IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 157of 2007

BETWEEN : **SANGEETA MANI REDDY** and **VINAY VIKASH REDDY** both Of Sacramento, California, USA,

PLAINTIFFS

A N D : **NAG MANI REDDY** of Salovi, Nadi Domestic Duties as Executor and Trustee in the estate of Latchman Reddy.

1st DEFENDANT

AND : **THE DIRECTOR OF LANDS,** Government Buildings, Suva.

2nd DEFENDANT

AND : **THE ATTORNEY GENERAL OF FIJI**

3RD DEFENDANT

(Ms) Miriama Narisia for the Plaintiffs
(Ms) Georgina Raumanu Pranjivan, State Counsel, Attorney General's Chambers for the Second and Third Defendants

Date of Hearing: - 16th March 2016
Date of Ruling: - 20th May 2016

RULING

(A) INTRODUCTION

1. The matter before me stems from the **second and third Defendants Summons** dated 02nd September 2015, made pursuant to **Order 18, Rule 18 (1) (a), (b) and (d) of the**

High Court Rules, 1988 and the inherent jurisdiction of the Court seeking the grant of the following orders;

> *That the Writ of Summons and Statement of Claim filed in the High Court on the 7 July 2015 be dismissed and/or struck out with costs on the following grounds:-*
>
> *(i) That it discloses no reasonable cause of action;*
> *(ii) That it is scandalous, frivolous and vexatious and*
> *(iii) That it is otherwise, an abuse of Court process.*

2. The application for striking out is supported by an Affidavit sworn by **"Inia Navunisaravi,"** the **Divisional Land Manager West** in the **Ministry of Lands and Mineral Resources.**

3. The application is strongly opposed by the Plaintiffs. The first named Plaintiff filed an 'Affidavit in opposition' sworn by her on 04th December 2015. The second and third Defendants did not file an 'affidavit in reply'.

4. The plaintiffs and the second and third Defendants were heard on the Summons. They made oral submissions to Court. In addition to oral submissions, the Counsel for the Plaintiffs and the second and third defendants filed a careful and comprehensive written submission for which I am most grateful.

(B) THE FACTUAL BACKGROUND

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

(2) The Plaintiffs in this matter filed two separate applications. The first application for joinder via a **Notice of Motion**, together with an Affidavit in support was filed on 06th May 2015. In addition to this application, an 'Ex- Notice of Motion' seeking an injunction against the Defendants was also filed and served. Since there was a Motion seeking an injunction against the defendants, the Director of Lands and Attorney General were joined as parties.

(3) On 18th May, 2015, the Plaintiffs served the Defendants with an "Amended Writ of Summons."

(4) To give the whole picture of the action, I can do no better than set out hereunder the averments/ assertions of the pleadings. The Plaintiffs in their Amended Statement of Claim plead *inter alia*;

1. *The Plaintiffs and the 1st Defendant are the lawful children and the only beneficiaries to the Estate of late LATCHMAN REDDY of Salovi, Nadi, deceased who died on the 12th day of November, 2003.*

2. *That the Deceased Latchman Reddy died on the 12th day of November, 2003 and Probate No. 41956 (hereinafter called* ***"the said property")*** *was granted to the Defendant by the High Court Probate Division pursuant to a will as executed by the Deceased on or around 7th day of April, 2003 (said will).*

3. *That pursuant to the said will and probate, the Deceased bequeathed his estate to his three children namely;*

a)	*Sangeeta Mani*	-	*1/3 (One Third Share)*
b)	*Vinay Vikash Reddy*	-	*1/3 (One Third Share)*
c)	*Nag Mani Reddy*	-	*1/3 (One Third Share)*

Property of Deceased constituting entitlement of the parties

4. *That the major component of the said estate is comprises an agricultural property, being Crown Lease No. 6774 described as Part of Nabuyagiyagi and Part of Nakoke formerly CT 2438 & CT 31/3000 (Farm 2278) Lot 3 and Lot 7, Plan No. 5129 and ND 5158 in the Province of Viti Levu in Nadi, comprising an area of 5,0812 hectares.*

5. *That the Plaintiffs and the 1st Defendant are entitled to equal shares in the same.*

Other Estate Property/ ies

6. *That further property of the Deceased included motor vehicle and a tractor bearing the registration numbers 02 654 and AG 712 respectively;*

7. *That further property of the Deceased comprised of farm equipment namely; 1 x Disc plough,1 x Tiller, 1 x Tractor Harrow,1 x Mould Board Plough,1 x Line Plough,1 x Cotton King, 2 x Harrows.*

8. *That the Plaintiffs and the 1st Defendant are entitled to equal shares in*

the same.

9. *That the 1st Defendant as executor trustee was required at all times to act in the best interests of the said.*

Breach of Duty as Trustee

10. *SINCE the grant of the probate the Defendant as trustee has not performed her duties with respect to the administration and distribution of the said estate according to the will of Latchman Reddy aka Lachmi Reddy) (fathers name Samundralu Reddy aka Sambanthrayalu).*

11. *THE 1st Defendant's performance, or lack of, as trustee of the said Estate is causing the estate loss and affecting the value and entitlement to the Plaintiffs, as particularized as follows;*

    (a) That as of September 2006, the 1st Defendant has started to proceed to subdivide the said Estate property and has not provided a full account of the income for such sale of property pursuant to the sub-division.

