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

Civil Action No. HBC 215 of 2012

BETWEEN : **ANN ELIZABETH HAWORTH** of Lexington, Texas

Plaintiff

AND : **STARWOOD PROPERTIES LIMITED**

First Defendant

AND : **DUBBO LIMITED trading as WESTIN RESORT & SPA LIMITED**

Second Defendant

AND : **MR SHANE CUNNING OF WESTIN RESORT & SPA** Nadi, Fiji Islands, General Manager

Third Defendant

Appearances : **Mr. C.B. Young for the plaintiff**
: **No appearance for the 1st defendant**
: **Mr. John Apted for the 2nd and 3rd defendants**

Hearing : **Tuesday, 02nd April, 2019**

Ruling : **Friday, 16th August, 2019**

RULING

[A] INTRODUCTION

(1) The matter before me stems from the second and third defendants Summons filed on 25th March, 2019 seeking the grant of the following orders;

(*) The Affidavit Verifying Plaintiff's 2nd Supplementary List of Documents filed on 12th March, 2019 be struck out and removed from the Court file and the Plaintiff may not produce and rely on any document listed therein;

(*) *The Affidavit Verifying Plaintiff's 3rd Supplementary List of Documents filed on 21st March, 2019 be struck out and removed from the Court file and the Plaintiff may not produce and rely on any document listed therein;*

(*) *The plaintiff's notice of proposal to adduce hearsay evidence under Section 4 of the Civil Evidence Act 2002 given on 15th March, 2019 does not give the defendants reasonable and practicable notice in the circumstances for the purposes of enabling the defendants to deal with matters arising from it being hearsay, and no hearsay evidence may be adduced by the plaintiff or alternatively any hearsay evidence allowed should be treated as having no weight pursuant to Section 4 and 6 of the Civil Evidence Act 2002;*

(*) *Pursuant to Section 15 of the Civil Evidence Act 2002 and O.25, r.8 of the High Court Rules 1988, no expert oral evidence may be adduced by the plaintiff;*

(*) *The costs of this application be costs in the cause; and*

(*) *Such further Orders as this Honourable Court deems just and fair.*

(2) The application is made pursuant to Order 24, rule 16 & Order 25, rule 8 of the High Court Rules 1988, Section 4, 6 and 15 of the Civil Evidence Act 2002 and under the inherent jurisdiction of the High Court.

(3) The Summons is supported by an Affidavit sworn by 'Viliame B. Vodonaivalu', the Chief Investment Officer of the Fiji National Provident Fund, the current owner of the shares in the second defendant and a Director on the Board of the second defendant.

(4) The application is vigorously resisted by the plaintiff. The hearing was held on 02nd April, 2019. Submissions and authorities were filed.

[B] BACKGROUND

(O1) This action was commenced by a Writ of Summons and Statement of Claim filed on 04th October, 2012. In it, the plaintiff claims against the defendants for alleged personal injury from electrocution while a guest at the second defendant's resort, the Westin Resort and Spa on Denarau Island on 04th October, 2009.

(02) After completion of pre-trial steps on 16th April 2015, the matter was fixed for trial from 17th – 18th November, 2015.

(03) On 06th November, 2015 (viz, 11 days before the trial was due to commence) the plaintiff, via her previous Solicitors, filed a Supplementary List of Documents (the First Affidavit Verifying Supplementary List of Documents) without seeking leave of the Court. The same was served on the defendants on 12th November, 2015 (viz, 5 days before the trial).

(04) On 12th November, 2015 (viz, 05 days before the trial was due to commence) the plaintiff via her previous Solicitors gave the defendants a notice of her intention to rely on two medical reports at trial as hearsay evidence being Dr Ronald Devere's and Dr Marcy Roy's Medical reports.

(05) When the matter was taken up for trial on 17th November 2015 before J. Sapuvida, the defendants raised objections to the late discovery of additional documents and the hearsay notice and asked for the evidence to be excluded, but the Court decided to vacate the trial to deal with the objection.

(06) The Court delivered its ruling on the defendant's objection on 30th January, 2017. Justice Sapuvida ordered;

> (*) *Plaintiff's Supplementary Affidavit Verifying List of documents dated 06th November, 2015 is struck out and dismissed.*
>
> (*) *The documents listed in the said Affidavit shall not be produced in evidence.*

(07) The basis of these orders of Justice Sapuvida is summarized at paragraph (93) of his Lordships' ruling. The paragraph (93) reads;

> *"[93].- The plaintiff failed to comply properly with the order made on 7th March, 2014 to serve on the defendants a list of documents relating to the matters raised in the pleadings herein and filed an affidavit verifying the same in accordance with the requirements of the rules and practice. When she filed her affidavit verifying list of documents on 17th April, 2014 she deliberately withheld a large number of documents from the defendants until 2 working days before the date of the trial. The reasons that have been advanced for the late discovery of the documents are unconvincing. The affidavit has also been improperly sworn and was filed without leave of the Court by a Law Clerk.*

(08) Subsequently on 13th March, 2017 the plaintiff sought leave to file another Supplementary Affidavit Verifying List of Documents. The application was opposed by the second and third defendants on the following grounds;

- the High Court has already ruled against discovery of the majority of documents.
- the rules that the application relies on does not respond and/or
- the reasons for leave to be granted are inadequate.

(09) The application was heard by Justice Ajmeer and his Lordship refused leave on 14th September, 2017. His Lordship J. Ajmeer ordered;

- *Leave refused.*

- *Plaintiff application dismissed with costs of $800.00 payable by the plaintiff to the 2nd and 3rd defendants in three weeks from today.*

- *Matter is adjourned for Mention to fix hearing at 9.30a.m on 12th October, 2017.*

(10) The basis of these orders of Justice Ajmeer is summarized at paragraphs (20), (21) and (22) of his Lordships' ruling. The paragraphs 20, 21, and 22 read;

> *"[20] It appears that the plaintiff is attempting to re-litigate a matter which the court has already decided upon merits.*
>
> *[21] Functus means the court had expended its jurisdiction in respect of the same cause between the same parties (see Merchant Finance & Investment Co. Ltd v Lata [2016] FJCA 151; ABU0034.2013 (29 November 2013).*
>
> *[22] Admittedly, the previous application was also made against the same defendants as in this application. On that application, both parties filed their respective written submission. Sapuvida J, after considering the submissions made by both parties, ruled and ordered that the plaintiff's supplementary affidavit verifying list of documents is to be struck out and dismissed. The plaintiff did not appeal that ruling. There is a binding judgment between the parties in relation to the supplementary affidavit verifying the list of documents. In the current application, the plaintiff is attempting to re-litigate the matter that had already been decided by the court. Unfortunately, the current application filed by the plaintiff is unnecessary and unwarranted. I am not convinced by the submissions and the reasons adduced by the plaintiff for filing the supplementary affidavit verifying the list of documents. The inherent jurisdiction of the court cannot be exercised to curing a mistake which a party had made in complying with the rules of the Court. The documents the plaintiff is attempting were in the control and custody of the plaintiff well ahead of the application. Some of the documents date from April 2012 to November 2015. These documents are not new documents. I would, therefore, refuse to grant leave to file the supplementary affidavit verifying the list of documents and dismiss the application with costs of $800.00 payable by the plaintiff to the 2nd and 3rd defendants within 3 weeks. I now adjourn the matter for mention to fix hearing at 9.30am on 12th October, 2017."*

(11) On 24th August, 2018 the Court re-fixed the matter for trial between 8th – 11th April, 2019. On 15th October, 2018 Young & Associates filed Notice of Change of Solicitors.

(12) On 12th March, 2019 without leave, the plaintiff filed an Affidavit Verifying Plaintiff's 2nd Supplementary List of Documents which listed more than 280 documents dating back to 2009 (including documents Court expressly prohibited her from producing into evidence in its rulings by J. Sapuvida and J. Ajmeer).

(13) On 15th March, 2019 the plaintiff again gave Notice of her intention to adduce hearsay evidence at the trial from 5 documents (including Dr Devere's 16th April, 2014 medical report which the Court expressly prohibited in its 30-01.2017 ruling). [Defendants annexure marked "VV-3C"]

(14) On 21st March, 2019 again without leave, the plaintiff filed an Affidavit Verifying Third Supplementary List of Documents which listed 11 additional documents dating back to 1990.

