* ***show a prima facie case** that the specific document or class of documents do **in fact exist or have existed (see Order 24 Rule 7 (1)).***
>
> *(iii)* ***Establish that** these documents are **relevant** in the sense that **they relate to the matter in question in the action.** In other words, the information in the document must either directly or indirectly enable the applicant either to advance his own case or damage the case of his or her adversary. Alternatively, it is sufficient if the information in the document is such that it may fairly lead to a train of enquiry which may have either of these consequences. The relevance of a document is to be tested against the issues and/or questions raised by the pleadings (see **A.B Anand (Christchurch) Ltd –v- ANZ Banking Group Limited (1997) 43 FLR 22 30 January 1997).***
>
> *It is important to note that whether or not any particular document is admissible or inadmissible is immaterial to its discoverability. It is enough if the document is likely to throw some light on the case (see **Volume 13 paragraph 38 of Halsbury's Laws of England- 4th Edition) page 34 s cited in Singh v Minjesk).***
>
> *(iv)* ***show that** these documents were in the physical possession, custody (i.e. the mere actual physical or corporeal holding of the document regardless of the right to its possession) or power (i.e. the enforceable right to inspect it or to obtain possession or control of the documents from one who ordinarily has it in fact) of the opposing party (see **Order 24 Rule 7 (3)).***

[9]. Courts will not allow the discovery process to be used towards assisting a party upon a fishing expedition such as to fish for witnesses or a new case (see ***Martin and Miles Martin Pen Co. Ltd v Scrib Ltd*** *[1950] 67 RPC 1-7 as cited in* ***Singh v Minjesk), Calvet –v- Tomkies*** *[1963] 3 All ER 610.*

Nor will discovery be ordered in respect of documents which are not related to or may not affect the actual outcome of the action: ***Martin and Miles Martin Pen Co. Ltd.- v- Scrib Ltd. [1950] 67 RPC 1-7).*** *Furthermore, discovery will also be prohibited if it is for a general purpose of enabling a party."*

In **Wakaya Ltd v Nusabaum HBC 256 of 2010** Master Amartunga (as he was then) set out the requisite test under Order 24, i.e.

1. *Supreme Court Practice (1999) at p 471 24/7/2 state as follows:*

   '...the present rule an application may be made for an affidavit as to specific document or classes of documents. This must be supported by an affidavit stating that in the belief of the deponent other party has or has had prima facie case is made out for (a) possession, custody or power and (b) relevance of the specified documents ***(Astra National Production Ltd v neo Art productions Ltd [1928]W.N. 218****. This case may be base merely on the probability arising from the surrounding circumstances or in part on specific facts deposed to.*

   See too ***Berkeley administration v McClelland*** *[1990] F.S.R. 381where at p 382 the Court restated the principles as follows:*

(1) There is no jurisdiction to make an order under RSC 024 r 7 for the production of documents ***unless***

(a) *there is sufficient evidence that the* ***documents exist*** *which the other party has not disclosed.*

(b) *the document or documents* ***relate to matters*** *in issue in the action.*

(c) *there is sufficient evidence that the document* ***is in the possession, custody or power*** *of the other party.*

(2) When it is established that ***those three prerequisites*** *for jurisdiction do exist, the court has discretion whether or not to order disclosure.'*

(Emphasis added)

(3) In "**Mohammed Alam v Colonial National Bank and Others, Civil Action No. HBC 02 of 2006** Master J. Udit canvassed the applicable principles in relation to **interrogatories** as follows;

*"As a general principle, unless interrogatories are absolutely necessary for the preparation of the interrogators case, an application will be refused on the grounds of pre-maturity if discovery is incomplete or not intended to. His Lordship, Mr Justice Colman in **Det Danske Hedeselskabet v KDM [1994] 2 Lloyds Reports 534** witting in the Commercial Court in considering the use of interrogatories in Commercial Court said:-*

> *"First, unless the answers are essential for the preparation of the requesting party's case for trial and cannot reasonably be expected to emerge from requests for further and better particulars and further discovery or witness statements, interrogatories will not normally be ordered. For this reason the service of interrogatories before witness statements have been exchanged will almost always be premature."*

Whilst we do not have a general practice or rule governing witness statements, nonetheless, they are used from time to time. But, we certainly have rules for compulsory discovery procedure under Orders 24 and 25, which are further supplemented by Order 34 rule 2 (2), which prescribes the following :-

> *"(2) Before an action may be set down for trial the solicitor acting for any of the parties shall make a written request to all the other solicitors and for other parties to the action to attend a conference at a mutually convenient time and place; with the object of reaching agreement as to possible ways of curtailing the duration of the trial, and, in particular, as to all or any of the following matters:-*
>
> *(a) the possibility of obtaining admission of facts or documents;*
> *(b) the holding of inspections and examinations;*
> *(c) the discovery of documents;*
> *(d) the exchange between parties of reports of experts;*
> *(e) the plans, diagrams, photographs, models and similar articles to be used at the trial;*
> *(f) the quantum of damages; and*
> *(g) the consolidation of trial."*

*The aforesaid passage of Colman J was subsequently approved by court of Appeal in **Hall v Sevalco** (The Times, March 27 1996). The Master of the Rolls, Sir Thomas Bingha, at page 183 of The Times Law Reports said:*

> *"... the guiding principle had to be that laid down in Order 26, rule 1 (1) that interrogatories had to be necessary either for disposing fairly of the cause or matter or for saving costs.*
>
> *Necessity was a stringent test, it could not be necessary to interrogate to obtain information or admissions which were or were likely to be contained in pleadings, medical reports, discoverable*