    (b) The 1st Defendant is refusing to distribute the property to the other two legal beneficiaries of the Estate that is, the Plaintiffs, despite numerous requests to do the same;

    (c) The 1st Defendant has repeatedly asked the Plaintiffs to renounce their shares in the said Estate in breach of the express wishes of their late father;

    (d) The 1st Defendant has not accounted for the proceeds of the sale of estate property to the Plaintiffs; and

    (e) The 1st Defendant has further sold estate property in breach of specific court injunctive orders.

12. *The Estate of Latchman Reddy includes Crown Lease No. 6774 which is administrated by the Second Defendant.*

13. *On the 26th day of July 2005 the transmission by death was registered in the name of First Defendant in relation to Crown Lease No 6774. The Second Defendant is the lessor of the lease.*

14. *On the 26th day of April 2007 the Plaintiff's registered a caveat on Crown Lease No. 6774 to protect the interest of the Plaintiffs as beneficiaries in the Estate of Latchman Reddy.*

15. *The Second Defendant was aware of the interest of the Plaintiff by virtue of the transmission by death and the caveat.*

16. *The Second Defendant is fully aware that the First Defendant has failed to settle the estate within 12 months or within a reasonable time and the Second Defendant has allowed this to continue.*

17. *The Second Defendant is aware that parts of the land in Crown Lease No 6774 is sub-divided into lots and sold by the First Defendant was required to obtain consent or agreement of the Plaintiffs before the alternation of the interested Crown Lease No 6774*

18. *On the 22nd day of August 2014 the Plaintiff wrote the Second Defendant requesting information on the lease and the Plaintiffs also offered to pay them shares of the dues, that is rental penalties the Second Defendant has not responded to the said letter.*

19. *In January 2015 the Plaintiff discovered that the Second Defendant had allowed the First Defendant to accumulate rental arrears of $ 7 435.67 on the Crown Lease No.6774.*

20. *On 27th January 2015 following correspondence from First Defendants lays the Plaintiff again wrote to asking what if a new lease is issued it must be in name of three beneficiaries or First Defendant as trustees suffer loss and damages of testator's intention is defeated Plaintiff also indicated that they were willing to pay rental.*

21. *The Second Defendant did not reply to the Plaintiffs letter dated 27th January 2015.*

22. *The Plaintiff was informed during one of their visits that the new lease will be in name of the estate with First Defendant as administrator.*

Particulars

a) *The Second Defendant promised that new lease will be in name of estate.*
b) *The Plaintiff relied on the promise.*

c) *The Plaintiff will suffer loss and damages to the value of;*

(i) *The market value of the estate is about $400,000.00 to-day (valuation will be provided at the trial). In 2008 the valuation was $202,000.00*

(ii) *The improvements on the property is valued at about $100.000.00.*

(iii) *About 5 lots of the estate has been sold for about $6,000.00 to $8,000.00 per lot*

(iv) *Loss of income for cane proceeds since 2004*

(v) *Loss of vehicle and implements of the estate.*

(vi) *Loss of income in the bank.*

(vii) *Loss of rental income from properties of the estate.*

23. *The Second Defendant, as per the sworn Affidavit of First Defendant has now promised to issue the renewal of same lease in the name of Second Defendants the expiry of current lease is in August 2015.*

Particulars

a) *The second Defendant was aware that the estate could have been settled in 12 months or within a reasonable time.*

b) *The Second Defendant was aware that the First Defendant had accumulated rental arrears and interest on arrears.*

c) *The Second Defendant knew the Plaintiff were willing to pay the rental, but the Second Defendant stated that the receipt will be issued in name of the First Defendant.*

24. *The Second Defendant is liable in damage to the extent of loss to the beneficiaries by the conduct of the Second Defendant in promising the new lease to the First Defendant.*

25. *The Second Defendant is estopped from denying the interest of the Plaintiffs in their father's estate.*

26. *In the Alternative the Second Defendant is liable also in equity for its inconsiderable conduct.*

Particulars

a) *The Plaintiff such equitable remedy in the alternative*

b) *An equitable injunction preventing the Second Defendant from issuing a new lease in the name of the First Defendant in her personal capacity.*

c) *Damage is equity.*

d) *The action of the Second Defendant is unjust departure by a party from an assumption which he caused another party to adopt or accept.*

Particulars of Damages

(i) The intention of the testator will be abrogated

(ii) The current court action will have no utility.

(iii) The Plaintiff who are 2/3 beneficiaries of the estate will be deprived of their shares.

27. The 3rd Defendant is in the action by virtue of his position.

(5) **WHEREFORE THE PLAINTIFFS PRAY FOR THE FOLLOWING ORDERS AGAINST THE FIRST DEFENDANT**

i) ***DECLARES*** *that the Defendant has not performed its duties as executor trustee and trustee*

ii) ***REVOKES*** *the said grant of probate to the Defendant and to appoint the Plaintiffs as the duly appointed trustee of the said estate;*

iii) ***ALTERNATIVELY ORDERS*** *that the* ***1st*** *Defendant as the sole executor trustee of the estate of Latchman Reddy aka Lachmi Reddy complete the administration of the said Estate by attending to the division and distribution of Crown Lease No. 6774 described as Part of Nabuyagiyagi and Part of Nakoke formerly CT 2438 & CT 31/3000 (Farm 2278) Lot 3 and Lot 7, Plan No. 5129 and ND 5158 in the Province of Viti Levu in Nadi, comprising an area of 5.0812 hectares as per the last will and testament of Latchman Reddy aka Lachmi Reddy and all other properties real or otherwise as it relates to the estate of Latchman Reddy aka Lachmi Reddy;*