(15) All the documents listed in the plaintiff's 2nd and 3rd Supplementary Affidavit of List of Documents filed on 12th and 21st March, 2019 have been given to the defendants Solicitors on 06-03-2019 and 15-03-2019 respectively. (defendant's annexure marked VV-3A and VV-3B)

[C] DISCUSSION

(1) Counsel for the defendants has tendered extensive written submissions in support of the Summons filed on 25th March, 2019. Counsel for the plaintiff too filed written submissions. I am grateful to Counsel for those lucid and relevant submissions and the authorities therein collected which have made my task less difficult than it otherwise might have been.

If I do not refer to any particular submission that has been made, it is not that I have not noted that submission or that that submission is not relevant; it is simply that, in the time available, I am not able to cover in this decision every point that has been made before me.

(2) In his submissions before me, Mr. Apted, Counsel for the defendants argued that the plaintiff's late discovery of more than 290 additional documents and the giving of a hearsay notice on the eve of the trial constitute another attempt at a 'trial by ambush' and are in breach of the rules of discovery, the rules of evidence and the Civil Evidence Act 2002.

(3) The defendants elaborated on this in their written submissions filed on 02-04-2019. The following paragraphs are pertinent;

> *"SUBMISSIONS*
>
> ***Plaintiff's 2nd and 3rd AVSLD***

27. *This is a case in which there have been two separate rulings of the Court, first directing that specific documents are not to be produced in Court, and subsequently refusing leave to file a Supplementary Affidavit Verifying List of Documents listing those documents as well as 2 others that could have been discovered earlier.*

28. *Despite these two Rulings, the Plaintiff has filed the 2nd AVSLD, which contains 112 documents that were listed specifically or generally in the 1st AVSLD and which were excluded by the Court's order as well as a large number of other documents that should have been disclosed in the Plaintiff's original AVLD or at some subsequent time but well before the 2nd AVSLD. She has also filed a 3rd AVSLD listing 11 documents. 9 of which pre-date the AVLD filed in 2014 and should have been discovered at that time.*

29. *Attached as Appendix 1 is a table setting out the Defendants' objections to the 2nd and 3rd AVSLDS and the documents listed therein.*

2nd AVSLD

30. *Item 1 in Appendix 1 lists the 3 documents specifically listed in the 1st AVSLD and which were expressly excluded. They include the report of Dr. Devere, which the Plaintiff also proposed to rely on as hearsay evidence. They also include another medical report of Dr Macy Roy which was also previously excluded.*

31. *In the Haworth Affidavit, reference is made to the fact that the Dr Devere report was commissioned by the Defendants' insurers. That does not affect the fact that there is a substituting order excluding it from being produced in evidence. Indeed, even though she is aware objection is taken to it, the Plaintiff has annexed the document to the First Haworth Affidavit in yet another blatant breach of the First Ruling. This is, with respect, contemptuous.*

32. *Item 2 in Appendix 1 lists 71 further documents that were listed in the 1st AVLD under the general heading "Invoice/Receipts' and Electrocutions Related Medical Expenses. They were contained in the Plaintiff's bundle of documents filed at that time and so were covered by the 1st AVLSD.*

33. *These items were all specifically excluded by the First Ruling, as re-inforced by the Second ruling. It is contemptuous for the Plaintiff to file the 2nd AVSLD listing these documents together a bundle containing these documents.*

34. *Rules of O.24 r 16 (1) of the High Court Rules provides –*

"Failure to comply with requirement for discovery, etc.

16.-(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspections or any other purpose, fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1),

(a) That party shall not be entitled subsequently to product a document in respect of which default was made without the leave of the Court, and

(b) The Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.

35. *Item 3 lists (150) documents that existed prior to the initial AVLD filed on 17 April 2004. They existed when that affidavit was filed and should have been listed in that AVLD. The failure to list them in the AVLD was a breach of the Plaintiff's obligations under O.24 R.3 (1) to comply with the Court's order to make discovery of all relevant documents in the AVLD. The withholding of these documents until a month before trial is prejudicial and an attempt at trial by ambush. This was disapproved of in the First Ruling. As in that Ruling, it is submitted that the Court should order under O.24 r.16 (1), that the documents cannot be produced as evidence.*

36. *The 2nd AVSLD includes certain documents that were listed in either the Plaintiff's or the Defendants' earlier AVLDs. Striking on the 2nd AVSLD will not affect the admissibility of these documents. However, the repetition necessitates amendments to the orders sought by the Defendants.*

37. *It is respectfully submitted that since the 2nd AVSLD contains numerous breaches of the First and Second Rulings, the whole Affidavit should be struck out and as a consequence, none of the documents listed in it (other than those that were in the original AVLDs) can be produced in Court.*

38. *Alternatively, in any event, the additional documents that were not excluded by the First and Second Ruling should not have been listed in the 2nd AVLD and should not be admissible for the following reasons.*

Documents which should have been Discovered Earlier.

39. *In **Vernon v Bosley** (No.2) [1997] 3 W.L.R. 683; [1997] 1 All E.R. 614 at page 451 the England Court of Appeal reaffirmed that a party to civil*

litigation was under a continuing obligation under RSC, O.24, r.1 until the conclusion of the proceedings to disclose all relevant documents whenever they came into his possession. That said such disclosure could either be by letter or supplementary affidavit.

40. *Item 4 of appendix 1 lists 67 documents that are dated between 17 April 2014 and December 2018. It is submitted that these should all have been discovered much sooner in the proceedings under the Plaintiff's continuing duty of disclosure.*

41. *The Plaintiff's discovery of them a month before trial constitutes trial by ambush, and it is respectfully submitted these documents should also be excluded under O.24, r.16 (1) of the High Court Rules on the same basis as the First Ruling.*

42. *The fact that the Plaintiff changed solicitors is irrelevant. She is bound by their actions. In any case, she appointed her present solicitors in October 2018 and given the imminence of the trial, all of those documents should have been discovered much earlier.*

43. *Item 5 of Appendix 1 lists 45 previously undisclosed documents containing expert medical evidence. As elaborated upon below, the Plaintiff has not complied with the automatic directions in O.25 r.8 so these documents cannot be produced in Court as the relevant makers cannot be called as expert witnesses. They should be excluded.*

Special Damages Documents

44. *Item 6 lists 189 documents evidencing special damages – the vast majority of which fall to be excluded under items 1 to 4 above. Further or alternatively they should be excluded, because they relate to special damages which have not been particularized in the Statement of Claim.*

45. *It is well established that a plaintiff may not lead evidence of any special damages unless the damages claimed have been particularized in her pleading. The Court of Appeal (constituted by Calanchini, AP, Chitrasiri, JA, and Basnayake, JA) in* ***Nasese Bus Company Ltd v Chand*** *[2013] FJCA 9; ABU 40.2011 (8 February 2013) stated the principle in a personal injury case as follows –*

> *"[64]. In Perestrello E Companhia Limitada –v- United Paint*
>
> *Co. Ltd [1969] 3 All ER 479 the Court of Appeal at page 486 stated:*
>
> *"The same principle gives rise to a Plaintiff's undoubted*

obligation to plead and particularize any item of damage which represents out-of-pocket expenses or loss of earnings, incurred prior to the trial and which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is "special" in the sense that fairness to the defendant requires that it be pleaded."

[65]. In a personal injury claim a plaintiff should provide in his pleadings (with an up to date amendment at the start of the trial) full details of his past loss of earnings. There is also an obligation on the part of a plaintiff to particularize the facts upon which calculations for pas loss of earnings have been made.

[66]. In the event that a plaintiff pleads and particularizes his claim for loss of earnings, evidence must be adduced at the trial to prove the claim. The burden rests on the plaintiff to prove a claim for part loss of earnings. In the event that the plaintiff does not plead and subsequently particularizes a claim for past loss of earnings, that Plaintiff will not be permitted to lead evidence in support of such a claim, save where leave has been given to amend the claim. These principles apply equally in Fiji. See ***The Head Teacher (Qalitu District School) and Others –v- Ilaitia Tuivere*** *(unreported civil appeal No. ABU 24 of 2009 delivered 13 September 2010).*

[67]. Furthermore, up to the end of the trial the issue of damages, both special and general, remained in dispute. Since past loss of earnings had neither been pleaded nor particularized, the Respondent was not entitled to adduce evidence and nor was she entitled to be awarded any sum by way of special damages in the form of past loss of earnings."