> *documents or witness statements unless, exceptionally, a clear litigious purpose would be served by obtaining such information or admissions on affidavit.*
>
> *As a general statement the court would agree with that in paragraph 11.6 of the Guide to Commercial Court Practice ... [in setting out where that is to be found] and endorsed by Mr Justice Colman in Det Danske Hedeselskabet v KDM International plc ... [to which I have referred already]; 'Suitable times to interrogate (if at all) will probably be after discovery and after exchange of witness statements.'*
>
> *Interrogatories should not be regarded as a source of ammunition to be routinely discharged as part of an interlocutory bombardment preceding the main battle. The interrogator had to be able to show that his interrogatories, if answered when served, would serve a clear litigious purpose by saving costs or promoting the fair and efficient conduct of the action.*
>
> *In the Det Sanske case Mr Justice Colman had given reliable guidance on the approach to interrogatories. Since the same rules applied in the Commercial Court as elsewhere his observations were not applicable only to commercial cases"*

Further, I will disallow a large number of the interrogatories on the basis that they are solely directed to the interpretation of the contents of the discoverable documents. Undoubtedly this involves questions of law and/or mixed questions of law and fact. Ordinarily, such interrogatories as a matter of general principle are not allowed; ***AG –v- Wang New Zealand Ltd [1990] 3 NZLR 148, at 151****, His Honour Justice Dougue summarised the law pertaining to such questions as follows:-*

> *"That has been the law for a substantial period of time and it is clear, as* ***Nash v Layton*** *[1911] 2 Ch 71, indicates, that whilst questions of fact may be put, mixed questions of fact and law or of law alone cannot be put, as is confirmed also by such Australian decisions as* ***Looker v Murphy*** *[1889] 15 VLR 348, 351,* ***McBride v Sandland*** *[1917] SALR 249, 259."*

At page 152, His Honour further stated:-

> *"As a matter of principle it would seem clear that it is inappropriate that interrogatories should extend to matters of law or mixed law and fact as in the ordinary case the person making the affidavit in response tot eh interrogatories will be a lay person who would have no knowledge of the law. It is also inappropriate that a party should be interrogated on matter of law which would more often than not be one of the very questions for determination by the Court."*

However, as stated above, in my view there remain some pertinent interrogatories which require answers at this juncture, which are essential for a clear litigious

purpose. In this instance I adopt the definition of 'essential' as Colman J put it in ***Det Danske Hedeselskabet v KDM [1994] 2 Lloyds Reports 534*** *at 537:-*

> *"essential ... in the sense that if the matter is left until cross examination at the trial that party will or probably will be irremediably prejudiced in his conduct of the trial or the trail may be unduly interrupted or otherwise disorganised by the later emergence of the information."*

(D) ANALYSIS

(1) Let me now turn to the merits of the application bearing in my mind the above mentioned legal principles and the factual background uppermost in my mind.

(2) As I said earlier, the Defendants have filed Summons pursuant to Order 24, rule 3 and 7 of the High Court Rules, 1988 for "Specific Discovery" as follows;

> *(a) The Plaintiff within 14 days disclose by affidavit copies of receipts and/or invoices for medicine, clothing, spectacles and any other expenses that was incurred by the deceased's mother as a dependant for the period of three years prior to the accident pertaining to Mr Tikiko Qoro which the Plaintiff, is or has at any time been in his possession, custody or power and if he parted with them, when he parted with any of them and what has become of them* ***AND FOR A FURTHER ORDER*** *that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendants;*
>
> *(b) The Plaintiff within 14 days disclose by affidavit copies of all receipts and/or invoices for expenses particularised under special damages as claimed in the pleadings which the Plaintiff, is or has at any time been in his possession, custody or power and if he parted with them, when he parted with any of them and what has become of them* ***AND FOR A FURTHER ORDER*** *that the Plaintiff do within 14 days thereafter make available such documents or copies of them for inspection on behalf of the Defendants;*

(3) Moreover, the Defendants seek leave of the Court to issue and require the Plaintiff to answer the following interrogatories;

> *1. How often was the deceased engaged with work at the farm (i.e. how many hours and days a week)?*
>
> *2. Who owned the farm?*
>
> *3. Where was the produce sold?*
>
> *4. To whom was the produce sold?*

5. *Could you provide details of the farm number and/or location of the farm?*

6. *What was the percentage of dependency that the Plaintiff and his mother had on the deceased?*

7. *Was the deceased of unsound mind?*

8. *If your answer to [7] above is yes, then, could you provide full details of the nature and extent of his mental disability?*

9. *Was the deceased treated by any medical practitioners and/or medical clinics?*

10. *If your answer to [9] above is yes, then, could you provide details of that medical practitioner and/or medical clinic?*

(4) Before determining against the Plaintiff, the real issue and the only issue which this Court has to consider at the outset is whether the Defendants have surmounted the **threshold criteria spelt out** in Order 24, rule (7) of the High Court Rules, 1988.

Let me have a close look at Order 24, rule (7).

Provisions relating to "**Specific Discoveries**" are contained in Order 24, rule (7) of the High Court Rules, 1988.

Order 24, rule (7) provides;

Order for discovery of particular documents (O.24, r.7)

7.-(1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not than in his possession, custody or power, when he parted with it and what has become of it.

(2) An order may be made against a party under this rule not withstanding that he may already have made or been required to make a list of documents or affidavit under rule 2 or rule 3.

(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified or described in the application and that it relates to one or more of the matters in question in the case or matter.

In **Halsbury's, Laws of England, 4th Edition** at pg. 78 the authors aptly described the documents which are capable of being discovered as follows:-

> **8. Documents required to be disclosed.**
>
> *The obligation of a party to make discovery necessarily involves that he must make a full and frank disclosure of all relevant documents which are or have been in his possession, custody of power. Apart from any order limiting the scope of the discovery of particular documents or class of documents, or to particular issues, there are two general and essential conditions as to what documents are required to be disclosed, namely:-*
>
> *(i)* ***they must be relevant; that is they must relate to some matter in question in the action or other proceedings; and***
>
> *(ii)* ***they must be or have been in possession, custody or power of the party required to make discovery", (see to Atkins Volume 15, (2nd) addition page 78-80).***

In **Re Barlow Clowes Gilt Managers Ltd.** [1991] 4 All E.R. 385 Millet J. said at p. 393:

> *"It is a feature common to both systems of justice, civil and criminal that there is a strong public interest that the court should have all relevant information made available to it. But the courts have never assumed or been granted the power to compel the production of all such information regardless of its nature and source. That would amount to an intolerable invasion of privacy. Statue and rules of court made under statutory power have long established the circumstances in which production can be compelled in the interests of justice and have thereby resolved the conflict between the two competing public interests."*

What is the rule of conduct of this Court in an application such as this?