iv) ***ANY OTHER ORDERS*** *that this Court may deem just and expedient in the circumstances*

v) ***COSTS***

AS AGAINST THE SECOND AND THIRD DEFENDANTS

vi) ***AN INJUNCTION*** *restraining reframing the 2nd Defendant through its agents, servant and or employees from issuing a new lease to the if Defendant and a personal capacity in regards to Crown Lease No. 6774 describe as part of Nabuyagiyagi and part of Nakoke formerly CT 2438 & CT 31/3000 (Farm 2278) Lot3 and Lot 7, Plan No. 5129 and ND 5158 in the Province of Vitilevu in Nadi~ comprising an area of 5.0812 hectares in her personal capacity pending the determination of this action.*

vii) *A* ***DECLARATION*** *that the Plaintiffs are entitled as leases and beneficiaries of the estate of Latchman Reddy against the State to Crown Lease No. 6774 to the said Crown Lease.*

viii) ***DAMAGES*** *as identified in paragraph 22 of this claim.*

ix) *In the alternative* ***EQUITABLE INJUNCTION*** *restraining the 2nd Defendant or its servants or agents from granting the renewal of Crown Lease No. 6774 to the 1st. Defendant in her personal capacity.*

x) ***ANY OTHER ORDERS*** *that this Court may deem just and expedient in the circumstances.*

xi) ***COST*** *on an indemnity basis.*

(C) THE LAW

(1) Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing **"striking out"**. Rather than refer in detail to various authorities; I propose to set out hereunder important citations, which I take to be the principles of the play.

(2) Provisions relating to striking out are contained in **Order 18, rule 18 of the High Court Rules.** Order 18, rule 18 of the High Court Rule reads;

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

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

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

Footnote 18/19/3 of the 1988 Supreme Court Practice reads;

"It is only plain and obvious cases that recourse should be had to the summary process under this rule, per Lindley MR. in Hubbuck v Wilkinson(1899) 1 Q.B. 86, p91 Mayor, etc., of the City of London v Homer (1914) 111 L.T, 512, CA). See also Kemsley v Foot and Qrs (1952) 2KB. 34; (1951) 1 ALL ER, 331, CA. affirmed (195), AC. 345, H.L .The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable " (Att – Gen of Duchy of Lancaster v L. & N.W. Ry Co (1892)3 Ch 274, CA). The summary remedy under this rule is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process or the case unarguable (see per Danckwerts and Salmon L.JJ in Nagle v Feliden(1966) 2. Q.B 633, pp 648, 651, applied in Drummond Jackson v British Medical Association(1970)1 WLR 688 (1970) 1 ALL ER 1094, (CA) .

Footnote 18/19/4 of the 1988 Supreme Court Practice reads;

"On an application to strike out the statement of claim and to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues are in dispute ***(Wenlock v Moloney) [1965] 1. WLR 1238; [1965] 2 ALL ER 87, CA).***

*It has been said that the Court will not permit a plaintiff to be "driven from the judgment seat" except where the cause of action is obviously bad and almost incontestably bad (per Fletcher Moulton L.J. in **Dyson v Att. – Gen [1911] 1 KB 410 p. 419).**"*

(4) In the case of **Electricity Corporation Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641,** it was held;

*"The jurisdiction to strike out a pleading for failure to disclose a cause of action is to be sparingly exercised and only in a clear case where the Court is satisfied that it has **all the requisite material to reach a definite and certain conclusion**; the Plaintiff's case must be so clearly untenable that it could not possibly success and the Court would approach the application, assuming that all the allegations in the statement of claim were factually correct"*

(5) In the case of **National MBF Finance (Fiji) Ltd v Buli [2000] FJCA 28; ABU0057U.98S (6 JULY 2000),** it was held;

"The law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the Court".

(6) In **Tawake v Barton Ltd** [2010] FJHC 14; **HBC 231 of 2008 (28 January 2010),** Master Tuilevuka (as he was then) summarised the law in this area as follows;

*"The jurisdiction to strike out proceedings under Order 18 Rule 18 is guardedly exercised in exceptional cases only where, on the pleaded facts, the plaintiff could not succeed as a matter of law. It is not exercised where legal questions of importance are raised and where the cause of action must be so clearly untenable that they cannot possibly succeed (see **Attorney General –v- Shiu Prasad Halka 18 FLR 210 at 215,** as per Justice Gould VP; see also **New Zealand Court of Appeal decision in Attorney –v- Prince Gardner [1998] 1 NZLR 262 at 267.**"*

(7) His Lordship Mr Justice Kirby in **Len Lindon –v- The Commonwealth of Australia (No. 2) S. 96/005** summarised the applicable principles as follows:-

a) *It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the court, is rarely and sparingly provided.*

b) *To secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action ... or is advancing a claim that is clearly frivolous or vexatious...*

c) *An opinion of the Court that a case appears weak and such that is unlikely to succeed is not, alone, sufficient to warrant summary termination... even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and arguments and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.*

d) *Summary relief of the kind provided for by O.26 r 18, for absence of a reasonable cause of action, is not a substitute for proceeding by way of demurrer.... If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.*

e) *If, notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a Court will ordinarily allow that party to reframe its pleading.*

f) *The guiding principle is, as stated in O 26 r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit.*

(8) In **Paulo Malo Radrodro v Sione Hatu Tiakia & others, HBS 204 of 2005,** the Court stated that:

"The principles applicable to applications of this type have been considered by the Court on many occasions. Those principles include:

a) *A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered – Lord Pearson in* ***Drummond Jackson v British Medical Association*** *[1970] WLR 688.*

b) *Frivolous and vexation is said to mean cases which are obviously frivolous or vexations or obviously unsustainable – Lindley Li in* ***Attorney General of Duchy of Lancaster v L.N.W Ry****[1892] 3 Ch 274 at 277.*

c) *It is only in plain and obvious cases that recourse would be had to the summary process under this rule – Lindley MR in* ***Hubbuck v Wilkinson*** ***[1899] Q.B 86.***

d) *The purpose of the Courts jurisdiction to strike out pleading is twofold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice; defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.*

e) *"The first object of pleadings is to define and clarify with position the issues and questions which are in dispute between the parties and for determination by the Court. Fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that the opposing parties can bring evidence on the issues disclosed –* ***ESSO Petroleum Company Limited v Southport Corporation*** ***[1956] A.C at 238" – James M Ah Koy v Native Land Trust Board & Others – Civil Action No. HBC 0546 of 2004.***

f) *A dismissal of proceedings "often be required by the very essence of justice to be done"..... – Lord Blackburn in* ***Metropolitan – Pooley [1885] 10 OPP Case 210 at 221-*** *so as to prevent parties being harassed and put to expense by frivolous, vexations or hopeless allegation – Lorton LJ in* ***Riches v Director of Public Prosecutions*** ***(1973) 1 WLR 1019 at 1027"***

g) *A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered – Lord Pearson in* ***Drummond Jackson v British Medical Association*** ***[1970] WLR 688.***

h) *Frivolous and vexation is said to mean cases which are obviously frivolous or vexations or obviously unsustainable – Lindley Li in* ***Attorney General of Duchy of Lancaster v L.N.W Ry****[1892] 3 Ch 274 at 277.*

i) *It is only in plain and obvious cases that recourse would be had to the summary process under this rule – Lindley MR in* ***Hubbuck v Wilkinson*** ***[1899] Q.B 86.***

j) *The purpose of the Courts jurisdiction to strike out pleading is twofold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice; defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.*

k) *"The first object of pleadings is to define and clarify with position the issues and questions which are in dispute between the parties and for determination by the*

*Court. Fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that the opposing parties can bring evidence on the issues disclosed – **ESSO Petroleum Company Limited v Southport Corporation** [1956] A.C at 238" – **James M Ah Koy v Native Land Trust Board & Others** – Civil Action No. HBC 0546 of 2004.*

l) *A dismissal of proceedings "often be required by the very essence of justice to be done"..... – Lord Blackburn in **Metropolitan – Pooley [1885] 10 OPP Case 210 at 221-** so as to prevent parties being harassed and put to expense by frivolous, vexations or hopeless allegation – Lorton LJ in **Riches v Director of Public Prosecutions** (1973)1 WLR 1019 at 1027"*

(9) **In Halsbury's Laws of England ,Vol 37, page 322** the phrase **"abuse of process"** is described as follows:

"An abuse of process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of an abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court."

(10) The phrase **"abuse of process"** is summarised in **Walton v Gardiner (1993) 177 CLR 378** as follows:

"Abuse of process includes instituting or maintaining proceedings that will clearly fail proceedings unjustifiably oppressive or vexatious in relation to the defendant, and generally any process that gives rise to unfairness"

(11) In **Stephenson –v- Garret [1898] 1 Q.B. 677** it was held:

"It is an abuse of process of law for a suitor to litigate again over an identical question which has already been decided against him even though the matter is not strictly res judicata".

(D) ANALYSIS

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

(2) Before I pass to consideration of submissions, let me record that the counsel for the Plaintiffs and the second and third Defendants in their written submissions has done a fairly exhaustive study of judicial decisions and other authorities which they considered to be applicable.

I interpose to mention that I have given my mind to the oral submissions made by counsel, helpful written submissions and the judicial authorities referred to therein.

(3) The second and third Defendants in this application are relying on **Order 18, Rule 18 of the High Court Rules of Fiji, 1988** and the inherent jurisdiction of the court. Order 18 rule 18 states that:

> *"18 (1)The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action or anything in any pleading or in the endorsement, on the ground that-*
>
> *(a) it discloses no reasonable cause of action or defence, as the case may be; or*
> *(b) it is scandalous, frivolous or vexatious: or*
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
> *(d) it is otherwise an abuse of the process of the court;*
>
> *And may order that the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be..."*

The Striking out application by the second and third defendants is made on the grounds that the Plaintiffs action;

(a) discloses no reasonable cause of action
(b) is scandalous, frivolous or vexatious: and
(c) is an abuse of the process of the court.

