IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 150 of 2015

BETWEEN : **TIMAIMA LEBA DAKUNA** of Saweni Lautoka, Laundry Attendant.

PLAINTIFF

AND : **LAUCALA ISLAND RESORT LIMITED**, a limited liability company having its registered office at KPMG, Level 10, BSP Central, Renwick Road, Suva.

DEFENDANT

(Ms) Repeka Qoro Varasikete for the Plaintiff
Mr. John Leslie Apted for the Defendant

Date of Hearing : - 19th October 2016
Date of Ruling : - 20th January 2017

RULING

(A) INTRODUCTION

1. The matter before me stems from the 'Inter-Parte Summons' filed by the Defendant, pursuant to Order 18, rule 18 (1) (a), (b), (c) and (d) of the High Court Rules, 1988 and the inherent jurisdiction of the Court seeking the grant of the following Orders;

> *(a) An Order under O.18 r 18(1) (a) of the High Court Rules, 1988 and the inherent jurisdiction of the Court that the Statement of Claim be wholly struck out and the Plaintiff's claims against the Defendant contained therein be dismissed upon the ground that they disclose no reasonable cause of action;*

(b) *Further or in the alternative, an Order under O.18 r18(1)(b) of the High Court Rules, 1988 that the Statement of Claim be wholly struck out and the Plaintiff's claims against the Defendant contained therein be dismissed, upon the ground that they are scandalous, frivolous or vexatious;*

(c) *Further or in the alternative, an Order under O.18 r18(1)(c) of the High Court Rules, 1988 that the Statement of Claim be wholly struck out and the Plaintiff's claims against the Defendant contained therein be dismissed, upon the ground that they prejudice, embarrass or delay the fair trial of the action;*

(d) *Further or in the alternative, an Order under O.18 r18(1)(d) of the High Court Rules, 1988 that the Statement of Claim be wholly struck out and the Plaintiff's claims against the Defendant contained therein be dismissed, upon the ground that they are otherwise an abuse of the process of the court.*

(e) *An Order that the Plaintiff pays the costs of this application on a full indemnity basis; and*

(f) *Such further and other orders as this Honourable Court may deem just.*

(2) The Defendant did not file any Affidavit as evidence in support of the Summons for striking- out.

(3) The application for striking-out is strongly opposed by the Plaintiff. The Plaintiff too did not file any Affidavit. However, the Plaintiff has, in response, filed her Summons on 10th May 2016 to amend her Statement of Claim. That application is not yet before the Court for hearing.

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

(B) THE FACTUAL BACKGROUND

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

(2) On 11th September 2015, the Plaintiff issued a Writ against the Defendant seeking damages.

(3) There are three aspects to the Plaintiff's case;

(a) Breach of Statutory duty arising from the **"Health and Safety at Work Act, 1996".**

(b) Tort of **Negligence** for personal injury.

(c) Breach of the provisions in the **Employment Relations Promulgations, 2007**".

(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 Plaintiff in her Statement of Claim pleads *inter alia;*

1. *At all material time the Plaintiff was employed by the Defendant as laundry attendant from 2009 to 2014.*

2. *At all material time the Defendant is a limited liability company having its registered office at KPMG Level 10, BSP Suva Central, Renwick Road, Suva and carries on business of Tourism at Laucala Island.*

3. *That the Plaintiff was employed by the 1st Defendant to do work as follows:*

   i. *Shift work from 5 am to 3 pm daily during the week*
   ii. *Washing staff uniforms using washing machine and hand washing using washing detergent.*
   iii. *Ironing clothes.*

4. *That after the death of one of the laundry employee, Mr. Emosi Seru working with the Plaintiff, the Defendant then installed air condition in the workplace.*

5. *That sometimes in June or July 2013 during the course of her employment, the Plaintiff developed sudden pain on her left middle finger, and slowly her left hand swollen and increased in size.*

6. *The Plaintiff informed and made complaint of pain to the laundry supervisor and she visited the company doctor on the island. The Plaintiff was prescribed and given with panadol tablets but advised to continue working.*

7. *The Plaintiff visited the resort doctor and went to Waiyevo Hospital in Taveuni on number of occasions when pain persisted but was never treated. She was advised to travel to CWM Hospital, Suva for treatment.*

8. *On 11th November 2013 due to consistent and continuous pain on her left hand, the plaintiff went to Suva on her own and was seen at CWM Hospital for treatment. The Plaintiff was advised to do light duty and reviewed on 21st January 2014. Her next review was on 4th February 2014.*