Courts have a wide jurisdiction to order discovery and inspection.

As noted above, in **Ram Kumar Singh v Minjesk Invesment Corporation Ltd, Civil Action No – 148/2006 (05-05-2008)** Master J. Udit canvassed the applicable principles and case law authorities in some detail. From his analysis, **what emerges clearly is that the onus initially is on the applicant to establish the following by way of affidavit evidence:**

> *(v) Identify clearly the particular document or documents or class of documents that he seeks from to be discovered by the opposing party (see Order 24 Rule 7 (1).*

(vi) *Show a prima facie case that the specific document or class of documents do in fact exist or have existed (see Order 24 Rule 7 (1)).*

(vii) *Establish that these documents are relevant in the sense that they relate to the matter in question in the action. In other words, the information in the document must either directly or indirectly enable the applicant either to advance his own case or to damage the case of his or her adversary. Alternatively, it is sufficient if the information in the document is such that it may fairly lead to a train of enquiry which may have either of these consequences. The relevance of a document is to be tested against the issues and/or questions raised by the pleadings (see* ***A.B. Anand (Christchurch) Ltd v ANZ Banking Group Limited*** *(1997) 43 FLR 22 30 January 1997).*

It is important to note that whether or not any particular document is admissible or inadmissible is immaterial to its discoverability. It is enough if the document is likely to throw some light on the case (see ***Volume 13 paragraph 38 of Halsbury's Laws of England – 4th Edition) page*** *34 cited in* ***Singh v Minjesk***

(viii) *Show that these documents were in the physical possession, custody (i.e. the mere actual physical or corporeal holding of the document regardless of the right to its possession) or power (i.e. the enforceable right to inspect it or to obtain possession or control of the document from one who ordinarily has it in fact) of the opposing party (see Order 24 Rule 7 (3)).*"

Therefore, the **threshold criteria** in relation to "**Specific Discovery**", as I understand it, is this;

> "In order that any document may be discoverable it must **firstly, be shown "... to relate to (some) matter in question in the cause**..." In other words the document must be relevant to a question or issue in the proceedings in so far as the same may be deduced from the pleadings in the action. **Secondly, the document(s), must be shown to exist and '... are or have been in (the) possession, custody or power ...' of the party against whom discovery is being sought."**

What is meant by the phrase "**a relevant document?**"

> *"... the matter in question in the action if it contain information which – not which must – either directly or indirectly enable the party requiring the discovery either to advance his own case or to damage the case of his adversary, or which may fairly lead to a train of enquiry which may have either of this consequences. Documents relate to matters in question in the action whether they are capable of being given in evidence or not, so long as they are likely to throw light on the case. The expression 'matter in question' means a question or issue in dispute in the action and not the thing about*

which the dispute arises". **See;** ***Volume 13 paragraph 38 of Halsbury's Laws of England (4th Edition) page 34.***

In the leading authority of **Compagnie Financière du Pacifique v. Peruvian Guano Co. (1882) 11 Q.B.D. 55 Brett L.J.** stated of the above first requirement at p.63:

> *"It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in, the words 'either directly or indirectly' because, it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences."*

(5) It is these principles I apply. Applying those principles to the instant case, what do we find?

The Plaintiff's grounds for objections to produce the documents sought and to answer the interrogatories are as follows; (Reference is made to paragraph 02 to 05 of the Plaintiff's Affidavit in Opposition)

Para 2. *THAT I am aware of the importance of financial documents and that it is relevant for claims however this not the case in all circumstances particularly in subsistence farming where there is no documentation of sales and expenses required.*

3. *THAT the delay in providing a Response to AK Lawyer's letter dated the 5th of January 2016 was explained in our letter to AK Lawyers dated the 5th of January 2016. I now produce and annex a copy of the said letter marked "AS – 1".*

4. *THAT I acknowledge that the deceased farmed on the mataqali's reserve land at Natalau Village in Sabeto, he does not have a bank account and is not required by law to keep an income statement. The deceased had spent his monies as he earned it and he died at the scene of the accident which was clearly being elaborated in the Certificate of Death which includes the cause of death by medical examiner. I herein produce and annex a copy of the said document marked as "AS – 2".*

5. *THAT I had provided answers to interrogatories in our letter dated the 1st of March 2016. It is difficult to recover receipts in relation to the expenditure in concern to the deceased's mother as everyone in the family contributed to the expenses. I now produce and annex a copy of the said letter marked as "AS-3".*

(6) It is important to remember that, significantly as I believe, the Plaintiff did not complain that the documents requested to be discovered do not exist, not relevant, confidential, oppressive or fishing expedition.

Moreover, the Plaintiff did not complain that the interrogatories as submitted by the Defendants are irrelevant and oppressive or fishing interrogatories.

(7) **Invoices and/or receipts for medicine, clothing, spectacles and any other expenses that was incurred by the deceased's mother as a dependant for the period of three years prior to the accident.**

As Counsel for the Defendant pointed out the discovery of these documents would be relevant as it would show the projected costs on the loss of the deceased's mother's loss of dependency. Further, it would resolve the issue of quantum under loss of dependency by accurately ascertaining how much the deceased expended on his mother and the Plaintiff.