46. The Court is respectfully invited to peruse the Copy Pleadings dated 15 October 2014 filed by the Plaintiff. Nowhere in those pleadings has the Plaintiff particularized any claim for special damages. The Plaintiff has also not filed an up-to-date amended statement of claim particularizing her special damages claim to date with only a week to the trial. It is submitted on the authorities that the Plaintiff may therefore not lead any evidence of any special damages of any description.

Litigation Costs Are Not Damages

47. Item 7 lists documents relating to litigation costs. In so far as the Plaintiff attempts to claim expenses associated with her preparing and brining her

claim against the Defendants, these are not allowable as special damages; as these are costs and not damages. The distinction was recently referred to by the Supreme Court (constituted by Marsoof JA, Chandra, JA and Mutunayagam, JA) in ***Ambaram Narsey Properties Ltd v Lautoka City Council*** *[2014] FJSC 18; CBV3.2014 (14 November 2014) (copy attached) where the court said –*

"23. The purpose of including a claim under special damages is to avoid the elements of surprise on the other party as has been stated in decisions such as ***British Transport Commission v. Gourley*** *(1956) All ER 796,* ***Perestrello v. United Paint Co. Ltd*** *[1969] 3 All ER 479. The Petitioner by claiming the said amount had brought it to the notice of the Respondents and it had not been challenged. However, the question for consideration is as to whether such claim should be allowed. Petitioner's Counsel cited the decision in* ***Krishna Brothers v Post and Telecommunications Limited*** *ABU 0028.2004S (29 July 2005) where it was stated that the "Court is entitled to consider a claim for damages when presented as special and unchallenged". However, my view is that though the Court is entitled to consider such a claim, Court is not bound to accept and grant same as special damages. Court has to consider whether such a claim comes within the realm of special damages and it is left to the Court to consider whether such a claim can be granted as special damages.*

24. In assessing damages caused to a building it may be necessary to seek the assistance of experts in that field and obtain their opinions and they would charge fees for giving such opinions. Although the Petitioner has classed such expenses as special damages, do they really constitute special damage? It is a cost incurred by the Petitioner, which is litigation costs and as observed by the Court of Appeal may be subsumed in the costs of the action. In Halsbury's Laws of England (4th Edition) Volume 12 (1) at paragraph 807 on 'Damages as distinguished from costs' sets out:

"Costs are distinct from damages".

And at footnote 13 states:

"thus in a personal injuries case, the costs of medical treatment is part of the damages, but the costs of a medical examination for the purpose of litigation forms part of the costs."

25. Drawing an analogy from the above statement in Halsbury's

Laws of England, cost of a medical examination for the purpose of litigation would be similar to the costs of Experts Reports in the present case and therefore would not come within special damages and would form part of the costs of the action."

48. *These documents listed in items 6 and 7 are any case inadmissible.*

Plaintiff's 3rd AVSLD

49. *The Plaintiff's 3rd AVSLD lists 13 documents, 9 of which date back to January 1990 to November 2011. They should all have been disclosed in the Plaintiff's original AVLD in 2014. The Plaintiff's withholdings the documents until a month before trial is yet another attempt to mount a trial by ambush, as inadequate time is allowed to the Defendants to consider and respond to this evidence.*

50. *On the same principles that the Court applied in the First and Second Ruling, this evidence should be excluded and the 3rd AVSLD struck out under O.24 r.16 (1)*

No Expert Oral Evidence

51. *The Plaintiff has applied for leave to call by Skype the evidence of Dr David Flume. In her answering affidavit filed on 1 April 2019, she indicates that she also intends to call the evidence of a pharmacist as well as Dr Marci Roy who is described as neurologist and Dr Steven Rose.*

52. *Expert evidence in personal injury cases including medical evidence is subject to a special rule in the High Court Rules 1992. O.25 r.8 provides as follows –*

> *"Automatic directions in personal injury actions (O.25, r.8)*
>
> *8.-(1) When the pleadings in any action to which this rule applies are deemed to be closed the following directions shall take effect automatically;*
>
> *(a) there shall be discovery of documents within 14 days in accordance with Order 24, rule 2, and inspection within seven days thereafter, save that where liability is admitted, or where the action arises out of a road accident, discovery shall be limited to disclosure by the plaintiff of any documents relating to special damages;*
>
> *(b) subject to paragraph (2), where any party intends to*

place reliance at the trial on expert evidence, he shall, within 10 weeks, disclose the substance of that evidence to the other parties in the form of a written report, which shall be agreed if possible.

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

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

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

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

(4) For the purposes of this rule –
"a road accident", means an accident on land due to a collision or apprehended collision involving a vehicle; and "documents relating to special damages" include documents relating to any industrial injury, industrial disablement or sickness benefit rights.

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

(Our emphasis)."

53. *O.25 r.8(1) (b) requires a special report on the expert evidence to be prepared for the purposes of a personal injury action, failing which expert witnesses may not be called. This is to be prepared after discovery.*

54. *As earlier pointed out, the Plaintiff has not compiled with this requirement.*

55. *The Rule is intended to assist the Court by limiting expert evidence and also to accord justice to the parties by allowing them sufficient time to consider and if necessary respond to expert evidence. Such evidence is only "opinion" on which witnesses may differ and is based on expertise on which alternative professional views may be required.*

56. *This rule is not about discovery but about expert evidence. It applies whether or not medical reports have been discovered.*

57. *In her second Affidavit in answer, the Plaintiff alludes to knowledge of her treatment by these doctors by the Defendants' insurers. However, this knowledge does not excuse the Plaintiff from complying with O.25 r.8 (1) (b). In the absence of a medical report or alternative orders of the Court, the Defendants were entitled to believe that the Plaintiff would not be calling any expert medical witnesses and to believe that they did not need to take any steps to call their own such evidence or obtain advice to enable them to cross-examine appropriately.*

58. *Accordingly, it is respectfully submitted that the Plaintiff is not entitled to call any expert evidence – whether medical or otherwise. It would be wholly unjust for the Plaintiff to be allowed to do so.*

No Hearsay Evidence

59. *By a notice dated 15 March 2019, the Plaintiff purported to give a hearsay evidence notice under section 4 of the Civil Evidence Act 2002 that she intends to adduce hearsay evidence from the following documents –*

    (i) Ronald Devere's Report to AIG Worldsource dated 16 April 2014 comprising of 8 pages

    (ii) David L.Flume's Notice to Mr Maopa dated 6 June 2017

    (iii) David L.Flume's letter of 8 January 2019

    (iv) Email from David Flume to Ann Haworth dated 6 February 2019

    (v) Handwritten statement given by Shashi Shankar dated 5 November 2009.

60. *Dr Devere's report has already been specifically excluded by the Court in the First and Second Rulings. It would be a contempt for the Plaintiff to produce and rely on that report.*

61. *As to the remaining documents, section 4(1) of the Act provides – "Notice of proposal to adduce hearsay evidence*

4.-(1) A party proposing to adduce hearsay evidence in civil proceedings must, subject to the following provisions of this section, give to the other party or parties to the proceedings –

(a) a notice of that fact; and

(b) on request, the particulars of or relating to the evidence,

as is reasonable and practicable in the circumstances for the purpose of enabling the other party or parties to deal with any matters arising from its being hearsay. (our emphasis)

62. *Section 5 of the Act preserved the other party's right to call the person whose hearsay statement is produced to be cross-examined as if the hearsay statement had been given in evidence-in-chief.*

63. *It is respectfully submitted that documents (ii), (iii) and (iv) may not be relied upon or alternatively should be given little weight because notice has been given too late for the Defendants to deal with matters arising from it being hearsay. In any event, these documents are not just hearsay, they are also opinion evidence, which would duly be admissible as expert evidence. As agreed below, in personal injury cases, O.25 r.8 limits and prescribes the procedure for expert evidence.*

64. *Document (v) is the Defendant's document. They reserve the right to submit that it should be given no weight because the relevant hearsay notice has been given too close to trial to enable the Defendants to respond to it.*

(4) Counsel for the plaintiff argued against this. The following extracts are taken from the reply submissions filed by the plaintiff on 02-04-2019.

The effect of Justice Sapuvida's Ruling of 30 January 2017

1.1 The Ruling was given in relation to the Defendant's objection against the Plaintiff's solicitors filing a Supplementary List of Documents on 6 November 2015 and not serving the same on the Defendants until 12 November 2015 when the matter was set for trial on 17 November 2015.