(4) The second and third Defendants argument runs essentially as follows: **(Reference is made to paragraphs 4.3, 4.4, 4.6, 5.3 and 5.4 of the second and third Defendants written submissions)**

> 4.3 *The defendant submits that the above case clearly illustrates the operation of a claim and how if the Plaintiff's claim does not show any reasonable cause of action by not relying on legislative provisions to enforce the allegations of how the*

defendants owe the beneficiaries of an estate a duty of care. The Plaintiffs fail to recognise the statutory role of the 2nd named defendant as Landlord over the lease and that the 1st named Defendant was the registered Lessee. ***Stovin v Wise*** *[supra] requires that statute, its policy and construction is relevant to a consideration of whether or not there are special circumstances for imposing a duty or care on a statutory authority. The Defendant further submits that the Plaintiff's claim does not rely on any statutory authority but simply alleges negligence on the part of the 2nd named Defendant.*

4.4 *The Defendant submits that the claim filed by the Plaintiff does not show any reasonable cause of action against the Defendant as it does not present allegations that can be considered to cause some chance of success as the allegations are rebutted with either statutory boundaries or simple facts that are substantiated in the Court Records or public records. It is our respectful submission that there is no reasonable cause of action against the Defendant.*

4.6 *The Plaintiff's substantive claim alleges negligence and the defendants submit that the law on negligence is specific and must be pleaded accordingly. The law of Negligence requires that there be a duty of care, that the duty be breached, that there be causation and that the breach cause harm or damage to a plaintiff. The legal issues that need to be raised are within these four basic elements and the plaintiff must show the Court that its allegation of negligence falls within these four elements. The Defendants further submits that there are no legal issues that can be raised on the facts pleaded as they appear in the claim relied upon by the Plaintiff.*

5.3 *The Defendant further submits that the claim filed by the Plaintiffs is frivolous and vexatious in that the application does not clearly stipulate the cause of action and define the statutory legislations that it depends on. The law of negligence is specific and there are four elements that must be met and more so in civil suits against the State.*

5.4 *Moreover, the Plaintiffs are imposing the role and duty of the Administrator and Executrix of the estate of the late Latchman Reddy upon the 2nd named defendant which is wrong in law. Paragraphs 23, 24, 25 and 26 of the Writ of Summons imply that the 2nd named Defendant is denying the Plaintiffs of their interest in the estate. The 2nd named Defendant is simply the administrator and Landlord of all State land in Fiji and is given powers under statute which do not deal with estates.*

(5) As against this, the Plaintiffs say that the Amended Statement of Claim discloses a reasonable cause of action and tribal issues against the second and third Defendants.

(6) **Striking Out**

As noted above, the Courts rarely will strike out a proceeding .It is only in exceptional cases where, on the pleaded facts, the Plaintiff could not succeed as a matter of law or

where the cause of action is so clearly untenable that it cannot possibly succeed will the courts act to strike out a claim.

In this regard, I am inclined to be guided by the decision of the New Zealand Court of Appeal in **"Lucas & Sons (Nelson Mail) v O. Brien** (1978) 2 N.Z.L.R 289 as being a convenient summary of the correct approach to the application before the court. It was held;

> *"The Court must exercise .....jurisdiction to strike out pleadings sparingly and with great care to ensure that a Plaintiff was not improperly deprived of the opportunity for a trial of his case.* ***However, that did not mean that the jurisdiction was reserved for the plain and obvious case; it could be exercised even when extensive argument was necessary to demonstrate that the Plaintiff's case was so clearly untenable that it could not possibly succeed."***
>
> (Emphasis added)

Where, a claim to strike out depends upon the decision of one or more difficult points of law, the court should normally refuse to entertain such a claim to strike out. But, if in a particular case the court is satisfied that the decision of the point of law at that stage will either avoid the necessity for trial altogether or render the trial substantially easier and cheaper ; the court can properly determine such difficult point of law on the striking-out application. In considering whether or not to decide the difficult question of law, the court can and should take into account whether the point of law is of such a kind that it can properly be determined on the bare facts pleaded or whether it would not be better determined at the trial in light of the actual facts of the case; **See *Williams & Humber Ltd v H Trade markers (jersey) Ltd (1986) 1 All ER 129 per Lord Templeman and Lord Mackay.***

Returning back to the instant case, in my view, the facts pleaded in the Amended Statement of Claim are appropriate to determine a question of law.

(7) Now let me return to the instant case, bearing the aforesaid legal principles uppermost in my mind.

I note that the **3rd Defendant** is sued as "the legal representative of the Government of Republic of Fiji". The absence of any specific averments against it does not concern this court on this particular application.

The particular averments against the **2nd defendant** are contained in **paragraphs 15 to 26** in the Amended Statement of Claim, as follows;

Para 15. *The Second Defendant was aware of the interest of the Plaintiff by virtue of the transmission by death and the caveat.*

Para 16. *The Second Defendant is fully aware that the First Defendant has failed to settle the estate within 12 months or within a reasonable time and the Second Defendant has allowed this to continue.*

Para 17. *The Second Defendant is aware that parts of the land in Crown Lease No 6774 is sub-divided into lots and sold by the First Defendant was required to obtain consent or agreement of the Plaintiffs before the alternation of the interested Crown Lease No 6774*

Para 18. *On the 22nd day of August 2014 the Plaintiff wrote the Second Defendant requesting information on the lease and the Plaintiffs also offered to pay them shares of the dues, that is rental penalties the Second Defendant has not responded to the said letter.*

Para 19. *In January 2015 the Plaintiff discovered that the Second Defendant had allowed the First Defendant to accumulate rental arrears of $ 7 435.67 on the Crown Lease No.6774*

Para 20. *On 27th January 2015 following correspondence from First Defendants lays the Plaintiff again wrote to asking what if a new lease is issued it must be in name of three beneficiaries or First Defendant as trustees suffer loss and damages of testator's intention is defeated Plaintiff also indicated that they were willing to pay rental.*

Para 21. *The Second Defendant did not reply to the Plaintiffs letter dated 27th January 2015.*

Para 22. *The Plaintiff was informed during one of their visits that the new lease will be in name of the estate with First Defendant as administrator.*

Particulars

a) The Second Defendant promised that new lease will be in name of estate.

b) The Plaintiff relied on the promise.