The Plaintiff resisted discovering and disclosing above documents on the basis that it is difficult to recover the documents (Reference is made to paragraph 5 of the Plaintiff's Affidavit in Opposition)

> *Para 5. THAT I had provided answers to interrogatories in our letter dated 1st of March 2016. It is difficult to recover receipts in relation to the expenditure in concern to the deceased's mother as everyone in the family contributed to the expenses. I now produce and annex a copy of the said letter marked as "AS-3".*

I am not prepared to accept this. I focus my attention on paragraph 05 to 10 in the supporting affidavit of Arvendra Kumar. He deposed inter alia;

> *5. Further I am aware that AK Lawyers wrote a letter to the Plaintiff's solicitor on 28th October, 2015 requesting specific discoveries of documents noted therein together with request to answer interrogatories also notes therein. I now produce and annex a copy of the said letter marked "AK – 3".*
>
> *6. AK Lawyers thereafter made another request on 5th January, 2016 since no reply was forthcoming from the Plaintiff's solicitors to the previous request. The Plaintiff's solicitors replied in their letter dated 5th January, 2016 advising that they require time to obtain instructions from their client pertaining to the interrogatories. I therefore produce and annex copies of the relevant letters marked as "AK – 4", and "AK – 5" respectively.*
>
> *7. On 6th January, 2016 the Plaintiff's solicitors sent an email to AK Lawyers advising that they will provide answers to interrogatories*

within 7 days. I now produce and annex a copy of the email marked as "AK – 6".

8. *Despite the above, the Plaintiff still failed to provide a response and instead kept delaying in complying with the requests made. I now produce copies of various emails requesting for further time to respond marked as "AK – 7" and "AK – 8".*

9. *I am aware that the Plaintiff's solicitors finally provided answers to interrogatories by way of their letter dated 28th January, 2016, however the letter was marked "without prejudice" as it also contained confidential information. AK Lawyers subsequently requested for an open letter on 19th February, 2016. I now produce and annex copy of the letter dated 19th February, 2016 marked "AK – 9".*

10. *The Plaintiff's solicitors advised AK Lawyers vide email on 19th February that they will provide an answer on 22nd February, 2016. A response via an open letter was provided on 1st March, 2016. However I have been advised by AK Lawyers that the Plaintiff failed to provide complete answers in the aforementioned letter. Accordingly AK Lawyers wrote another letter to the Plaintiff's solicitors on 1st March, 2016 requesting them to provide complete answers to interrogatories. Copies of the relevant email and letters are annexed hereto and marked "AK – 10", "AK-11" and "AK – 12".*

There is no controversy as to the above on the affidavits. I do not leave out of account the fact that the Plaintiff did not at any stage during the course of the three written requests made by the Defendant's Solicitors (Between the period 28th October 2015 and 01st March 2016) advise or inform that the documents sought are not available in his possession or difficult to recover.

If the documents sought are not available in his possession or difficult to recover, the Plaintiff should have said that at the outset.

Thus, it is reasonable to assume that receipts, invoices for medicine, clothing, spectacles and any other expenses that was incurred by the Deceased's mother as a dependant for the period of three years prior to the accident are in the physical possession/custody of the Plaintiff or, otherwise, that it is within the Plaintiff's power to obtain them from any other person/entity that might have possession or custody of the documents.

(8) **Copies of all receipts and/or invoices for expenses particularised under special damages.**

As Counsel for the Defendants pointed out, the discovery of these documents would be relevant for the purpose of quantifying the claim for compensation under special damages. These receipts and/or invoices would accurately determine the exact expenses that the Plaintiff is entitled to. Thus, the requested documents are relevant for the issues in dispute and should be disclosed. One which I think worth mentioning

is that under Order 25, rule 8, the Plaintiff is bound to disclose documents pertaining to the claim for special damages.

For the sake of completeness, Order 25, rule 8 is reproduced below in full.

Automatic directions in personal injury actions (O.25 r.8)

8.- (1) When the pleadings in any action to which this rule applies are deemed to be closed the following directions shall take effect automatically:

(a) ***there shall be discovery of documents within 14 days in accordance with Order 24, rule 2, and inspection within seven days thereafter, save that where liability is admitted, or where the action arises out of a road accident, discovery shall be limited to disclosure by the plaintiff of any documents relating to special damages;***

(b) subject to paragraph (2), where any party intends to place reliance at the trial on expert evidence, he shall, within 10 weeks, disclose the substance of that evidence to the other parties in the form of a written report, which shall be agreed if possible;

(c) unless such reports are agreed, the parties shall be at liberty to call as expert witnesses those witnesses the substance of whose evidence has been disclosed in accordance with the preceding sub-paragraph, except that the number of expert witnesses shall be limited in any case to two medical experts and one expert of any other kind;

(d) photographs, a sketch plan and the contents of any police accident report book shall be receivable in evidence at the trial, and shall be agreed if possible;

(2) Where paragraph 1(b) applies to more than one party the reports shall be disclosed by mutual exchange, medical for medical and non-medical for non-medical, within the time provided or as soon thereafter as the reports on each side are available.

(4) Nothing in paragraph (1) shall prevent any party to an action to which this rule applies from applying to the Court for such further or different directions or orders as may, in the circumstances, be appropriate.

(4) For the purposes of this rule-

"a road accident" means an accident on land due to a collision or apprehended collision involving a vehicle; and "documents relating to special damages" included documents relating to

any industrial injury, industrial disablement or sickness benefit rights.

(5) This rule applies to any action for personal injuries except any action where the pleadings contain an allegation of a negligent act or omission in the course of medical treatment.

(Emphasis added)

The Plaintiff did not complain that he does not have those documents. Even if he does not have in his possession now, they can be obtained from the relevant offices. It is within the power of the Plaintiff to obtain them.

(9) Interrogatories

Counsel for the Defendants seeks leave of the Court to allow the following interrogatories;

1. *How often was the deceased engaged with work at the farm (i.e. how many hours and days a week)?*
2. *Who owned the farm?*
3. *Where was the produce sold?*
4. *To whom was the produce sold?*
5. *Could you provide details of the farm number and/or location of the farm?*
6. *What was the percentage of dependency that the Plaintiff and his mother had on the deceased?*
7. *Was the deceased of unsound mind?*
8. *If your answer to [7] above is yes, then, could you provide full details of the nature and extent of his mental disability?*
9. *Was the deceased treated by any medical practitioners and/or medical clinics?*
10. *If your answer to [9] above is yes, then, could you provide details of that medical practitioner and/or medical clinic?*

In my view, the interrogatories enumerated above are intimately linked to the facts and issues central to the claim, as well as the Defence. Indeed, the answer will most certainly result in reduction of the duration of trial or even preparation time.