9. *On 29th January 2014 the Plaintiff was admitted and discharged from CWM Hospital on 12th February 2014 and her next review was on 21st February 2014.*

10. *On 4th February 2014 the Plaintiff was taken for a left hand biopsy and discharged on 7th February 2014.*

11. *On 21st February 2014 the Plaintiff was reviewed by orthopaedic clinic and again admitted. She was transferred to the Hub Centre and TB Ward, Tamavua for her retroviral test.*

12. *In summary the Plaintiff was admitted 3 times vide letter dated 30th April 2014 to CWMH.*

29.01.14 to 03.04.14
- Left hand biopsy

21.02.14 to 03.04.14
- Pulmonary Tuberculosis
- Immuno Compromised State
- Varicella Zoster injection

16.05.14 to 10.06.14
- Pulmonary Tuberculosis
- Immuno compromised State

STATUTORY BREACH

13. *That the Defendant failed to comply with the provision of the Health and Safety at Work Act 1996, specifically Section 26 of the said Act.*

PARTICULARS OF BREACH

- *The Defendant failed to give notice of the accident or bodily injury to the relevant authority.*
- *The Plaintiff was never provided with adequate safety equipment during her working hours.*
- *Fail to provide adequate cooling system during the working hours*
- *Fail to provide safety equipment and procedures at the workplace.*
- *The Defendant allowed the Plaintiff to do other work like hand sewing of staff uniforms*
- *Allowed the Plaintiff to remove stains on clothes by hand washing using "DIPITZ" chemical mixture and other washing detergent.*
- *Did hand sewing machine and needles for patching staff clothes/uniforms.*

NEGLIGENCE

14. *The resort doctor as employee, servant and agent failed to provide proper medical prescription and medical advice to the Plaintiff. Hence the Plaintiff after complaining of the sudden pain on her wrist to her supervisor, the resort doctor failed to examine and or treat the Plaintiff.*

15. *As consequence of the matters aforesaid, the Plaintiff's left hand was swollen on the base of 4th and 5th fingers over 6 months and left supraclavicular swelling and left axilla swelling over 1 month.*

16. *Whilst the Plaintiff was still admitted at Tamavua Hospital the Defendant, his employee and or representative delivered termination letter dated 24th March 2014.*

17. *Such termination letter was effected immediately.*

BREACH OF EMPLYMENT RELATION PROMULGATION

18. *That such termination is in breach of the Employment Relation Promulgation specially Sections 29, 41 and 60 (1) (b) and (2).*

PARTICULARS OF BREACH

i. Failure to give one months notice
ii. Failure to pay wages and benefits in lieu of notice
iii. Fail to compensate in respect of accident or disease and right to repatriate
iv. Fail to pay holiday

19. *As consequences of the aforesaid matters the Plaintiff suffers and continues to suffer damages and financial loss.*

PARTICULARS OF LOSS

i)	*Transportation by husband and in laws for visitation over the period of admission*	-	*$1,000.00*
ii)	*Food and medical expenses*	-	*$ 300.00*
	Total	-	*$1,300.00*

20. *That the Plaintiff mitigated her loss by finding an employment with a tiny hotel in Lautoka as laundry attendant.*

(5) The Defendant filed its Acknowledgement of Service on 02nd October 2015 and its Statement of Defence on 20th October 2015.

The Defendant admits that the Plaintiff was an employee from 21st July 2008 to 14th May 2014, but denies any liability to the Plaintiff.

(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 remain in play.

(2) Provisions relating to striking out are contained in **Order 18, rule 18 of the High Court Rules, 1988 .** 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*
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> *(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 vexatious is said to mean cases which are obviously frivolous or vexatious 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, vexatious 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 vexatious is said to mean cases which are obviously frivolous or vexatious 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, vexatious 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 vexatious 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 counsel for the Defendant in his written submissions has done a fairly exhaustive study of judicial decisions and other authorities which he considered to be applicable.
I interpose to mention that I have given my mind to the oral submissions made by both counsel, helpful written submissions and the judicial authorities referred to therein.

(3) The Defendant in this application is 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..."*

(4) As I understand the arguments, the Defendant objects to the Plaintiff's claim for breach of Statutory duty on two distinct grounds; First that the alleged breaches (even if proved) is not enforceable in a Civil Action, and Secondly, even if they were, the relevant material facts have not been pleaded.