c) The Plaintiff will suffer loss and damages to the value of;

(i) The market value of the estate is about $400,000.00 to-day (valuation will be provided at trial) In 2008 the valuation was $202,000.00

(ii) *The improvements on the property is valued at about $100.000.00.*

(iii) *About 5 lots of the estate has been sold for about $6,000.00 to $8,000.00 per lot*

(iv) *Loss of income for cane proceeds since 2004*

(v) *Loss of vehicle and implements of the estate.*

(vi) *Loss of income in the bank.*

(vii) *Loss of rental income from properties of the estate.*

Para 23. *The Second Defendant, as per the sworn Affidavit of First Defendant has now promised to issue the renewal of same lease in the name of Second Defendants the expiry of current lease is in August 2015.*

Particulars

a) The second Defendant was ware that the estate could have been settled in 12 months or within a reasonable time.

b) The Second Defendant was aware that the First Defendant had accumulated rental arrears and interest on arrears.

c) The Second Defendant knew the Plaintiff was willing to pay the rental, but the Second Defendant stated that the receipt will be issued in name of the First Defendant.

Para 24. *The Second Defendant is liable in damage to the extent of loss to the beneficiaries by the conduct of the Second Defendant in promising the new lease to the First Defendant.*

Para 25. *The Second Defendant is estopped from denying the interest of the Plaintiffs in their father's estate.*

Para 26. *In the Alternative the Second Defendant is liable also in equity for its inconsiderable conduct.*

Particulars

a) The Plaintiff such equitable remedy in the alternative

b) An equitable injunction preventing the Second Defendant from issuing a new lease in the name of the First Defendant in her personal capacity.

c) *Damage is equity.*

d) *The action of the Second Defendant is unjust departure by a party from an assumption which he caused another party to adopt or accept.*

Particulars of Damages

(i) *The intention of the testator will be abrogated*

(ii) *The current court action will have no utility.*

(iii) *The Plaintiff who are 2/3 beneficiaries of the estate will be deprived of their shares.*

It is sufficiently clear from the averments, that the Plaintiffs claim is based on what are claimed to be **"failures"** and **"positive actions"** of the second Defendant. As I understand the pleadings, the Plaintiffs action is based on 'private law cause of action for breach of statutory obligations' and a cause of action for 'ordinary common law negligence' in the exercise of statutory powers. The gist of the action is damages. **The Plaintiffs do not specifically allege '*mala fide*' or '*ultra vires*'.**

(8) **Private law cause of action for breach of statutory obligations**

What concerns me is how could the liability arise on what are claimed to be **"failures"** and **"positive actions"** of the second Defendant in the absence of reference to any particular statute and statutory provision. **What is the particular statute and statutory provision imposing a duty of care on the second Defendant?** To be more precise, **what is the particular statutory framework within which the acts complained of were done?** This was not identified in the Amended Statement of Claim. **The Plaintiffs have failed to show the breach of any particular statute and statutory provision in the Amended Statement of Claim. Thus, I can see no escape from the conclusion that the Plaintiffs Amended Statement of Claim discloses no reasonable cause of action against the second and third Defendants. I am left with the strong impression that the Plaintiffs Amended Statement of Claim does not, under any conceivable circumstances, give rise to a 'cause of action' sufficient to support or maintain 'a civil proceedings against the state'. I am firmly of the view that the Plaintiffs action as pleaded is improperly constituted, discloses no reasonable or arguable cause of action; and is doomed to failure. Accordingly, to allow it to continue in its present form would be, not only vexatious but also an abuse of process of the court.**

(9) Nevertheless, I do not wish to rest the matter there. Let me assume for a moment in favour of the Plaintiffs that the Amended Statement of Claim does make reference to the breach of a particular statute, statutory provision and the damage caused by it.

Thus, the question, did the legislature intend to confer on the Plaintiffs a private law cause of action for breach of statutory duty? Did the legislature intend to confer on the Plaintiffs protection from damage of a kind for which, if the protection is not effectively provided, the common law will afford a monetary remedy?

In determining whether the Plaintiffs are entitled to damages for breach of statutory duty the issue is whether the legislature intended to confer on the Plaintiffs **a private law cause of action for breach of statutory duty** and whether the Plaintiffs belonged to a class which the statutory provision was intended to protect and as a result of a breach of that provision had suffered damage of a kind against which the provision was intended to protect them. In determining whether the legislature intended to confer on the Plaintiffs **a private law cause of action for breach of statutory duty**, the Court has to construe the particular statutory provision alleged to give rise to the right of action in its context.

See;

- **Groves v Lord Wimborne (1898) 2 Q.B 402**
- **Lonrho Ltd v Shell Petrollium Co Ltd (1981) 2 All E. R 456**
- **Arbon v Anderson (1943) 2 All. E. R. 154**
- **Stovin v Wise (1996) 3 All. E. R 801**
- **Eastern Express Ltd v Tuitoga 2001 FJHC 93.**

In this, I am further comforted by the decision of Lord Browne – Wilkinson in **X V Bed Fordshire CC** (1995) 3 All. E. R 353, where his Lordship under the heading "*Breach of statutory duty simpliciter*" said;

> *'The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty.'*

Therefore, my understanding of the law is that; a private law cause of action will not arise as long as the act or statute is one of general application for the benefit of all members of the public, without distinction.
Therefore, it is very clear, that a breach of a statutory duty does not give rise to private cause of action if the statute is plainly one of general application for the benefit of all members of the public without distinction.