1.2 One of the main reasons is set out in paragraph 77 of the judgment where His Lordship said:

"In this case, withholding these relevant documents until just

2 working days before trial meant that the defendants were not given a fair opportunity – or indeed any real opportunity - to prepare to respond to them."

And His Lordship concluded at para. 82 that he thought it:

"clearly amounted to trial by ambush, and the Court is of the view that the list of documents and the documents themselves were deliberately withheld from the Defendants to deprive them of the opportunity of fairly considering the evidence and preparing a case in response."

1.3 *Hence, the Ruling was based on the relevant fact that these documents were not disclosed until 2 days before the trial.*

1.4 *The Defendants by their exhibit in the Affidavit of Viliame B. Vodonaivalu sworn on 22 March 2019 per exhibit 'VV-3A' acknowledges that the 2nd Supplementary List of Documents was sent to the said solicitors under cover letter dated 6 March 2019 and the 3rd Supplementary List of Documents was sent to them under cover letter of 15 March 2019 'VV3A' and 'VV-3B'. This fact is significant and very different from the situation which Justice Sapuvida had to rule on.*

2. *14 September 2017 Ruling*

2.1 *The Plaintiff submits that the filing of the application for leave of the Court to file a Supplementary List of Documents by her previous solicitors was unnecessary because there is no need for leave to file a Supplementary List of Documents.*

2.2 *In fact, the Plaintiff submits that it did not require a leave to file Supplementary List of Documents because the obligation to provide discovery continues right throughout the court proceedings. This issue was not raised by the plaintiff's then solicitors. In* ***Vernon v Bosley (No.2)*** *[1997] 1 All ER 614 at 625 from para. (g) Lord Justice Stuart-Smith quoting with approval the judgment of Justice Hawkins in* ***Mitchell v Daley Main Colliery Co*** *[1884] 1 Cab & El 215:*

"Now, in my opinion, a party, who, after filing an affidavit of documents, discovers a document of which his opponent has a right to have inspection, but which is not disclosed in the schedule because it has been forgotten, or overlooked, or supposed not to exist, is bound to inform his opponent of the discovery either by a supplementary affidavit, which I think is the proper course, or at least by notice: and he has no right to keep back all knowledge of the newly-discovered document simply because he was not aware of it at the time he swore his affidavit in obedience to the order for discovery. To keep back under such circumstances a document

known to be material, would, in my opinion, amount to a reprehensible want of frankness, and if, by reason of such conduct, unnecessary expense ought to be visited upon the party who ought to give it. In the present case I am satisfied the defendants and their advisers were aware of the importance and materiality of the document; that the document was one which ought to have been disclosed; that there was no justification for not disclosing it as soon as it was found; and if it had been so disclosed, the whole of the expenses incurred by the plaintiff in his endeavour to prove that no subsisdence had occurred to damage his property before the year 1882, would have be spared."

2.3 *Hence, the Plaintiff's submission is that, it does not need the leave of the Court to file a Supplementary List of Documents because all parties including the Defendants should file Supplementary List of documents when they have discovered that they have failed to provide proper discovery.*

3. *Order 24 Rule 17*

3.1 *Order 24 Rule 17 provides:*

> *"Any order made under this Order (including an order made on appeal) may, on sufficient cause being shown, be revoked or varied by a subsequent order or direction of the Court made or given at or before the trial at the cause or matter in connection with which the original order was made."*

It therefore, empowers the Court to revoke and vary any earlier order by a subsequent order if sufficient cause is being shown. It is to be noted that it even includes an order made on appeal to the Court of Appeal with regard to issues of discovery under this Order. Hence, there is no need to appeal either of the Rulings of 2017.

4. *Defendant's objection to evidence of an expert*

4.1 *The Defendants have submitted that under Order 25 Rule 8(1)(b) which states:*

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

There is no disagreement that Dr. Ronald De Vere, Dr. Flume, Dr. Roy, Dr. Rose are medical practitioners in different disciplines of medicine. However, the rule

emphasis the word 'expert'. The Defendants in their affidavit have not provided any evidence that individuals like Dr. DeVere, Dr. Flume, Dr. Roy and Dr. Rose are experts, neither has the Plaintiff sought to call them experts. As Ms. Haworth deposed to in her Affidavit of 1 April 2019, she was being treated by Dr. Flume over 14 occasions and prescribed medication. There is nothing in any of the disclosed documentations that suggest that Dr. DeVere, Dr. Flume, Dr. Roy and Dr. Rose are experts.

4.2 *As for Dr. Flume, the Defendants knew that he was treating the Plaintiff as early as 14 April 2014 (see the Affidavit Veryifying List of Documents of 2nd and 3rd Defendants No. 48 and 85, 86, 89 and 90 for Dr. Roy).*

4.3 *Furthermore, the Plaintiff by a letter dated 18 March 2019 (exhibit 'AEH-3' of Ms Haworth's Affidavit filed on 1 April 2019) invited the Defendants solicitors to contact Dr. Flume directly. In any event there is nothing stopping the Defendants from contacting any of those doctors.*

4.4 *It is trite law to state that it is not the parties that decide who an expert is. It is the judge who makes that finding as was the case cited in the Ruling of 30 January 2017 in* ***G.P. Reddy & Co Ltd v New India Assurance Co Ltd*** *(2011) FJHC 680 per Dias Wickramasinghe J. It is extremely relevant to note that the parties had accepted Mr Luff (the witness in that case) as an expert and part of his experience was that he had given evidence as an expert in other court proceedings. Inspite of this the Judge did not feel bound to accept him as an expert but still considered his evidence and in the end disbelieved him on his report that the fire was caused by the owner of that property.*

5. Order 25 Rule 7(1)

5.1 *Order 25 Rule 7(1) provides:*

> *"7.(1) Any party to whom, the summons for directions is addressed must so far as practicable apply at the hearing of the summons for any order or directions which he may desire as to any matter capable of being dealt with on an interlocutory application in the action and must not less than 7 days before the hearing of the summons, serve on the other parties a notice specifying those orders and directions in so far as they differ from the orders and directions asked for by the summons."*

Justice Sapuvida's Ruling dated 30-01-2017 and Justice Ajmeer's Ruling dated 14-09-2017

(5) Justice Sapuvida delivered his Lordship's ruling on the defendants' objection on 30-01-2017. His Lordship found that the plaintiff's late discovery of additional documents and

the giving of a hearsay notice just before the trial amounted to a **'trial by ambush'** because it deprived the defendants "of the opportunity of fairly considering the evidence and preparing a case in response". The Court ordered;

> *"Plaintiff's Supplementary Affidavit Verifying List of Documents dated 6th November, 2015 is struck out and dismissed."*
>
> *"The documents listed in the said Affidavit shall not be produced in evidence".*

(6) In coming to this conclusion, the Court said;

> *"[77] The purpose of discovery is to give the other party advance notice of the evidence which is or was in the discovering party's possession, custody or power so that the other party can consider them and prepare their case for trial. It is accepted that sometimes it is not possible to include all relevant documents in the affidavit verifying list of documents. However, a party should notify the other side that their list is incomplete and must include the omitted documents in a supplementary affidavit as soon as possible and well in advance of trial to avoid trial by ambush. In this case, withholding these relevant documents until just 2 working days before trial meant that the defendants were not given a fair opportunity – or indeed any real opportunity – to prepare to respond to them.*
>
> *[78] It is conceded by the defendants that documents 4 and5, being the reports of Dr Ronald Devere dated 16th April, 2014 and of Marci A Roy dated 3rd September, 2015, came into the plaintiff's possession after 16th April, 2014. However again these also should have been included in a supplementary affidavit verifying list of documents as soon as possible i.e. in early September 2015 and well before the trial. In any event, the report of Marci A Roy should have been sent to the defendants as soon as it was received by the plaintiff in view of the imminent trial.*
>
> *[79] In summary, all but a few of the documents in the plaintiff's bundle and which it seems were intended to be disclosed by the plaintiff's supplementary affidavit verifying list of documents should have been discovered earlier. More importantly, there appears to be no good reason why the plaintiff's supplementary affidavit verifying list of documents was not filed and served until 2 days before trial.*
>
> *[80] .....*
>
> *[82] It is noted by the Court that the process followed clearly amounted to trial by ambush, and the Court is of the view that the list of documents and the documents themselves were deliberately withheld form the defendants to deprive them of the opportunity of fairly considering the evidence and preparing a case in response."*