(5) DETERMINATION

(i) 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 Statement of Claim are appropriate to determine a question of law.

A striking-out application proceeds on the assumption that the facts pleaded in the Statement of Claim are true. That is so even although they are not or may not be admitted.

(ii) **Plaintiff Must Plead a Reasonable Cause of Action**

In relation to the ground of "no reasonable cause of action", paragraph 18/19//10 of the White Book states –

> *".... A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v British Medical Association [1970] WLR 688; [1970] 1 All ER 1094, CA."*

What is a "Cause of Action"?

The High Court in **Dean v Shah [2012] FJHC 1344**, defined a cause of action in the following way –

> *"A cause of action is said to be a set of facts that gives rise to an enforceable claim by a Plaintiff. In **Read v Brown 22 QBD 128** Esther M.R. States that a cause of action comprises every fact which if traversed the Plaintiff must prove in order to obtain Judgement. Lord Diplock in **Letang v Cooper (1965) 1 QB 232 at 242-243** states that a cause of action:*
>
> *".... Is simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person" (My emphasis)*

The High Court in **Dominion Insurance Ltd v Pacific Building Solutions [2015] FJHC 633**, defined a cause of action to mean –

> *".... Any facts or series of facts which are complete in themselves to found a claim for relief. (Obi Okoye, Essays on Civil Proceedings, page 224 Art 110, cited in **Shell Petroleum Development Company Nigeria Ltd & Anr v X.M. Federal Limited & Anr S.C. 95/2003).**"*

It is apparent from the authorities that the term "cause of action" means allegations of material facts which, if proved, will provide a complete foundation for a recognised type of claim. There are, therefore, two aspects to consider: **first, does the law recognise the Plaintiff's claim as one as an enforceable one, and if so, secondly do the material facts alleged if proved, give rise to a right to a remedy.**

UNRECOGNISED CLAIM

In **Mohammed v Khan [2015] FJHC 412**, the Plaintiff's claim was based on an agreement for the Defendant to sell his interest in a parcel of land. Statute required such agreements to be in writing and the Plaintiff did not plead an existence of a written agreement. In striking out the Plaintiff's claim, this Court held-

> *"... Nevertheless, there is a fatal flaw in the two causes of action. Section 59 (d) of the Indemnity, Guarantee and Bailment Act (Cap 232) states that no action shall be brought upon any contract or sale of lands or any interest in them unless the agreement upon which such action is brought or a memorandum thereof is in writing. ...*
>
> *No such writing is in evidence in the present case. There is no shred of evidence tending to establish such writing. Accordingly, the oral contract pleaded by the Plaintiff is invalid and unenforceable.*
>
> ...

In view of the mandatory requirement of Section 59 (d) of the Indemnity, Guarantee and Bailment Act and the legal consequences that flow from non-compliance, I have reached the irresistible conclusion that the Plaintiff's Statement of Claim discloses no reasonable cause of action against the Defendant."

The Court will readily strike out claims which are not recognised by law, and are therefore unenforceable.

CLAIMS LACKING NECESSARY FACTUAL FOUNDATION

The Court can strike out claims which involve a cause of action recognised by law, but which are not supported the pleading of all material facts that would be necessary to obtain the relief sought. The English Court of Appeal in **Bruce v Odhams Press Ltd [1936] 1 All ER 287, 295** (Recently applied in **Hanif v Housing Authority [2013] FJHC 248**) held that –

"The cardinal provision in rule 4 is that the statement of claim must state the material facts. The word "material" means necessary for the purpose of formulating a complete cause of action; and if one "material" statement is omitted, the statement of claim is bad; it is "demurrable" in the old phraseology, and in the new is liable to be "struck out" under R.S.C. Ord. XXV, r.4 (See ***Philipps v Philipps*** *(2)); or "a further and better statement of claim" may be ordered under rule 7 (Per Scott LJ)."*

In **Kumar v Habib Bank Ltd [2011] FJHC 2000**, it was held that –

"It must be emphasised that a mere statement of claim is not automatically indicative of a cause of action. The reasonable cause of action means a cause of action with some chance of success. The plaintiff must show some real prospect of his statement of claim. He cannot succeed by showing some whimsical claims on the statement of claim. If the statement of claim fails to address the legal foundation of claim and fails to state what and how the defendant is liable it shall be struck out." (My emphasis)

MATERIAL FACTS

Under O.18 r.6, a pleading must contain a statement in summary form of the material facts on which the party pleading relies for his claim or defence and under O.18 r.18 (a) these material facts must amount to a "reasonable cause of action" failing which the Statement of Claim is bad and is liable to be struck out.