It is pertinent to note that when the interrogatories was first served on the Plaintiff's solicitor's on 28th October 2015 (annexure AK-3 of Arvendra's affidavit) the Plaintiff's solicitor's did not object to the said interrogatories. Moreover, there is not a word against interrogatories in the Plaintiff's affidavit in opposition.

I examine the answers provided to the interrogatories (annexure AK – 11 of Arvendra's affidavit). It appears to me that the Plaintiff was not answering or avoid answering important questions, i;e., question number (01) and (05).

The Defendant submitted that the Plaintiff has not answered the question sufficiently.

Thus, I will allow the interrogatories.

(10) Finally, the Defendants moved for indemnity costs on the following grounds; (Reference is made to paragraphs 10.2, 10.3, 10.4 and 11.4 of the Defendants written submissions)

> *Para 10.2* *The Defence had made written requests to the Plaintiff's Solicitors for the discovery of documents and answers to interrogatories marked as annexures AK03, AK-4, AK-9 and AK-12.* ***Further the Plaintiff's solicitors were also put on notice in the aforementioned written requests that costs would be sought on a full solicitor/client indemnity basis if the Defendants are compelled to file a formal application.***
>
> *10.3* *It is evidently clear that the Defendants have been consistently requesting for compliance since October, 2015.* ***It is now well over 9 months since the first request was made. Furthermore it is an aggravating factor that since 21st January, 2016, the Plaintiff has been in breach of Order 25 Rule 8 mandating that they proceed with automatic discovery.*** *It is on this basis that this Honourable Court would no doubt note that the Defendant has been put to incur significant legal costs when it really is on the Plaintiff to diligently prosecute this action.*
>
> *10.4* *The Plaintiffs conduct can be nothing more than reprehensive. We therefore seek an order for indemnity costs summarily assessed in the sum of $3,000.00*
>
> *11.4.* *The Defence also seeks costs on a full solicitor/client indemnity basis for the preparation for hearing, submissions, research, preparation and filing of application, filing fees, instructions and travelling for the hearing in the sum of $3,000.00. This Honourable Court must note that the Plaintiff has not attended to discovery as mandated under Order 25 Rule 8, nor has he prosecuted this matter beyond the close of pleadings stage. The delays thus far (in providing disclosure or prosecuting this claim) has been some 9 months.* ***The Plaintiff***

> ***was also put on notice via the letters sent from the Defendants solicitors that it would be seeking costs on a full solicitor/client indemnity basis should he not comply with our request for interrogatories and specific discovery.*** *On these grounds we submit that the Plaintiff has been reprehensible in his conduct and that costs should follow on an indemnity basis.*
>
> (Emphasis Added)

The Plaintiff opposed the application for indemnity costs but did not argue above point.

Order 62, Rule (37) of the High Court Rules empower courts to award indemnity costs **at its discretion.**

For the sake of completeness, Order 62, Rule (37) is reproduced below.

Amount of Indemnity costs (O.62, r.37)

> *37.- (1) The amount of costs to be allowed shall (subject to rule 18 and to any order of the Court) be in the discretion of the taxing officer.*

G.E. Dal Pont, in "Law of Costs", Third Edition, writes at Page 533 and 534;

'Indemnity' Basis

> *"Other than in the High Court, Tasmania and Western Australia, statute or court rules make specific provision for taxation on an indemnity basis. Other than in the Family Law and Queensland rules – which define the 'indemnity basis' in terms akin to the traditional 'solicitor and client basis' – the 'indemnity basis' is defined in largely common terms to cover all costs incurred by the person in whose favour costs are ordered except to the extent that they are of general law concept of 'indemnity costs'. The power to make such an order in the High Court and Tasmania stems from the general costs discretion vested in superior courts, and in Western Australia can arguably moreover be sourced from a specific statutory provision.*
>
> *Although all costs ordered as between party and party are, pursuant to the 'costs indemnity rule', indemnity costs in one sense, an order for 'indemnity costs', or that costs be taxed on an 'indemnity basis', is intended to go further. Yet the object in ordering indemnity costs remains compensatory and not penal. References in judgments to a 'punitive' costs order in this context must be seen against the backdrop of the reprehensible conduct that often justifies an award of indemnity costs rather than impinging upon the compensatory aim. Accordingly,*

such an order does not enable a claimant to recover more costs than he or she has incurred."

Now let me consider what authority there is on this point.

The principles by which Courts are guided when considering whether or not to award indemnity costs are discussed by Hon. Madam Justice Scutt in "**Prasad v Divisional Engineer Northern** (No. 02)" (2008) FJHC 234.

As to the **"General Principles",** Hon. Madam Justice Scutt said this;