As noted above, the improper exercise of statutory powers does not, by itself, give rise to any civil liability in English law; **See *Bourgoin SA V Ministry of Agriculture Fishries and Food (1985) 3 ALL ER 585.***

The liability in private law for the improper exercise of statutory powers can only arise **(a) If the second Defendant acted knowingly in excess of such powers or maliciously, (b) If the statute was passed for the protection of a specific class of the public to which the Plaintiffs belong or (c) the power has been exercised negligently in breach of a private law duty of care to the Plaintiffs.**

As I understand the pleadings, the Plaintiffs do not claim under either (a) or (b). They come under (c).

As noted above, the exercise of statutory powers does not give rise to a private law duty of care; **See; *Davis v Radcliffe (1990) 2 ALL ER 536.***

It is well established that in cases where the exercise of a statutory discretion involves the weighing of competing public interests, particularly financial or economic interests, no private law duty of care arises **because the matter is not justiciable by the courts**. It is for the body to whom Parliament has committed that discretion to weigh the competing public interest factors; the courts cannot undertake the task; A distinction is drawn between such 'policy discretions' on the one hand and 'operational powers' on the other. Broadly, operational powers involve the carrying out policy decisions. The exercise of operational statutory powers can, but not necessarily will give rise to private law duty of care ; See ***Anns v Merton London Borough (1977) 2 ALL ER 492, per Lord Wilberforce and Rowling v Takro Properties Ltd (1988) 1 ALL ER 163.***

As was said by **Sir Nicolas Browne-Wilkinson V.C** in **Lonrho Plc v. Tebbit** (1991) 4 ALL E.R 973 at **p.981:**

> *'.....it is well established that in case where the exercise of a statutory discretion involves the weighing of competing public interests, particularly financial or economic interests, no private law duty of care arises because the matter is not*

justiciable by the courts. It is for the body to whom Parliament has committed that discretion to weigh the competing public interest factors: the courts cannot undertake that tasks.'

Moreover, if the breach of a statutory duty does not give rise to private cause of action, it would exclude the existence of a Common Law duty of Care. In **'Stovin v Wise"** (1996) 3 All. E. R 801, Lord Hoffman said;

'The same is true of omission to perform a statutory duty. If such a duty does not give rise to a private right to sue for breach, it would be unusual if it nevertheless gave rise to a duty of care at common law which made the public authority liable to pay compensation for foreseeable loss caused by the duty not being performed ..... If the policy of the Act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care.'

The approach was re-echoed by Lord Bridge in **Murphy v Brentwood D.C** (1990) 2 All E. R. where his Lordship said;

'(There) may be cogent reasons of social policy for imposing liability on the authority. But the shoulders of a public authority are only broad enough to bear the loss because they are financed by the public at large. It is pre-eminently for the legislature to decide whether these policy reasons should be accepted as sufficient for imposing on the public the burden of providing compensation for private financial losses. If they do so decide, it is not difficult for them to say so.'

For the reasons which I have endeavoured to explain ,the Plaintiffs private law cause of action for breach of statutory powers is not only vexatious it is an abuse of process of the court. The enforcement of a positive statutory duty lies in a public law action brought by way of judicial review and not in a private law claim for damages.

(10) **A cause of action for ordinary common law negligence in the exercise of statutory powers**

Is there a cause of action for ordinary common law 'negligence' in the exercise of statutory powers?
It is trite law that a claim in ordinary common law 'negligence' will only succeed if the Plaintiffs are able to establish **(a) that the second Defendant owed a duty of care to the Plaintiffs (b) that the second Defendant breached the duty of care (c) such breach resulted in causing damages to the Plaintiffs.**

What concerns me is whether the relationship between the Plaintiffs and the second Defendant sufficiently proximate to constitute the special relationship required giving rise to a duty of care to prevent any economic loss or damages to the Plaintiffs?

This question has to be approached in two stages. First, one has to ask whether, as between the alleged wrongdoer, the second Defendant, and the person who has suffered damage, the Plaintiffs, there is a sufficient relationship of 'proximity' or 'neighbourhood' such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative , or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise . **See *Home Office v Dorset Yacht Co Ltd, (1970) 2 ALL ER 294, per Lord Reid.***

In my view, in the instant case, there is no such a special relationship of proximate as to give rise to a duty of care to protect the Plaintiffs against economic loss or damages. **The English law does not recognise that there can ever be a duty of care owed by someone exercising statutory powers not to cause economic loss or damages to those affected by the exercise of such powers.** Because, as a matter of public policy , the imposition of liability in negligence on a public officer will make him so cautious in the exercise of his statutory function as to lead to unnecessary delay in the discharge of those functions contrary to public interest. If public officers start looking over their shoulders because of the risk of liability in 'negligence', the public administration will be adversely affected. The court will be going beyond its proper role, if it seeks to attach private liabilities to discharge of public functions. I find considerable support for my view from the dicta in the following judicial decisions.

In the **Caparo Industries plc v Dickman** [1990] 1 All ER 568 at 573 – 574, [1990]2 AC 005 at 617 – 618) Lord Bridge said:

> *'What emerges is that, in addition to the foreseeability of damages, necessary ingredients in any situation giving rise to a duty of care are*

that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity" or neighbourhood and that the situation should be one in which the court considers it fair , just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effects to little more than convenient labels to attaché to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principals common to the whole field of negligence, I think the law has now moved in the direction of attached greater significance to the more.