At paragraph 18/7/11 of the **White Book**, the principle is stated as follows –

> *"All material facts – it is essential that a pleading, if it is not be embarrassing, should state those facts which will put those against whom it is directed on their guard, and tell them what is the case which they will have to meet (per Cotton L.J. in* ***Philipps v Philipps (1878) 4 Q.D.B. 127****, p.139.* ***"Material" means necessary for the purpose of formulating a complete cause of action; and if any one material statement is omitted, the statement of claim is bad (per Scott L.J. in Bruce v. Odhams Press Ltd [1936] 1 All E.R. 287 at 294. Each party must plead all the material facts on which he means to rely at the trial; otherwise he is not entitled to give any evidence of them at the trial. No averment must be omitted which is essential to success. Those facts must be alleged which must, not may, amount to a cause of action (West Rand Co. v Rex [1905] 2 K.B 399; see Ayers V. Hanson [1912] W.N. 193."***
>
> *(Emphasis added)*

As counsel for the Defendant correctly points out, the deficiencies in the pleading of material facts to make out a reasonable cause of action cannot be remedied by the Court's jurisdiction to order further and better particulars.

The English Court of Appeal in **Bruce v Odhams Press Ltd** (supra) said after referring to the requirement to plead all relevant material facts –

> *"... The function of 'particulars' under r 6 is quite different. They are not to be used in order to fill material gaps in a demurrable statement of claim – gaps which ought to have been filled by appropriate statements of the various material facts which together constitute the plaintiff's cause of action. The use of particulars is intended to meet a further and quite separate requirement of pleading, imposed in fairness and justice to the defendant. Their function is to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial. Consequently in strictness, particulars cannot cure a bad statement of claim."*

The Court in **Raza V Illangasinhe [2000] 1 FLR 160,** applying a later English authority held that –

> *"... [I] is not the function of 'particulars' to take the place of necessary averments in the pleading, nor 'to state the material facts omitted ... in order by filling the gaps to make good an inherently bad pleading: per Scott L.J. in Pinson v Lloyds Bank (1941) 2 K.B. 72."*

(6) With all that in my mind, let me now move to consider the Defendant's application for striking out. The Defendant's most critical argument is that the Plaintiff's alleged breaches are not enforceable in a civil action. The sole current issue, in my Judgment, is whether the Plaintiff's claim for breach of Statutory duty, is legally enforceable, or not.

The Statement of Claim alleges, in paragraph 13 that;

> *13. That the Defendant failed to comply with the provision of the Health and Safety at Work Act 1996, specifically Section 26 of the said Act.*
>
> ***PARTICULARS OF BREACH***
>
> - *The Defendant failed to give notice of the accident or bodily injury to the relevant authority.*
> - *The Plaintiff was never provided with adequate safety equipment during her working hours.*
> - *Fail to provide adequate cooling system during the working hours*
> - *Fail to provide safety equipment and procedures at the workplace.*
> - *The Defendant allowed the Plaintiff to do other work like hand sewing of staff uniforms*
> - *Allowed the Plaintiff to remove stains on clothes by hand washing using "DIPITZ" chemical mixture and other washing detergent.*
> - *Did hand sewing machine and needles for patching staff clothes/uniforms.*

On my perusal and examination of these allegations, in my Judgment, only one of the particularised allegation involves an alleged breach of Section 26 of the **'Health and Safety at Work Act 1996 (HSW Act)** and other particularised allegations involve an alleged breach of Section 9, as follows;

Particulars	**Section & Part of HSW Act**
Failure to give notice of the accident or bodily injury	s. 26 (1) [Part IV]
Failure to provide adequate safety equipment during working hours	s.9 {Part II]
Failure to provide cooling system	s.9 [Part II]
Failure to provide safety equipment and procedures at the workplace	s.9 {Part II]
Allowing the Plaintiff to hand-sew	s.9 [Part II]
Allowing the Plaintiff to hand-wash stains using detergents and "DIPITZ"	s.9 {Part II]
Exposing the Plaintiff to heat and overcrowding at the workplace	s.9 {Part II]
Allowing the Plaintiff to hand-stitch (repeated)	s.9 [Part II]

Section 26 (1) of the 'Health and Safety at Work Act, 1996 (HSW Act) provides;

PART IV – OCCUPATIONAL HEALTH AND SAFETY STATISTICS

Notification of accidents and other matters

26.-(1) Where –

(a) an accident occurs at a workplace, whether or not it causes the death of, or bodily injury to, any person; or

(b) any other matter occurs at or in relation to a workplace which affects the health or safety of any person,

being an accident or other matter which is required by the regulations to be notified under this Section:

(c) except as provided by paragraph (d) of this subsection, the employer at the workplace; or

(d) such other person as is prescribed,

shall give notice of the accident or other matter in accordance with subsection (3) of this Section.