- *A court has 'absolute and unfettered' discretion vis-à-vis the award of costs but discretion 'must be exercised judicially': **Trade Practices Commission v. Nicholas Enterprises** (1979) 28 ALR 201, at 207*
- *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': **Colgate-Palmolive Company v. Cussons Pty Ltd** [1993] FCA 536; (1993) 46 FCR 225, at 234, per Sheppard, J.*
- *A party against whom indemnity costs are sought 'is entitled to notice of the order sought': **Huntsman Chemical Company Australia Limited v. International Cools Australia Ltd** (1995) NSWLR 242*
- *That such notice is required is 'a principle of elementary justice' applying to both civil and criminal cases: **Sayed Mukhtar Shah v. Elizabeth Rice and Ors** (Crim Appeal No. AAU0007 of 1997S, High Court Crim Action No. HAA002 of 1997, 12 November 1999), at 5, per Sir Moti Tikaram, P. Casey and Barker, JJA*
- *'... neither considerations of hardship to the successful party nor the over-optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs. But additional costs may be called for if there has been reprehensible conduct by the party liable': **State v. The Police Service Commission; Ex parte Beniamino Naviveli** (Judicial Review 29/94; CA Appeal No. 52/95, 19 August 1996), at 6*
- *Usually, party/party costs are awarded, with indemnity costs awarded only 'where there are exceptional reasons for doing so': **Colgate-Palmolive Co. v. Cussons Pty Ltd** at 232-34; **Bowen Jones v. Bowen Jones** [1986] 3 All ER 163; **Re Malley SM; Ex parte Gardner** []2001] WASCA 83; **SDS Corporation Ltd v. Pasonnay Pty Ltd &Anor** [2004] WASC 26 (S2) (23 July 2004), at 16, per Roberts-Smith, J.*
- *Costs are generally ordered on a party/party basis, but solicitor/client costs can be awarded where 'there is some special or unusual feature of the case to justify' a court's 'exercising its discretion in that way': **Preston v. Preston** [1982] 1 All ER 41, at 58*
- *Indemnity costs can be ordered as and when the justice of the case so requires: **Lee v. Mavaddat** [2005] WASC 68 (25 April 2005), per Roberts-Smith, J.*

- *For indemnity costs to be awarded there must be 'some form of delinquency in the conduct of the proceedings': **Harrison v. Schipp** [2001] NSWCA 13, at Paras **[1], [153]***

- *Circumstances in which indemnity costs are ordered must be such as to 'take a case out of the "ordinary" or "usual" category ...":**MGICA (1992) Ltd v. Kenny & Good Pty Ltd (No. 2)** (1996) 140 ALR 707, at 711, per Lindgren J.*
- *'... it has been suggested that the order of costs on a solicitor and client basis should be reserved to a case where the conduct of a party or its representatives is so unsatisfactory as to call out for a special order. Thus, if it represents an abuse of process of the Court the conduct may attract such an order': **Dillon and Ors v. Baltic Shipping Co. ('The Mikhail Lermontov')**(1991) 2 Lloyds Rep 155, at 176, per Kirby, P.*
- *Solicitor/client or indemnity costs can be considered appropriately 'whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known ... he had no chance of success': **Fountain Selected Meats (Sales) Pty Ltd v. International Produce Merchants Ltd & Ors**[1988] FCA 202; (1998) 81 ALR 397, at 401, per Woodward, J.*
- *Albeit rare, where action appears to have commenced/continued when 'applicant ... should have known ... he had no chance of success', the presumption is that it 'commenced or continued for some ulterior motive or ... [in] wilful disregard of the known facts or ... clearly established law' and the court needs 'to consider how it should exercise its unfettered discretion': **Fountain Selected Meats**, at 401, per Woodward, J.*
- *Where action taken or threatened by a defendant 'constituted, or would have constituted, an abuse of the process of the court', indemnity costs are appropriate: **Baillieu Knight Frank (NSW) Pty Ltd v. Ted Manny Real Estate Pty Ltd** (1992) 30 NSWLR 359, at 362. per Power, J.*
- *Similarly where the defendant's actions in conducting any defence to the proceedings have involved an abuse of process of the court whereby the court's time and litigant's money has 'been wasted on totally frivolous and thoroughly unjustified defences': **Baillieu Knight Frank**, at 362, per Power, J.*

- *Indemnity costs awarded where 'the defendant had prima facie misused the process of the court by putting forward a defence which from the outset it knew was unsustainable ... such conduct by a defendant could amount to a misuse of the process of the court': **Willis v. Redbridge Health Authority** (1960) 1 WLR 1228, at 1232, per Beldam, LJ*
- *'Abuse of process and unmeritorious behaviour by a losing litigant has always been sanctionable by way of an indemnity costs order inter parties A party cannot be penalised [for] exercising its right to dispute matters but in very special cases where a party is found to have behaved disgracefully or where such behaviour is deserving of moral condemnation, then indemnity costs may be awarded as between the losing and winning parties': **Ranjay Shandil v. Public Service Commission** (Civil Jurisdiction Judicial Review*

*No. 004 of 1996, 16 May 1997), at 5, per Pathik, J. (quoting Jane Weakley, 'Do costs really follow the event?' (1996) **NLJ** 710 (May 1996))*

- *'It is sufficient ... to enliven the discretion to award [indemnity] costs that, for whatever reasons, a party persists in what should on proper consideration be seen to be a hopeless case': **J-Corp Pty Ltd v. Australian Builders Labourers Federation Union of Workers (WA Branch)(No. 2)** (1993) 46 IR 301, at 303, per French, J.*
- *'... where a party has by its conduct unnecessarily increased the cost of litigation, it is appropriate that the party so acting should bear that increased cost. Persisting in a case which can only be characterised as "hopeless" ... may lead the court to [determine] that the party whose conduct gave rise to the costs should bear them in full': **Quancorp Pty Ltd &Anor v. MacDonald &Ors**[1999] WASC 101, at Paras [6]-[7], per Wheeler, J.*
- *However, a case should not be characterised as 'hopeless' too readily so as to support an award of indemnity costs, bearing in mind that a party 'should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain' for 'uncertainty is inherent in many areas of law' and the law changes 'with changing circumstances': **Quancorp Pty Ltd &Anor v. MacDonald &Ors** [1999] WASC 101, at Paras [6]-[7], per Wheeler, J.*
- *The law reports are replete with cases which were thought to be hopeless before investigation but were decided the other way after the court allowed the matter to be tried: **Medcalf v. Weatherill and Anor** [2002] UKHL 27 (27 June 2002), at 11, per Lord Steyn*
- *Purpose of indemnity costs is not penal but compensatory so awarded 'where one party causes another to incur legal costs by misusing the process to delay or to defer the trial and payment of sums properly due'; the court 'ought to ensure so far as it can that the sums eventually recovered by a plaintiff are not depleted by irrecoverable legal costs': **Willis v. Redbridge Health Authority,** at 1232, per Beldam, LJ*
- *Actions of a Defendant in defending an action, albeit being determined by the trial judge as 'wrong and without any legal justification, the result of its own careless actions', do 'not approach the degree of impropriety that needs to be established to justify indemnity costs ... [R]egardless of how sloppy the [Defendant] might well have been in lending as much as $70,000 to [a Plaintiff], they had every justification for defending this action ... The judge was wrong to award [indemnity costs] in these circumstances. He should have awarded costs on the ordinary party and party scale': **Credit Corporation (Fiji) Limited v. Wasal Khan and MohdNasir Khan** (Civil Appeal No. ABU0040 of 2006S; High Court Civil Action No. HBC0344 of 1998, 8 July 2008), per Pathik, Khan and Bruce, JJA, at 11*