(7) **Justice Ajmeer's Ruling**

Subsequently, the plaintiff sought leave to file another supplementary list containing the same documents listed in the 1st Affidavit Verifying Supplementary List of Documents as well as two additional documents which the Court refused on 14th September, 2017. Justice Ajmeer found the application to be "res judicata and that the Court was "functus officio". His Lordship held;

> *"[20] It appears that the plaintiff is attempting to re-litigate a matter which the court has already decided upon merits.*
>
> *[21] Functus means that the court had expended its jurisdiction in respect of the same cause between the same parties (see Merchant Finance & Investment Co. Ltd v Lata [2016] FJCA 151; ABU0034.2013 (29 November 2013).*
>
> *[22] Admittedly, the previous application was also made against the same defendants as in this application. On that application, both parties filed their respective written submission. Sapuvida J, after considering the submissions made by both parties, ruled and ordered that the plaintiff's supplementary affidavit verifying the list of documents is to be struck out and dismissed. The plaintiff did not appeal that ruling. There is a binding judgment between the parties in relation to the supplementary affidavit verifying the list of documents. In the current application, the plaintiff is attempting to re-litigate the matter that had already been decided by the court.*
>
> *[23] Unfortunately, the current application filed by the plaintiff is unnecessary and unwarranted. I am not convinced by the submissions and the reasons adduced by the plaintiff for filing the supplementary affidavit verifying the list of documents. The inherent jurisdiction of the court cannot be exercised to curing a mistake which a party had made in complying with the rules of the court. The documents the plaintiff is attempting were in the control and custody of the plaintiff well ahead of the application. Some of the documents date from April 2012 to November 2015. These documents are not new documents. I would, therefore, refuse to grant leave to file the supplementary affidavit verifying the list of documents and dismiss the application with costs of $800.00 payable by the plaintiff to the 2nd and 3rd defendants within 3 weeks ....."*

(8) With respect, I remain uncomfortable with the decision of Justice Sapuvida and Justice Ajmeer. I hold a different view. On the issue of discovery and hearsay notice, I am in complete disagreement with the interlocutory ruling of J. Sapuvida and J. Ajmeer.

(9) A judge of first instance, though he would always follow the decision of another judge of first instance, unless he is convinced that the judgment is wrong, would follow it as a matter of judicial comity. He certainly is not bound to follow the decision of a judge of equal jurisdiction[1].

(10) In **Zotovic v Dobel Boat Hire Pty Ltd , Blackburn C.J. said[2];**

> *"As a judge of this Court, I should follow a decision of another judge of the Court unless there is a clear reason for not following it."*

(11) In **"La Macchia v Minister for Primary Industries and Energy" Burchett J said[3];**

> *"The doctrine of stare decisis does not, of course, compel the conclusion that a judge must always follow a decision of another judge of the same court. Even a decision of a single justice of the High Court exercising original jurisdiction, while "deserving of the closest and respectful consideration", does not make that demand upon a judge of this court: Businessworld Computers Pty Ltd v Australian Telecommunications Commission (1988) 82 ALR 499 at 504. But the practice in England, and I think also in Australia, is that "a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance [scil of coordinate jurisdiction] unless he is convinced that the judgment was wrong": Halsbury, 4th ed, vol 26, para 580. The word "usually" indicates that the approach required is a flexible one, and the authorities illustrate that its application may be influenced, either towards or away from an acceptance of the earlier decision, by circumstances so various as to be difficult to comprehend within a single concise formulation of principle....'*

(12) With respect, the interlocutory ruling of Justice Sapuvida and Justice Ajmeer on the issue of discovery is clearly **inconsistent with:**

(i) The modern "cards on the table" approach to civil litigation encouraged by the Court's[4].

(ii) Current views as to the need to reduce costs and delay and to increase efficiency in civil proceedings.

(iii) the decision of the Canadian Courts in **Ontario Bean Producers Marketing Board v W.G. Thompson & Sons Ltd (Farm Products**

[1] Police Authority for Huddersfield v Watson (1947) 1 K.B. 842 at 848.
[2] (1985) 62 ACTR 29 at 32
[3] (1992) 110 ALR 201 at 204
[4] Naylor v Preston Area Health Authority (1987) 1 WLR 858 at 967; Davies v Eli Lilly (1987) 1 WLR 428 at 431; Black & Decker Inc v Flymo Ltd (1991) 1 WLR 753.

Marketing Board, third party) (1982) 134 DLR (3d) 108 and Lid Brokarage and Reality Co. Ltd v Budd (1977) 2 WWR 453.

(13) I refuse to follow the decision of Justice Sapuvida and Justice Ajmeer on the issue of discovery. With respect, to follow the decision of Justice Sapuvida and Justice Ajmeer on the issue of discovery would be to destroy the sensible practice contained in the white book note, to put this jurisdiction out of step with both Australia, Canada and New Zealand, and to introduce a practice so obviously out of step with the modern movement towards effective and cost saving procedures. I resist the temptation to examine the matter further, to do so would involve a hearing of the appeal. This court has a wide jurisdiction and large discretion to vary discovery orders made on interlocutory applications. However, as a matter of practice it would be extremely unsound for any judge to vary or discharge a discovery order;

(i) in the absence of a formal application filed under Order 24, rule 17

(ii) in the absence of changed circumstances or exceptional policy considerations.

2nd and 3rd Affidavit Verifying Supplementary List of Documents

(14) On 12th March, 2009 (27 days before the upcoming trial) without leave, the plaintiff filed an "Affidavit Verifying Plaintiff's 2nd Supplementary List of Documents" which listed more than 280 documents dating back to 2009. Again on 21-03-2009 (18 days before the upcoming trial) without leave, the plaintiff filed Affidavit Verifying 3rd Supplementary List of Documents" which listed 11 additional documents dating back to 1990.

(15) The defendants allege;

(*) Item 01 in Appendix 01 (2nd AVSLD) lists 3 documents specifically listed in the 1st AVSLD which were expressly excluded by the first ruling.

(*) Item 2 in Appendix 1 (2nd AVSLD) lists 71 further documents that were listed in the 1st AVSLD which were excluded by the first ruling.

(*) Item 3 lists (2nd AVSLD) 150 documents that existed prior to the initial AVLD filed on 17-04-2004. They existed when that affidavit was filed and should have been listed in that AVLD.

(*) Item 4 of Appendix 1 lists 67 documents that are dated between 17-04-2014 and December 2018. These should all have been discovered much sooner in the proceedings.

(*) The plaintiff's 3rd AVSLD lists 13 documents, 09 of which date back to January, 1990 to November 2011. They should all have been disclosed in the plaintiff's original AVLD in 2014.

16. **All those points may be conceded. The defendant's arguments miss the point. The fundamental point which this Court is concerned to underline is that:**

(A) there is an obligation to correct errors in discovery already given, once the error becomes known (that is to disclose relevant documents which were in fact in the party's possession custody or power at the time he previously gave discovery)[5].

(B) There is a continuing obligation to disclose after-acquired documents (ie, those that come into the possession of the party after discovery by list or affidavit is made)[6].

DISCOVERY – After–acquired documents

(17) The provisions as to discovery are contained in Order 24 of the High Court Rules, 1988. Order 24, 1(1) provides;

> *"After the close of pleadings in an action begun by Writ there shall, subject to and in accordance with the provisions of this order, be discovery by the parties to the action of the documents which are or have been in their possession, custody or power relating to matters in question in the action".*

(18) **Vernon v Bosley** (supra) is authority for the proposition that there is a continuing obligation to disclose after-acquired documents. In Vernon v Bosley, Evans J said , (page 639)

> *"The current situation, in my judgment, is that the parties to all forms of civil proceedings should recognize a duty to disclose after-acquired documents (in the sense indicated above: documents which come into existence or are first acquired after a list or affidavit has been served) which are relevant to an issue in the proceedings and which are not privileged for the purposes of the discovery rules. This duty is correlative to the court's power to order a further list or lists under r.3 and only in this sense is it a continuing duty under r.1. It does not require the service of a further list or any particular formality, because the essence of the duty is that relevant documents shall not be withheld, whether or not the party intends to introduce them at the trial (cf the duty not to take the opposing party by surprise at the trial (Order 18, rr 8 and 9), as the note points out). This is consistent in my view, with current views as to the need to reduce costs and delay and to increase efficiency in civil proceedings, and with the decisions of the Canadian courts in*

[5] Mitchell v Darley Main Colliery Co (1884) 1 Cab & El 215, Myers v Elman (1940) A.C. 282
[6] Vernon v Bosley (No.2) (1997) (1) ALL.E.R.614

Ontario Bean Producers' Marketing Board v W G Thompson & sons Ltd (Farm Products Marketing Board, third party)(1982) 134 DLR (3d) 108 and Lid Brokerage and Realty Co (1977) Ltd v Budd [1977] 2 WWR 453."