(2) Any person who contravenes or fails to comply with any provision of subsection (1) of this Section shall be guilty of an offence and shall be liable to a fine of not more than $10,000 in the case of a corporation or $5,000 in any other case.

(3) A notice of an accident or other matter referred to in subsection (1) of this Section shall be given to such person, within such time and in such manner as are prescribed.

Section 09 of the Health and Safety at Work Act 1996, comes under Part II of the Act.

Section 09 provides;

Duties of employers to workers

9.(1) Every employer shall ensure the health and safety at work of all his or her workers.

(2) Without prejudice to the generality of subsection (1) of this Section, an employer contravenes subsection if he or she fails –

(a) to provide and maintain plant and systems of work that are safe and without risks to health;

(b) to make arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage or transport of plant and substance;

(c) to provide, inappropriate languages, such information, Instruction, training and supervision as may be necessary to ensure the health and safety at work of his or her workers and to take such steps as are necessary to make available in connection with the use at work of any plant or substance adequate information in appropriate languages. –

(i) about the use for which the plant is designed and about any conditions necessary to ensure that, when put to that use, the plant will be safe and without risks to health; or

(ii) about any research, or the results of any relevant tests which have been carried out, on or in connection with the substance and about any conditions necessary to ensure that the substance will be safe and without risks to health when properly used.

(d) as regards any workplace under the employer's control –

(i) to maintain it in a condition that is safe and without risks to health; or

(ii) to provide and maintain means of access to and egress from it that are safe and without any such risks;

(e) to provide and maintain a working environment for his or her workers that is safe and without risks to health and adequate as regards facilities for their welfare at work; or
(f) to develop, in consultation with workers of the employer, and with such other persons as the employer considers appropriate, a policy, relating to health and safety at work, that will –

(i) enable effective cooperation between the employer and the workers in promoting and developing measures to ensure the workers' health and safety at work; and

(ii) provide adequate mechanism for reviewing the effectiveness of the measures or the redesigning of the said policy whenever appropriate.

(3) For the purpose of this Section, any plant or substance is not to be regarded as properly used by a person where it is used without regard to any relevant information or advice relating to its use which has been made available by the person's employer.

(4) Any employer who contravenes or fails to comply with any provision of this Section shall be guilty of an offence and shall be liable to a fine of not more than $100,000 in the case of a corporation or $10,000 in any other case.

Health and Safety at work Act 1996, explicitly states at Section 15 that any Civil right of action for breach of Part II is excluded.

Section 15 provides;

Civil liability not affected by Part II

15. Nothing in this Part II shall be construed as –

(a) conferring a right of action in any civil proceedings in respect of any contravention, whether by act or omission, of any provision of this Part;

(b) conferring a defence to an action in any civil proceedings or as otherwise affecting a right of action in any civil proceedings; or

(c)affecting the extent (if any) to which a right of action arises or civil proceedings may be taken with respect to breaches of duties imposed by or under the associated health and safety legislation.

The language of Section 15 of the Health and Safety at Work Act, 1996 is unmistakeably clear to me; there can be no Civil Claims for a breach of Part II.

Therefore, the Plaintiff's claims based on Part II of the Act are expressly unenforceable and they are bound to fail as a result. The object of Order 18, rule 18 is to ensure that Defendants shall not be troubled by claims against them which are bound to fail having regard to the uncontested facts. See; **Riches v D.P.P (1973) 2 ALL .E R. 935.**

It is clear that the Defendant intends to rely on Section 15 of the Act. There is nothing before the Court to suggest that the Plaintiff would escape from that Defence.

Therefore, the claim will be struck out as being frivolous, vexatious and an abuse of process of the Court.