[1991] 4 All ER 973 at 983

traditional categorisation of distinct and recognisable situations as guide to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think recognise the wisdom of the words of Brennan J in the High Court of Australia in Sutherland Shire Council v Heyman (1985) 60 ALR 1 at 43 – 44, where he said "It is preferable in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'consideration which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.'

This approach is re-echoed in the dicta in the **Rowling v Takaro Properties** [1988] 1 All ER 163 at 172, [1988] AC 473 at 501) where Lord Keith said:

'.....classification of the relevant decision as a policy or planning decision in this sense may exclude liability, but a conclusion that it does not fall within that category does no, in their Lordship' opinion, mean that a duty of care will necessarily exist. It is at this stage that it is necessary, before concluding that a duty of care should be imposed, to consider all the relevant circumstances. One of the considerations underlying certain recent decisions of the House of Lords.....is the fear that a too literal application of the well-known observation of Lord Wilberforce in Anns v Merton London Borough [1977] 2 All ER 492 at 498, [1978] AC 728 at 751 - 752 may be productive of a failure to have regard to, and to analyse and weigh, all the relevant considerations in considering whether it is appropriate that a duty of care should be imposed. Their Lordships consider that question to be

of an intensely pragmatic character, well suited for gradual development but requiring most careful analysis.'

I should add that the Plaintiffs in the instant case do not allege 'malice' or 'ultra vires'. They allege negligence. If a public authority exercises a statutory power negligently there is no liability if the damage results from the bona fide exercise of its discretionary powers. For planning decisions or other decisions of policy no duty of care can arise unless the Plaintiff first proved that the public body was acting ultra vires. **See;** ***Home Office v Dorset Yacht Co Ltd (1970) AC 1004, Anns v Merton London Borough Council, (1978) AC 728.***

Thus, the Plaintiffs cause of action for ordinary common law 'negligence' in the exercise of statutory powers is doomed to failure. Accordingly, to allow it to continue would be, not only vexatious but also an abuse of process of the court. I should add that it is an abuse of the process of the court for this case to be brought by way of an action in the ordinary courts since the Plaintiffs claim raises questions of public law which can only be properly raised in proceedings by way of judicial review. **See;** ***O'Reilly v Mackman, (1982) 3 ALL ER 1124.***

At this stage, I cannot resist in saying that allowing the Plaintiffs claim in the instant case to succeed would open up flood gates to whoever is unsatisfactory with the decision of an administrator or an executor over an estate.

(11) For the reasons which I have endeavoured to explain, I venture to say beyond a per adventure that the Plaintiffs Amended Statement of Claim does not raise debatable questions of facts. Therefore, it is competent for the Court to dismiss the action on the ground that it discloses no reasonable cause of action against the second and third Defendants.
Fundamentally, courts are required to determine cases on merits rather than dismissing them summarily on procedural grounds.

It is a fundamental principle of any civilised legal system that all parties in a case are entitled to the opportunity to have their case dealt with at a hearing at which they or their representative are present and heard.

At this juncture, I bear in mind the "**caution approach**" that the court is required to exercise when considering an application of this type.

I remind myself of the principles stated clearly in the following judicial decisions.

In Dev. v. Victorian Railways Commissioners[1949] HCA 1; (1949) 78CLR 62, 91 Dixon J said:

> *"A case must be very clear indeed to justify the summary intervention of the court ... once it appears that there is a real question to be determined whether of fact or of law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process."*

In Agar v. Hyde (2000) 201 CLR 552 at 575 the High Court of Australia observed that:

> *"It is of course well accepted that a court should not decide the issues raised in those proceedings in a summary way except in the clearest of cases. Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way and after taking advantage of the usual interlocutory processes."*

I am of course mindful that a case must be very clear indeed to justify summary intervention of the Court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional circumstances.

I have no doubt personally and I am clearly of the opinion that this is a case for the summary intervention of the Court. The decision of the point of law at this stage will certainly avoid the necessity for trial against the second and third Defendants. This action against the state must be dismissed.

At this stage, I cannot resist in saying that allowing the Plaintiffs claim in the instant case against the state to succeed would open up flood gates to whoever is unsatisfactory with the decision of an administrator or an executor over an estate.

In the circumstances, I certainly agree with the sentiments which are expressed inferentially in the Defendants submissions. I must confess that I am not in the least impressed by the proposition advanced by the Plaintiffs.

(12) To sum up, in view of the foregoing analysis, I venture to say beyond a per adventure that the Plaintiffs have failed to disclose a reasonable cause of action against the second and third Defendants and in the result the Plaintiffs case is clearly untenable.

I could see nothing to change my opinion even on the basis of exhaustive work contained in "**Commentary on Litigation**" by "**Cokes**", and "**A practical approach to Civil Procedure**", by "**Stuart Sime**", Thirteenth Edition.

Accordingly, there is no alternate but to dismiss the Plaintiffs action and the Amended Statement of Claim to protect the second and third Defendants from being further troubled, to save the Plaintiffs from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merits.

I cannot see any other just way to finish the matter than to follow the law.

Essentially that is all I have to say!!!

(E) FINAL ORDERS

(1) The Plaintiffs Amended Writ of Summons and Statement of Claim filed against the second and third Defendants is struck out.

(2) The Plaintiffs are ordered to pay costs of $1000.00 to the second and third Defendants which is to be paid within 14 days hereof.

I do so order!

HIGH COURT OF FIJI LAUTOKA

20/05/2016.

Jude Nanayakkara
Master

At Lautoka
20th May 2016.