The most recent of the Canadian decisions is ***Ontario Bean Producers Marketing Board v. W.J. Thompson & Sons Limited (1982)*** **134 D.L.R. (3d) 108**. That was a decision of three Judges of a Divisional Court of the Ontario High Court of Justice. It was concerned with a Canadian procedure enabling the oral examination of a party in relation to documents in his possession or power. *Southey J.,* who delivered the judgment of the Court, thought that a party into whose hands new documents came should be able to be examined concerning them. In the course of his judgment his Lordship said;

> *"The rules are silent on the point in issue, as they are in the case of production of documents, another form of discovery. Yet it is well-settled that a party who has been served with a notice to produce is under a continuing duty right up to the time of trial to disclose to the opposite party documents coming into his possession or power, even where he acquires possession or power after filing an affidavit of production. I can see no reason why the rule as to after-acquired information in oral discovery should be any different."*

(19) The note in the **Supreme Court Practice, 1987, Vol-1, para 24/1/2,** is some indication that it is the current practice to recognize such an obligation, The para 24/1/2 reads;

> *"Continuing obligation to give discovery – Although one reading of O.24 r.1 may suggest that discovery need be given only of documents which have come into a party's possession before the date of his list of documents, this is not the limit of a party's obligation to give discovery imposed by the rule. The obligation is general, and requires the disclosure of all relevant documents whenever they may come into a party's possession. This requirement is supported by the linked principle that a party must not seek to take his opponent by surprise (cf. O.18, rr.8 and 9), and that he must not, by withholding relevant documents, mislead his opponent or the Court into believing that the statement in his list that he has given full discovery continues to be true (Mitchell v Darley Main Colliery Co (1884) Cab & El 215)). An obvious example is where a plaintiff, who is claiming damages for prospective loss of earnings, obtains new lucrative employment during the course of the action; this fact must be communicated to the defendant and further discovery must be made (or, at all events, offered). In default, the plaintiff may be ordered to pay any costs occasioned by the failure to give discover promptly."*

(20) Since there is an obligation and a responsibility to discover after-acquired documents, the plaintiff needs not obtain leave of the Court to file a supplementary list of documents to discover after-acquired documents.

(21) The plaintiff is under specific continuing duty and a responsibility to disclose after-acquired documents. It would be patently wrong and absurd to dismiss or strike out the

plaintiff's supplementary affidavit verifying list of documents upon the ground of prolonged and inexcusable delay on the part of the plaintiff in making discovery of after-acquired documents.

The point is well made by Stuart-Smith L.J. in **Vernon v Bosley** as follows; (page 626)

> *First, the after-acquired document may alter the party's case, either for the better or worse as compared with that which is apparent from the documents hitherto disclosed. If the document is favorable to the party, late production may prejudice the other party and result in an adjournment, a belated attempt to settle the case or in the extreme example of Mitchell's case effectively a submission to judgment. In any event, it is likely to result in unnecessary expense and waste of court's time. The parties and the court should do all in their power to avoid this.*
>
> *Secondly, where the document is against the party, if it is not disclosed there is a risk that the other party and the Court will be misled. The other party may be misled into settling the case on terms he would not otherwise do if he had known the true facts. The Court may be misled into giving judgment on a basis that is no longer correct. The point is well made by Waite J in Birds Eye Walls Ltd v Harrison [1985] 1CR 278. In the industrial tribunal there is no automatic discovery, but in that case the parties had voluntarily given discovery of documents they intended to rely upon, but the employers did not disclose a document which appeared to be contrary to their case. Waite J said (at 287-288):*
>
> > *"Mr Tabachnik [for the employers] acknowledges, however, that this greater freedom in regard to discovery in the tribunals could not be permitted to provide a front for deception or unfair surprise. So he qualified his general submission by conceding that the complete freedom of a party to decide what documents he shall or shall not disclose to his opponent is curtailed by this principle. Any disclosure that he does make must not be so selective as to surprise unfairly, or misled, the other side. No document, that is to say, should be withheld if the effect of non-disclosure would be to alter or conceal the true meaning of any document which has been voluntarily disclosed.....any party who chooses to make voluntary discovery of any documents in his possession or power must not be unfairly selective in his disclosure. Once, that is to say, a party has disclosed certain documents(whether they appear to him to support his case or for any other reason) it becomes his duty not to withhold from disclosure any further documents in his possession or power (regardless of whether they support his case or not)if there is any risk that the effect of withholding them might be to convey to his opponent or to the tribunal a false or misleading impression as to the true nature purport or effect of any disclosed document."*

I state with conviction that an order striking out the plaintiff's supplementary affidavit verifying list of documents upon the ground of prolonged and inexcusable delay on the part of the plaintiff in making discovery of after-acquired documents would be;

(i) clearly inconsistent with the modern "cards on the table" approach to civil litigation encouraged by the Courts[7].

(ii) clearly inconsistent with current views as to the need to reduce costs and delay and to increase efficiency in civil proceedings,

(iii) clearly inconsistent with the decision of the Canadian Courts in **Ontario Bean Producers Marketing Board v W.G. Thompson & Sons Ltd (Farm Products Marketing Board, third party) (1982) 134 DLR (3d) 108 and Lid Brokerage and Reality Co Ltd v Budd (1977) 2 WWR 453.**

An order striking out the plaintiff's supplementary affidavit verifying list of documents upon the ground of prolonged and inexcusable delay on the part of the plaintiff in making discovery of after-acquired documents would;

(i) destroy the sensible practice contained in the white book note,

(ii) put this jurisdiction out of step with both Australia, Canada and New Zealand, and

(iii) introduce a practice so obviously out of step with the modern movement towards effective and cost saving procedures[8].

(22) The **TNT Management Pty Ltd v Trade Practices Commission (1983) 5 ATPR 40-366**, is a decision of the Full Federal Court of Australia, on appeal from a decision of the single judge. This was a case in which the Trade Practices Commission gave additional discovery, amounting to some 10,000 pages of documents, some six weeks before the trial date. Other parties in the action sought either to adjourn the hearing date or to strike out the TPC's action on the basis of failure to make proper discovery earlier. The full Court refused to strike out TPC's action and adjourned the hearing.

(23) The defendants in the case before me by their exhibit in the affidavit of 'Viliame B. Vodonaivalu' sworn on 22-03-2019 per exhibit "VV-3A" acknowledge that the 2nd supplementary list of documents was sent to their Solicitors under cover letter dated 06-03-2019, (33) days before the trial was due to commence and the 3rd supplementary list of documents was sent to them under cover letter of 15-03-2019, (24) days before the trial was due to commence.

The 2nd supplementary list of documents listed more than 280 documents dating back to 2009.

[7] Above note (4)
[8] Para (13) of the judgment

The 3rd supplementary list of documents contained 13 documents dating back to 1990.