One word more, as correctly pointed out by Counsel for the Defendant, Health and Safety at Work Act 1996 was modelled on the Health and Safety Work Act 1974 UK, which contains a similar restriction in Section 47 (1) (c) which reads;

"Civil liability

(1) Nothing in this Part shall be construed as –

(a) *as conferring a right of action in any civil proceedings in respect of any failure to comply with any duty imposed by section 2 to 7 or any contravention of section 8; or ...*"

As Counsel for the Defendant correctly submitted, the House of Lords held that Section 47(1) of Health and Safety at Work Act 1974 [UK], restricted any civil liability since the statute was not enacted for the purpose of creating liability for personal injury. In **R v Chargot Limited (t/a Contract Services) et al [2008] UKHL 73**, Lord Hoffimann said as follows –

> *"Section 47 (1) provides that nothing in Part I of the Act is to be construed as conferring a right of action in any civil proceedings for any failure to comply with any duty imposed by sections 2 to 7. A note to this section in Current Law Statutes explains that the policy of the Act was not to create any new liability for personal injury pending the report of the Pearson Commission on civil liability and compensation for civil liability, leaving the position as regards breaches of any existing statutory provisions unaffected. But the Act provides for the imposition of criminal sanctions."*

The English Court of Appeal in a recent case of **Morshead Mansions Ltd v Di Marco (No.2) [2014] EWCA** Civ 96, held –

> *"Sometimes an Act of Parliament makes it clear whether a civil remedy is available in addition to a criminal sanction. For example section 1 of the Protection from Harassment Act 1997 prohibits harassment. Section 2 creates a criminal offence; and section 3 creates a civil remedy. Conversely section 2 to 8 of the health and Safety at Work etc. Act 1974 impose duties on employers, but section 47 (1) (a) makes it clear that there is no civil liability for breach of those duties." (per Lewison LJ)*

I accept that the position in English courts prevails in Fiji as well. In **Raj v Flour Mills of Fiji Ltd [1999] FJHC 166**, the Plaintiff claimed against his employer for (inter alia) breach of statutory duty under Section 9 of the HSW Act. Shameem J held that –

> *"Section 9(4) provides that contravention of the section creates a criminal offence. Section 15 of the Act provides that:*
>
> ***'Nothing in this Part shall be construed as –***
> ***(a) conferring a right of action in any civil proceedings in respect of any contravention, whether by [a]ct or omission. Of any provision of this Part..'***
>
> *In light of this provision I find that section 9 of the Health and Safety at Work Act 1996, has very little relevance to these proceedings."*

Applying those principles to the case before me and carrying those principles to their logical conclusion, I venture to say beyond per-adventure that the Plaintiff's claims based on Part II of the Act are expressly unenforceable and they are bound to fail as a result.

Let me now move to consider the Plaintiff's claim under Section 26(1) of the Health and Safety Act, 1996.

It is plain that Section 26(1) of the Act applies only if an "accident" occurs at a workplace. The occurrence of an accident is the *sine quo non* for Section 26 to operate. The Statement of Claim does not plead anywhere, the occurrence of an accident. The Statement of Claim does not plead anywhere that the injuries sustained by the Plaintiff were from any accident occurred at workplace. Therefore, the Plaintiff's claim on this ground is bound to fail.

(7) THE PLAINTIFF'S CAUSE OF ACTION IN NEGLIGENCE

The Statement of Claim alleges, in paragraphs 14 to 16 that;

Para 14. *The resort doctor as employee, servant and agent failed to provide proper medical prescription and medical advice to the Plaintiff. Hence the Plaintiff after complaining of the sudden pain on her wrist to her supervisor, the resort doctor failed to examine and or treat the Plaintiff.*

15. *As consequence of the matters aforesaid, the Plaintiff's left hand was swollen on the base of 4th and 5th fingers over 6 months and left supraclavicular swelling and left axilla swelling over 1 month.*

16. *Whilst the Plaintiff was still admitted at Tamavua Hospital the Defendant, his employee and or representative delivered termination letter dated 24th March 2014.*

On pleading a negligence claim, **Atkin's Court Forms (2nd Edition, 1976 Issue)**, Volume 29 at Page 6 states –

> *"The Plaintiff in an action for damages for negligence must plead and prove three distinct elements of the tort:*
>
> *(1) that the defendant owed him a duty of care;*
> *(2) that the defendant was in breach of that duty; and*
> *(3) that he has suffered damage as a result of that breach."*

The learned authors of **Bullen & Leake's Precedents of Pleadings (11th Edition)** at page 533, state the following –