Defining 'Improper', 'Unreasonable' or 'Negligent' Conduct in Legal Proceedings as Guide to Indemnity Costs Awards: *Cases where 'wasted costs' rules or 'useless costs' principles have been applied against solicitors where their conduct in proceedings has led to delay and/or abuse of process can provide some assistance in determining whether conduct in proceedings generally may be such as to warrant the award of indemnity costs. These cases specifically relate to solicitors' conduct rather than directly touching upon the indemnity*

costs question; nonetheless the analysis or findings as to what constitutes conduct warranting an award of costs can be helpful. See for example:

- ***Ridehalgh v. Horsefield and Anor****[1994] Ch 205*
- ***Medcalf v. Weatherill and Anor****[2002] UKHL 27 (27 June 2002)*
- ***Harley v. McDonald*** *[2001] 2 AC 678*
- ***Kemajuan Flora SDN Bh v. Public Bank BHD &Anor****(High Court Malaya, Melaka, Civil Suit No. 22-81-2001, 25 January 2006)*
- ***Ma So So Josephine v. Chin Yuk Lun Francis and Chan Mee Yee*** *(FACV No. 15 of 2003, Court of Final Appeal Hong Kong Special Administrative Region, Final Appeal No. 15 of 2003 (Civil)(On Appeal from CACV No. 382 of 2002, 16 September 2004)*
- ***SZABF v. Minister for Immigration (No. 2)*** *[2003] FMCA 178*
- ***Heffernan v. Byrne*** *[2008] FJCA 7; ABU0027.2008 (29 May 2008)*

Some of the matters referred to include:

- *At the hearing stage, the making of or persisting in allegations made by one party against another, unsupported by admissible evidence 'since if there is not admissible evidence to support the allegation the court cannot be invited to find that it has been proved, and if the court cannot be invited to find that the allegation has been proved the allegation should not be made or should be withdrawn:* ***Medcalf v. Weatherill and Anor****, at 8, per Lord Bingham*

- *At the preparatory stage, in relation to such allegations – not necessarily having admissible evidence but there should be 'material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it:* ***Medcalf v. Weatherill and Anor****, at 8, per Lord Bingham*

- *Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples of wasting the time of the court or an abuse of its processes resulting in excessive or unnecessary costs to litigants:* ***Harley v. McDonald****, at 703, Para* ***[50]*** *(English Privy Council)*
- *Starting an action knowing it to be false is an abuse of process and may also involve knowingly attempting to mislead the court:* ***Ma So So Josephine v. Chin Yuk Lun Francis and Chan Mee Yee*** *(FACV No. 15 of 2003, Court of Final Appeal Hong Kong Special Administrative Region, Final Appeal No. 15 of 2003 (Civil)(On Appeal from CACV No. 382 of 2002, 16 September 2004), at Para* ***[43]****, per Ribeiro, PJ (Li, CJ, Bokhary and Chan, PJ and Richardson, NPJ concurring)*
- *Lending assistance to proceedings which are an abuse of the process of the court – using litigious procedures for purposes for which they*

*were not intended, 'as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest' or evading rules intended to safeguard the interests of justice 'as by knowingly failing to make full disclosure on ex parte application[s] or knowingly conniving at incomplete disclose rue of documents': **Ridehalgh v. Horsefield** [1994] Ch 205, at 234, per Bingham, MR*

- *Initiating or continuing multiple proceedings which amount to abuse of process: **Heffernan v. Byrne** [2008] FJCA 7; ABU0027.2008 (29 May 2008), per Hickie, J.*

***Specific Circumstances of Grant/Denial Indemnity Costs:** Specific instances supporting or denying the award of indemnity costs include:*

- *Indemnity costs follow per a '**Calderbank** offer', that is, where a party makes an offer or offers prior to trial, which is/are refused, and that party succeeds at trial on a basis which is better than the prior offer: **Calderbank v. Calderbank**[1975] 3 WLR 586*
- *However, no indemnity costs awarded where **Calderbank** letter contains no element of compromise, making it not unreasonable for the party not to accept the offer. The question is '... whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs ...': **SMEC Testing Services Pty Ltd v. Campbelltown City Council** [2000] NSWCA 323, at Para[37], per Giles, JA Hence, if the* offer is not a genuine offer of compromise and/or there is no appropriate opportunity provided to consider and deal with it, then no indemnity costs follow: **Richard Shorten v. David Hurst Constructions P/L; D. Hurst Constructions v. RW Shorten** [2008] Adj LR 06/17 (17 June 2008), per Einstein, J. (NSW Supreme Court, Equity Division T&C List); **Leichhardt Municipal Council v. Green** [2004] NSWCA 341, at Paras**[21]-24], [36]**, per Santow, JA, Stein, JA (concurring); **Herning v. GWS Machinery Pty Ltd (No. 2)** [2005] NSWCA 375, at Paras**[4]-[5]**, per Handley, Beazley and Basten, JJA; **Elite Protective Personnel v. Salmon** [2007] NSWCA 322, at Para **[99]; Donnelly v. Edelsten**[1994] FCA 992; [1994] 49 FCR 384, at 396

- *Indemnity costs awarded:*
  - *upon a winding-up petition's being presented on a debt known to the petitioner to be genuinely disputed on substantial grounds;*
  - *the clearly established law being that a winding up order will not be granted in such circumstances, meaning that the petitioner 'had no chance of successfully obtaining a winding up order';*

