

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

Civil Action No. 374 of 1999.

**BETWEEN** : **CONCAVE INVESTMENTS COMPANY LIMITED** a limited liability company having its registered office in Suva.

**PLAINTIFF**

**AND** : **NADI TOWN COUNCIL** a Local government Body created under the Local Government Act (Cap 125).

**DEFENDANT**

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

1. Before me is an application to strike out the plaintiff's statement of claim. The application is made pursuant to Order 18 Rule 18(1)(a) of the High Court Rules 1988. Order 18 Rule 18(1)(a) 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

2. Generally, the Courts will exercise this jurisdiction under Order 18 Rule 18(1)(a) rather guardedly. The reason why they would do so 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.

3. 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.

4. To demonstrate the extent to which the Court must adopt a guarded attitude, Kirby J went on to say as follows in **Len Lindon**:

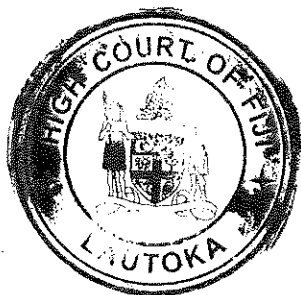
An opinion of the Court that a case appears weak and such that is unlikely to succeed is not, alone, sufficient to warrant summary termination... even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and arguments and extended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

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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

5. Where an application to strike out is based on the allegation that the statement of claim discloses no reasonable cause of action, the Courts will look only at the facts as pleaded and, assuming them to be proved, ask whether the plaintiff could succeed on his claim.
6. 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. If the facts as pleaded do raise legal questions of importance, or a triable issue of fact on which the rights of the parties depend, the courts will not strike out the claim. (as per Mr. Justice Kirby in **Len Lindon -v- The Commonwealth of Australia** (No. 2) S. 96/005).
7. Having reviewed the statement of claim, I am the view that the claim discloses a reasonable cause of action.
8. My reasons follow:
  - (i). CICL used to own CT 10581 having an area of 21 acres 3 rood and 3 perches. CICL decided to subdivide the land in 1993 to create commercial and residential lots.
  - (ii). plans were drawn up and the proposed scheme was lodged with the Director of Town & Country Planning for approval.
  - (iii). DTCP, as part of its process, presented the plan to the defendant Council for approval.
  - (iv). in due course, the defendant council would approve the plan and so did DTCP subject to certain conditions in the approval granted in December 2003.
  - (v). as pleaded at paragraph 8 of the statement of claim, the defendant council did not impose any terms or conditions regarding drainage, waste water and refuse disposal.
  - (vi). CICL then commenced subdivision in terms of the approvals of DTCP and the defendant Council.
  - (vii). at some point near completion of subdivision works, the defendant Council wrote to CICL consultants that they required CICL to have a drainage outlet through the neighbour's land, one Lal Deo and for CICL to enter into an agreement with Lal Deo for that purpose.

- (viii). CICL took the view that since there was no such requirement on the approved plan, it was not necessary for it to enter into such an agreement with Deo. However, to minimise its loss, CICL eventually did and, allegedly, suffered some loss as a result.
  - (ix). that completed stage 1 of the subdivision to the satisfaction of the defendant Council which it did confirm in writing.
  - (x). CICL then applied to, and obtained from the Registrar of Titles separate titles for each lot.
  - (xi). in due course, CICL would start selling the lots but the sale of the lots were being hampered by the defendant council's refusal to approve building plans on the ground that the subdivision did not have a storm water outlet.
9. I accept that the defendant Council and the DTCP would fail even more greatly if they were to have approved the purchasers' plans knowing full well that the subdivision lacked a proper storm water outlet. If that had been the case, the purchasers would have a case against the developer CICL and, in turn, CICL would still have roped in the current defendants in third party proceedings for having approved the building plans knowing full well that the subdivision lacked a storm water outlet.
10. I think CICL has a really weak case but I still take heed of Kirby J's warning in Len Lindon (supra paragraph 4 above). Accordingly, I dismiss the summons/strike out the claim. Costs in the cause.
11. Case adjourned to Wednesday **05 October 2016** for mention to set a trial date.



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Anare Tuilevuka  
**JUDGE**  
28 September 2016