> *"It is not enough for the plaintiff in his Statement of Claim to allege merely that the defendant acted negligently and thereby caused him damage; he must also set out facts which show that the alleged negligence was a breach of a duty which the defendant owed to the plaintiff. The Statement of Claim "ought to state facts upon which the supposed duty facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged" (per Willies J. in* ***Gautret v Egerton (1867) L.R. 2 C.P. 371****, cited with approval by Lord Alverston C.J. in West Rand Central Mining Co. v R. [1905] 2 K.B. at 400). Then should follow an allegation of the precise breach of that duty, of which the plaintiff complains; in other words, particulars must always be given in the pleading, showing in what respect the defendant was negligent; and lastly, the details of the damaged sustained."*

MATERIAL PARTICULARS MUST BE PLEADED

The law on pleadings also requires that negligence must be pleaded with particularly to make the claim certain and precise. It was held in **Gautret v Egerton (1867) L.R. 2 C.P. 371**, that –

> *"The plaintiff must, in his declaration, give the defendant notice of what his complaint is. He must recover secundum allegata et probate. What is it that a declaration of this sort should state in order to fulfil those conditions? It ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged."*

On my perusal of the Statement of Claim it seems to me perfectly plain that the Statement of Claim contains no proper pleading of 'Vicarious liability'. There is no pleading that any servant or agent of the Defendant was under any individual duty of care. The Plaintiff's failure to allege and identify the separate duty of care owed by the servant or agent of the Defendant is not a mere pleading technicality. Unless and until the basis on which the servants are alleged to be under a separate individual duty of care is identified, it is impossible to assess whether, in law, such duty of care can exist. Therefore, the Plaintiff cannot establish that the Defendant is under a vicarious liability for the tort committed by the servant. As a result, the Plaintiff's claim in negligence is bound to fail.

(8) **The Plaintiff claim under "Employment Relations Promulgation 2007". (ERP)**

The Plaintiff claims her termination from employment with the Defendant was in breach of the ERP (Ss. 29, 42 and 60(1) (b) and (2)) in paragraph 18, and provides the following distilled particulars –

Particulars	Section of the ERP
Failure to give a month's notice	S.29
Failure to pay wages and benefits in lieu of notice	S.41
Failure to compensate in respect of accident or disease and failure to repatriate	S.41
Failure to pay holiday	S.60

DEFICIENCIES IN THE PLEADINGS

Section 29 of the ERP, which provides for terminating an employment contract by notice, requires the notice period to be determined from the following factors –

(a) existence of an indefinite contract;

(b) absence of specific agreement on the period of notice;

(c) intervals in which wages or salary is paid; and

(d) whether it is a daily, weekly or monthly contract.

As Counsel for the Defendant correctly argues, the Plaintiff has not pleaded the material facts to establish that Section 29 of the ERP was applicable to her employment contract. The Plaintiff has not even pleaded the existence of an employment contract. She has not stated the material terms of her employment contract. She has not pleaded whether or not her contract contained a notice provision. She has not pleaded the intervals at which she was paid. In addition, she has not pleaded whether her employment contract was a daily, weekly or monthly contract.

Quite clearly, as counsel for the Defendant submitted, the Statement of Claim alleges a breach of Section 41 of the ERP under two particulars, but it fails to plead facts that would make Section 41 applicable. Materially, s.41 prescribes that 'the right of the worker to wages earned, compensation due to the worker in respect of accident or disease and the worker's right to repatriation' will survive, if a contract is terminated due to the worker's liability to perform the contract arising from a sickness or accident.

As counsel for the Defendant correctly points out, the Statement of Claim does not plead the material terms of her employment contract and she has not pleaded the wages that had allegedly accrued to her but which remained unpaid at the termination of the employment contract. She has not pleaded the existence of any accident or disease attributable to her work: the only disease pleaded is TB and there is no pleading that this arose from her employment. There is no pleading of how compensation is due to her in respect of an accident or disease. The Statement of Claim does not plead where the Plaintiff was recruited from or the place to which she alleges she was entitled to be repatriated. Therefore the Plaintiff has not pleaded the material facts necessary to bring the claim within Section 41.

I accept that Section 60 of the ERP regulates how holiday pay is to be calculated for workers on the termination of their contract. According to Section 60, the accrued holiday pay will depend on the commencement of employment and termination, the holidays already taken, the months that have elapsed since the last annual holiday was taken and the wages payable.