- *where in these circumstances the filing of the petition 'constituted a deliberate tactical manipulation of the winding up process by the [petitioner, the State Government Insurance Commission 'SGIC'] for the purposes of bringing very substantial pressure to bear' on Bond Corp Holdings 'BCH';*
- *this in the circumstances meant that the 'filing of the petition was an abuse of process of the court in the true sense of that expression';*
- *the discretion to stay the petition should not be exercised because this would 'cause BCH serious harm' meaning it would be 'extremely difficult for BCH to be able to conduct its business normally if the petition [were] not dismissed': citing* ***Re Lympne Investments*** *[1972] 1 WLR 523, at 527, per Megarry, J.; also* ***Re Glenbawn Park Pty Ltd*** *[1977] 2 ACLR 288, at 294, per Yeldham, J.*
- *an abuse of process 'having been established in the circumstances outlined, justice requires the award of solicitor and client, or, rather, "indemnity" costs' so that 'the SGIC should be ordered to pay all the costs incurred by BCH except insofar as they are of an unreasonable amount or have been unreasonably incurred, so that, subject to [these] exceptions, BCH be completely indemnified by the SGIC for its costs', citing* ***Foundation Selected Meats (Sales) Pty Ltd v. International Produce Merchants*** *[1988] FCA 202; (1988) 81 ALR 397, at 410, per Woodward J.:* ***Re Bond Corp Holdings Ltd*** *(1990) 1 ACSER 350, at 13, per Ipp, J.*

- *Indemnity costs are appropriate where an applicant (in an unfair dismissal):*
  - *'insists' over a respondents' objections that an application should proceed to trial rather than await the outcome of other possible litigation (including a police investigation);*
  - *fails repeatedly, despite allowances, to meet deadlines for lodgement of a witness statement;*
  - *fails to advise her lawyers of her whereabouts so denying them of the ability to inform the court of reasons for seeking an unqualified adjournment less than a week prior to trial;*
  - *fails to comply with directions to provide a current address, consult a medical specialist and obtain a report of fitness to attend the trial;*
  - *fails to appear at the final hearing when on notice that the application will be dismissed in event of such failure:* ***Nicole Pender v. Specialist Solutions Pty Ltd*** *(No. B599 of 2004. 17 May 2005), per Bloomfield, Commissioner*

- *Indemnity costs denied as against a Plaintiff who discontinued a claim for a permanent injunction to restrain a Defendant's industrial action, where the Defendant had filed a chamber summons seeking to have the Plaintiff's claim struck out as an abuse of process:* ***Cooperative Bulk Handling Ltd v. Australian Manufacturing Workers Union (WA Branch)****(Unreported, WASC, Lib. No. 970190, 30 April 1997), per Wheeler, J.*

- *Indemnity costs cannot be awarded in a criminal appeal, albeit 'in criminal appeals, as in civil cases, unreasonable conduct by the unsuccessful party might increase a usual award':* ***Sayed Muklitar Shah v. Elizabeth Rice and Ors*** *(Crim Appeal No. AAU0007 of 1997S, High Ct Crim Action No. HAA02 of 1997, 12 November 1999), at 4, per Sir Moti Tikaram, P., Casey and Barker, JJA*

- *Indemnity costs awarded then reversed on appeal where solicitor held liable for costs (under a 'wasted costs' order) in initiating action for clients where solicitor taken to have known that the basis of the clients' action was wholly false"*

The oral and written submissions of Counsel for the Defendants have addressed why *'indemnity costs'* should be awarded **in the current proceedings for specific discovery.**

Indeed, as was set out by in ***Carvill v HM Inspector of Taxes*** (Unreported, United Kingdom Special Commissioners of Income Tax, 23 March 2005,Stephen Oliver QC andEdwardSadler)(Bailii:[2005]UKSPCSPC00468,http://www.bailii.org/cgibin/markup.cgi?doc=/uk/cases/UKSC/2005/SPC00468.html),***"reprehensible conduct"*** requires two separate considerations (at paragraph 11):

> *"The party's conduct must be unreasonable, but with the further characteristic that it is unreasonable to an extent or in a manner that it earns some implicit expression of disapproval or some stigma."*

The Defendant's solicitors have made four written requests (Between the period 28th October 2015 and 01st March 2016) for answers to interrogatories and specific discovery. To this date, the Plaintiff's solicitors have not been able to attend to discovery of documents and to fully and sufficiently answer the interrogatories. It is now well over one year since the first request was made. There is not a word in the Plaintiff's affidavit **explaining the delay satisfactorily and cogently.** Thus, the Plaintiff's conduct is unreasonable and it is unreasonable to an extent or in a manner that it earns some implicit expression of disapproval or some stigma.

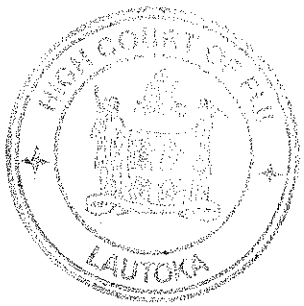
Therefore, it is a correct exercise of the Court's discretion to direct the Plaintiff to pay costs on an indemnity basis to the Defendants.

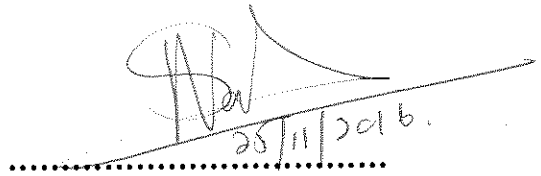
(E) FINAL ORDERS

(1) I grant Orders in terms of prayer (a), (b) and (c) of the Defendant's Summons, dated 23rd March 2016 for specific discoveries.

(2) The Defendants application for indemnity costs is allowed.

(3) The Defendants are directed to file and serve their detailed costs for the assessment of indemnity costs within 14 days hereof.





.....

Jude Nanayakkara
Master

At Lautoka
25th November 2016