The plaintiff was under obligation and was bound to make further discovery which she did. The plaintiff's delay of disclosure was unreasonable and her behaviour is culpable. But there had been no bad faith on the part of the plaintiff. The defendants are unable to show that the plaintiff has deliberately held on to the material for tactical advantage. I can find no scintilla of evidence which would suggest a sinister motive on the part of the plaintiff. When disclosed very close to trial, the issue is whether the late disclosure amounts to trial by ambush. What matters is the effect of the conduct on the defendant's ability to deal with the evidence fairly. The Court should not wear blinkers. I cannot shut my eyes to the fact that the additional documents disclosed as a result of the plaintiff's further discovery have imposed and will continue to impose a substantial extra burden on counsel, solicitors and clients alike. The difficulties of which the defendants complained was not exaggerated and outstated. The defendants were thus called upon to make a proper assessment of the late discovered documents at a time when they were in their last weeks of preparation for the hearing. I confess to a feeling of some bewilderment at the plaintiff's explanation as to why there has been the delay which necessitated this further discovery. There will be cases in which justice will be better served by allowing the consequences of the negligence of the solicitors to fall on their own heads rather than granting an indulgence at a very late stage. This is not such a case. The plaintiff in this case has a positive obligation and a responsibility to disclose after acquired documents. She also has a positive obligation and a responsibility to correct errors of discovery. She was bound to disclose after – acquired documents. She was bound to correct errors of discovery. In my view, the defendants cannot stand against the powerful tide of logical and judicial reasoning of ; **(A)** Stuart – Smith LJ and Evans J in Vernon v Bosley , (1997) (1) All . E R 614 **(B)** Southey J in Ontario Bean Producers Marketing Board v W.G Thompson & Sons LTD, (1982) 134 DLR (3d) 108 **(C)** Hawkins J. in Mitchell v Darley Colliery Co, (1884) 1 cab & el 215 **(D)** Lord Atkin and Viscount Maughan in Myers v Elman, (1940) AC 282. All I am saying is that the plaintiff's disclosure of documents, belated though it was, will enable the defendants to have the benefit of the examination of the documents in advance of the hearing and thus in advance of any use of the documents which the plaintiff may herself seek to make them. The date for the hearing of the trial is postponed from 08th to 11th April 2019 to 09th to 13th December, 2019 which will enable the defendants to have the benefit of the examination of the documents in advance of the hearing of the trial. Thus, there can be no complaint about a trial by ambush. The plaintiff should bear the costs thrown away by the vacation of the trial date because her behaviour is culpable and it caused the trial date to be vacated.

In an appropriate case the Court has power peremptorily to order the dismissal of the proceedings or the striking out of a defence if a party is in flagrant or contumelious disregard of his obligations under the rules or orders or directions of the Court. See; **Allen v McAlpine (1968) 2.Q.B. 229 and Brikett v James (1978) AC.297, per Lord Diplock at p.318.** This not such a case.

The authorities cited by Mr Apted do not bear on the problem now under consideration.

Correct a defect in the earlier Affidavit

(24) The main purpose of plaintiff's 2nd and 3rd Affidavit Verifying Supplementary List of Documents was to correct a defect in the plaintiff's 1st Affidavit Verifying List of Documents.

(25) As I have already pointed out there is an obligation and responsibility to correct errors in discovery already given, once the error becomes known (that is to disclose relevant documents which were in fact in the party's possession, custody or power at the time he previously gave discovery[9].)

(26) **Mitchell v Darley Main Colliery Co[10] and Myers v Elman**[11] are authority for the proposition that when a list (of affidavit) of documents is discovered subsequently to have been wrong or incomplete, because it failed to include a document through accident or oversight which either was or had been in the party's possession etc when the list was made, then the party comes under a duty and bound to correct the list as soon as the (pre-existing) document comes to light.

(27) **Mitchell v Darley Colliery Co** relates to a document, a diary kept by and affording contemporaneous support for the evidence of one of the principal witnesses, which had been in the possession, custody or power of the defendants at the time the affidavit of documents was sworn, but had been overlooked. It was not disclosed until trial, whereupon the plaintiff's case effectively collapses. **Hawkins J said**[12];

> *"Now, in my opinion, a party, who, after filing an affidavit of documents, discovers a document of which his opponent has a right to have inspection, but which is not disclosed in the schedule because it has been forgotten, or overlooked, or supposed not to exist, is bound to inform his opponent of the discovery either by a supplementary affidavit, which I think is the proper course, or at least by notice; and he has no right to keep back all knowledge of the newly-discovered document simply because he was not aware of it at the time he swore his affidavit in obedience to the order for discovery. To keep back under such circumstances a document known to be material, would, in my opinion, amount to a reprehensible want of frankness, and if, by reason of such conduct, unnecessary expense is entailed upon the party entitled to discovery, such unnecessary expense ought to be visited upon the party who ought to give it. In the present case I am satisfied the defendants and their advisers were aware of the importance and materiality of the document; that the document was one which ought to have been disclosed; that there was no justification for not disclosing it as soon as it was found; and that if it had been so disclosed, the whole of the expenses incurred by the plaintiff in his*

[9] See, Paul Matthewl in his article "Ongoing discovery in English law" (1994) 144 NLJ 327.
[10] (1884) 1 Cab & El 215
[11] (1940) A.C. 282
[12] At 216-217

endeavor to prove that no subsidence had occurred to damage his property before the year 1882, would have been spared."

Since there is an obligation to correct errors of discovery, the plaintiff needs not obtain leave of the Court to file a supplementary list of documents to correct errors of discovery.

The plaintiff is under specific continuing duty to correct errors of discovery. It would be patently wrong and absurd to dismiss or strike out the plaintiff's supplementary affidavit verifying list of documents upon the ground of prolonged and inexcusable delay on the part of the plaintiff in correcting the errors of discovery.
To dismiss or strike out the plaintiff's supplementary affidavit verifying list of documents upon the ground of prolonged and inexcusable delay on the part of the plaintiff in correcting errors of discovery would be;

(i) clearly inconsistent with the modern "cards on the table" approach to civil litigation encouraged by the Courts[13].

(ii) clearly inconsistent with current views as to the need to reduce costs and delay and to increase efficiency in civil proceedings,

(iii) clearly inconsistent with the decision of the Canadian Courts in **Ontario Bean Producers Marketing Board v W.G. Thompson & Sons Ltd (Farm Products Marketing Board, third party) (1982) 134 DLR (3d) 108 and Lid Brokerage and Reality Co Ltd v Budd (1977) 2 WWR 453.**

To dismiss or strike out the plaintiff's supplementary affidavit verifying list of documents upon the ground of prolonged and inexcusable delay on the part of the plaintiff in correcting errors in discovery would;

(i) destroy the sensible practice contained in the white book note,

(ii) put this jurisdiction out of step with both Australia, Canada and New Zealand, and

(iii) introduce a practice so obviously out of step with the modern movement towards effective and cost saving procedures

I remind myself the words of Stuart-Smith LJ in **Vernon v Bosley** at page 626

First, the after-acquired document may alter the party's case, either for the better or worse as compared with that which is apparent from the documents hitherto disclosed. If the document is favourable to the party, late production may prejudice the other party and result in an adjournment, a belated attempt to settle

[13] Above note (4)

the case or in the extreme example of Mitchell's case effectively a submission to judgment. In any event, it is likely to result in unnecessary expense and waste of court's time. The parties and the court should do all in their power to avoid this.

Secondly, where the document is against the party, if it is not disclosed there is a risk that the other party and the Court will be misled. The other party may be misled into settling the case on terms he would not otherwise do if he had known the true facts. The Court may be misled into giving judgment on a basis that is no longer correct. The point is well made by Waite J in Birds Eye Walls Ltd v Harrison [1985] 1CR 278. In the industrial tribunal there is no automatic discovery, but in that case the parties had voluntarily given discovery of documents they intended to rely upon, but the employers did not disclose a document which appeared to be contrary to their case. Waite J said (at 287-288):

> *"Mr. Tabachnik [for the employers] acknowledges, however, that this greater freedom in regard to discovery in the tribunals could not be permitted to provide a front for deception or unfair surprise. So he qualified his general submission by conceding that the complete freedom of a party to decide what documents he shall or shall not disclose to his opponent is curtailed by this principle. Any disclosure that he does make must not be so selective as to surprise unfairly, or misled, the other side. No document, that is to say, should be withheld if the effect of non-disclosure would be to alter or conceal the true meaning of any document which has been voluntarily disclosed.....any party who chooses to make voluntary discovery of any documents in his possession or power must not be unfairly selective in his disclosure. Once, that is to say, a party has disclosed certain documents(whether they appear to him to support his case or for any other reason) it becomes his duty not to withhold from disclosure any further documents in his possession or power (regardless of whether they support his case or not)if there is any risk that the effect of withholding them might be to convey to his opponent or to the tribunal a false or misleading impression as to the true nature purport or effect of any disclosed document."*

Special damages documents

(28) Item (6) lists documents evidencing special damages. Mr. Apted, counsel for the defendants objected to the special damages documents. The special damages have not been particularized in the Statement of Claim.

(29) The plaintiff, by Summons filed on 04-04-2019 has applied for leave to file and serve particulars of special damages. Submissions and authorities were filed and the parties agreed that the Summons could proceed on the papers. In my view, the Summons cannot be disposed of on papers. I need to hear oral Submissions.