It is true that the Plaintiff has not pleaded the material facts necessary to make Section 60 applicable. There is no pleading of how many days holiday the Plaintiff alleges was due to her. She has not pleaded the date on which she commenced employment with the Defendant. The Statement of Claim does not set out the number of months she had worked after the last annual leave taken by her, or any other factual matters that would support her reliance on Section 60.

Therefore, the Plaintiff's claims under **Employment Relations Promulgation, 2007** are inaccurate and improper. As against this, I heard no word said on behalf of the Plaintiff.

(9) As I mentioned earlier, the Plaintiff's cause of action under 'vicarious liability' and under Employment Relations Promulgation 2007' are inaccurate and improper. They failed to describe a factual situation which gives rise to a cause of action upon which the Plaintiff relies.

In such cases, the claim is not necessarily struck out at once. A proper opportunity to amend, or to add particulars may be given. See; **Lonrho plc & Others v Fayed and Others , 1994, (1) ALL.E R 188.**

I examined the 'Proposed Amended Statement of Claim' which is annexure TLO-1 in the Plaintiff's Affidavit filed on 10th May 2016 in support of the Amendment application. In my view, the proposed amended claim does not cure the defects in the original Statement of Claim.

(10) Notwithstanding the very high standard and precautionary test that the authorities imposed on applications such as this and in applying these authorities to the facts and submissions in this matter, I am of the opinion that the application should be granted.

(11) For the reasons which I have endeavoured to explain, I venture to say beyond per - adventure that the Plaintiff's 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 Defendant.
Fundamentally, courts are required to determine cases on merits rather than dismissing them summarily on procedural grounds.

It is a fundamental principle of any civilized 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 Defendant. This action against the Defendant must be dismissed.

In the circumstances, I certainly agree with the sentiments which are expressed inferentially in the Defendant's submissions.

(12) To sum up, in view of the foregoing analysis, I venture to say beyond per- adventure that the Plaintiff has failed to disclose a reasonable cause of action against the Defendant and in the result the Plaintiff 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 Plaintiff's action and the Statement of Claim 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 merits.

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

(13) Finally, the Defendant moved for **'indemnity costs'.**

It is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing **"indemnity costs"**.

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 Benianino 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] willful 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 Mohd Nasir 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 lodgment 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 Mukhtar 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"*

This Court has not been pointed to any "*reprehensible conduct*" in relation to the initiation of proceedings and pursuing the claim.

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 and Edward Sadler)(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."

I have not found, any evidence of "reprehensible conduct" by the Plaintiff in relation to the initiation of proceedings and pursuing the claim.

It seems tolerably clear that the Plaintiff is not guilty of any conduct deserving of **condemnation as disgraceful or reprehensible** and ought not to be penalised by having to pay indemnity costs.

Counsel for the Defendant argues that the claim has no legal merits whatsoever and amounts to no more than gross abuse of the court process. Is it a correct exercise of the Court's discretion to direct the Plaintiff to pay costs on an indemnity basis to the Defendant because the Defendant had undergone hardships in defending the action?

The answer to the aforesaid question is in the negative which I base on the following judicial decisions;

- **Public Service Commission v Naiveli Fiji Court of Appeal decision, No: ABU 0052 11/955, (1996) FJCA 3**

- **Thomson v Swan Hunter and Wigham Richardson Ltd, (1954) ,(2) AER 859**

❖ **Bowen Jones v Bowen Jones (1986) 3 AER 163**

In "**Public Service Commission v Naiveli**" ;(*supra*), The Fiji Court of Appeal held;

> ***"However, 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 – see the examples discussed in Thomson v. Swan Hunter and Wigham Richardson Ltd [1954] 2 All ER 859 and Bowen-Jones v. Bowen Jones [1986] 3 All ER 163."*
>
> (Emphasis added)

On the strength of the authority in the aforementioned three (03) cases, I venture to say beyond a per-adventure that neither considerations of hardship to the Defendant nor the over optimism of the unsuccessful Plaintiff would by themselves justify an award beyond party and party costs.

(E) ORDERS

(1) The Plaintiff's Writ of Summons and Statement of Claim filed against the Defendant is struck out. Civil Action No- HBC 150/2015 is hereby struck out.

(2) The Plaintiff to pay costs of $1500.00 (summarily assessed) to the Defendant within 14 days hereof.

I do so order!

20/01/2017

Jude Nanayakkara
Master.

At Lautoka.
20th January 2017