

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

Civil Action No. 171 of 2011

**BETWEEN** : **SUNBEACH FIJI LIMITED T/A TRANS**  
**INTERNATIONAL HOTEL** a limited liability company having  
its registered office at 11 Salala Place, Lautoka but operating from  
Queens Road, opposite Nadi Airport, Nadi.

**PLAINTIFF**

**AND** : **FRANCIS CHUNG, STEVEN PICKERING AND ISIKELI**  
**MARAKIWAI TUINAMUANA** all of Suva Trading as Ernst  
And Young a chartered Accountant operating from Suva and  
Lautoka.

**DEFENDANTS**

Solicitors : Suresh Maharaj for the Plaintiff  
O'Driscoll for the Defendant

## **R U L I N G**

### **INTRODUCTION**

1. Before me is an application to strike out the statement of claim. The application is made pursuant to Order 18 Rule 18 of the High Court Rules 1988. Order 18 Rule 18(1) (a), (b) and (d) of the High Court Rules 1988 states as follows:

**Striking out pleadings and endorsements (O.18, r.18)**

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

- (a) it discloses no reasonable cause of action or defence, as the case may be; or
- (b) it is scandalous, frivolous or vexatious; or
- (c) it is otherwise an abuse of the process of the court;

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

2. What is also before me is an application to set aside default judgement which was entered by the plaintiff against the defendants on 17 July 2012 on account of the defendants' failure to file a statement of defence. The judgement was entered regularly. Notably, the summons to strike out was filed a day before default judgement was entered on 16 July 2012.

### **THE PLAINTIFF'S CLAIM**

3. The plaintiff is a company which runs and operates the Trans International Hotel which is situated alongside the Queens Road opposite Nadi International Airport. The defendants are partners in the Accounting Firm of Ernst & Young. The plaintiff's claim is based on the allegation that that Ernst & Young's auditors failed to detect some fraud involving the sum of \$83,756.11 between 2009 and 2010 when they audited the plaintiff's accounts for the years ending 31 December 2009 and 31 December 2010. It is alleged that in failing to detect the fraud, Ernst & Young fell short of its professional duty as auditors.
4. The plaintiff's claim rests essentially on a written opinion submitted by Ernst & Young auditors for each of the two years of the audit process which states that in the opinion of the auditors:
5. Courts will rarely strike out a statement of claim. The reason is best explained by Mr Justice Kirby in **Len Lindon –v- The Commonwealth of Australia (No. 2) S. 96/005** as follows:-

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.

6. The same principles are further reinforced in Fiji under section 15(2) of the 2013 Constitution which gives to every party to a civil dispute the right to have the matter determined by a court of law.

*Access to courts or tribunals*

15.—(2) Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal.

7. I am of the view that the statement of claim discloses a reasonable cause of action. Without going into detail, suffice it to say that there are triable issue involved and that the affidavit of Pickering would tend to show that the defendants have a good defence.

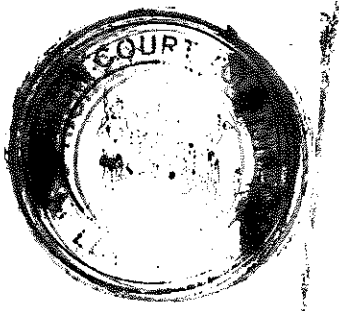
### **THE DEFENDANTS' POSITION**

8. I am also of the view that the defendants have a defence on the merits.

9. The Courts generally will exercise their discretion to set aside a default judgement which has been entered regularly if there is an affidavit of merits which disclose that the defendant has a meritorious defence.
10. The White Book (, i.e. The Supreme Court Practice 1997 (Volume 1) at p.143) states as follows:-
- "Regular judgment -If the judgment is regular, then it is an (almost) 13/9/5 inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing a defence on the merits (Farden v. Richter (1889) 23 Q.B.D. 124. "At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason," per Huddleston, B., ibid. p.129, approving Hopton v. Robertson [1884] W.N. 77, reprinted 23 Q.B.D. p. 126 n.; and see Richardson v. Howell (1883) 8 T.L.R. 445; and Watt v. Barnett (1878) 3 Q.B.D. 183, p.363).
11. The affidavit of Steven Pickering filed in support of the striking out application asserts that Ernst & Young's auditors did highlight certain control deficiencies in all their audit reports. They had found some issues within the plaintiff company's accounting processes. For these, they had recommended in the Audit Closing Report that the plaintiff company cause an investigation.
12. Pickering's affidavit asserts that the recommendations obviously were not heeded by the plaintiff company because the same control issues would be repeated in the latter audit process period and the same recommendations repeated.

### ORDERS

13. Application to strike out dismissed. Default Judgement Set Aside. Parties to bear own costs. Case adjourned to **25 August 2016** at **10.30 a.m** for directions.



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Anare Tuilevuka  
**JUDGE**  
12 August 2016