(30) I should hear arguments on the plaintiff's application seeking leave to file and serve particulars of special damages. When the pleadings are amended and the schedule of special damages are served on the defendants, the need for a further list would be recognized. Therefore, it is unnecessary at this stage to consider the plaintiff's special damages documents. I will adjourn the question of special damages documents to a later date.

Litigation costs documents

(31) Item (07) lists documents relating to litigation costs. The plaintiff attempts to claim expenses associated with her preparing and bringing her claim against the defendants. Mr.Apted objected to the litigation costs documents.

(32) I agree with Mr Apted's submission that these are not admissible as special damages as these are costs and not damages[14].

(33) The plaintiff may not produce and rely on litigation costs documents.

Expert Oral Evidence

(34) The plaintiff intends to call Dr. Ronald Devere, Dr. David Flume, Dr. Marci Roy and Dr. Steven Rose. Counsel for the defendants submitted that the plaintiff has not complied with Order 25, r.8(1) (b) which requires a special report on the expert evidence to be prepared for the purposes of a personal injury action. Counsel further submitted that the plaintiff is not entitled to call any expert evidence, whether medical or otherwise in the absence of medical reports prepared under Order 25, r.8(1) (b).

Order 25, r.(8) (1) provides;

> 8.(1) When the pleadings in any action to which this rule applies are deemed to be closed the following directions shall take effect automatically:
>
> (b) subject to paragraph (2), where any party intends to place reliance at the trial on expert evidence, he shall, within10 weeks, disclose the substance of that evidence to the other parties in the form of a written report, which shall be agreed if possible;

I cannot for a moment accede to the argument of the plaintiff that the defendant's prior knowledge about the physician's treatment of the plaintiff would absolve the plaintiff from complying with order 25, r.8 (1) (b). I find it a strange argument. I would reject this extreme and in my view unrealistic submission.

[14] Ambaran Narsey Properties Ltd v Lautoka City Council (2014) FJSC 18

(35) The plaintiff clarifies the nature of the testimony of the medical practitioners and the label given to them as follows in the written submissions filed on 02-04-2019. The following paragraphs are pertinent;

> *(3.2) The plaintiff has explained her dilemma which she faced with the changing of Solicitors in Fiji and Mr. De Gomez terminating his engagement as her United States Attorney. The involvement of Mr. De Gomez was a very involved hands-on-control of the litigation as appears from the documents that have been discovered including those in the Defendants List of Documents. Furthermore, with regard to Dr. Ronald Devere's report of 16th April, 2014 it is clear that it was a document prepared for AIG Worldsource and that that document should have been disclosed by the Defendants themselves. As Stuart-Smith LJ stated in* ***Vernon v Bosley (No.2)*** *(supra) at p.626 para (c) "Secondly, where the document is against the party, if it is not disclosed there is a risk that the other party and the Court will be misled". This issue and others (as developed later) were never considered by either of the Judges. The involvement of Dr. Roy and Dr. Rose was clearly evident from the Plaintiff's 1st List of Documents filed on 17th April, 2014 (See doc. 10 & 12). It was always apparent to the Defendants as early as 2010 and upto 2014.*
>
> *(3.3) The Defendants contend that the Plaintiff is seeking to introduce an expert report but the Defendants have not provided any evidence that the reports were given by an expert or* ***neither the Plaintiff has claimed that those doctors are experts.*** *The Plaintiff will address this issue of an expert separately.*
>
> *(4.1) The Defendants have submitted that under Order 25 rule 8(1)(b) which states:*
>
> > *"subject to paragraph (2), where any party intends to place reliance at the trial on expert evidence, he shall, within10 weeks, disclose the substance of that evidence to the other parties in the form of a written report, which shall be agreed if possible;"*
>
> ***There is no disagreement that Dr. Ronald Devere, Dr. Flume, Dr. Roy, Dr. Rose are medical practitioners in different disciplines of medicine. However, the rule emphasis the word 'expert'. The Defendants in their affidavit have not provided any evidence that individuals like Dr. Devere, Dr. Flume, Dr. Roy and Dr. Rose are experts, neither has the Plaintiff sought to call them experts. As Ms. Haworth deposed to in her Affidavit of 1st April, 2019 she was being treated by Dr. Flume over 14 occasions and prescribed medication. There is nothing in any of the disclosed documentations that suggest that Dr. Devere, Dr. Flume, Dr. Roy and Dr. Rose are experts.***
>
> **(Emphasis added)**

As I understand the submissions of Mr. Young, Counsel for the plaintiff, Dr. Devere, Dr. Flume, Dr. Roy and Dr. Rose are **fact witnesses** (treating physicians) and **not** "**expert witnesses**".

(36) There is a fine line between a retained expert and a non-retained treating physician. Typically, treating physicians are considered fact witnesses (opposed to expert witnesses) because they are testifying to the facts and circumstances surrounding their own treatment of the plaintiff, and unlike witnesses designated as experts, they are not rendering a medical opinion as to causation or reviewing material outside of their own medical records. A physician that is a true **fact witness** will only testify to his own personal observations when diagnosing, examining and treating the plaintiff. Therefore, Dr. Devere. Dr. Flume, Dr. Roy and Dr. Rose can attest to the plaintiff's medical conditions and treatments and the rules of disclosure do not apply to them. They will only testify to procedures they personally conducted and will only rely on notes and reports that they personally created in the ordinary course of their duties as Doctors. They will not testify to anything they did not personally witness. In the instance case, Dr. Devere, Dr. Flume, Dr. Roy and Dr. Rose were not labeled as **expert witnesses**. **They are labeled as a fact witnesses**. Essentially, a physician called to testify about his care and treatment of a plaintiff is a sophisticated fact witness and his role in the case is not dissimilar to that of a witness to an accident. They have no legal duty to give medical opinions that are not based on their personal observations and treatment of the plaintiff.

(37) Although all physicians are "expert witnesses" because of their credentials, a legal distinction is made between physicians who testify based solely on facts gained from their actual treatment of a patient (fact witness), and physicians who give opinions based upon facts and/or materials furnished to them during the course of litigation (expert witness). When a treating physician testifies about both his treatment of the plaintiff and relies on additional information concerning materials beyond his treatment, he is essentially converted into an expert witness. A treating physician cannot or should not offer a medical opinion outside the scope of his personal observations. While some Court's disagree, the majority of Courts even allow treating physicians to testify to causation, prognosis and the permanency and degree of injury without a written report so long as those opinions were reached during the course of treatment.

(38) In the upshot, it comes to this; Dr. Devere, Dr. Flume, Dr. Rose and Dr. Roy may be called to testify about their care and treatment of the plaintiff and may attest to the plaintiff's medical conditions and treatments. They cannot or should not offer a medical opinion outside the scope of their personal observations and treatment of the Plaintiff. They may not veer into expert testimony territory without adherence to all applicable disclosure rules. Not only will Courts' exclude physicians who are trying to "disguise" themselves as fact witnesses in order to circumvent the protocol for experts, the move may also affect the Doctor's credibility in the eyes of a fact finder.

Hearsay evidence

(39) By a notice dated 15th March, 2019 the plaintiff gave a hearsay evidence Notice under Section 4 of the Civil Evidence Act 2002 that she intends to adduce hearsay evidence from the following documents.

(i) Ronald Devere's Report to AIG Wordsource dated 16/04/2014 comprising of 08 pages.

(ii) David L. Flume's Notice to Mr Maopa dated 06-06-2017.

(iii) David L Flume's letter of 01/01/2019.

(iv) Email from David Flume to Ann Haworth dated 06/02/2019.

(v) Handwritten Statement given by Shashi Shankar dated 05/11/2009.

(40) The plaintiff may not produce and rely on Dr Devere's report because it has been excluded by the Court in the first and second rulings.

(41) Mr. Apted submits that the documents (ii), (iii), (iv) and (v) may not be relied upon or alternatively should be given little weight because the Notice has been given too late.

(42) I accept that the hearsay Notice is not served timeously. But I do not see any prospect of prejudice to the defendants because the trial had been postponed to 09th to 13th December, 2019. Moreover, Section 04 of the Civil Evidence Act, 2002, does not make it inadmissible if a hearsay Notice is not served timeously or does not allow the trial judge to have power to exclude hearsay evidence.

(43) The plaintiff may adduce hearsay evidence from documents (ii), (iii), (iv) and (v).

[D] CONCLUSION

1. I state with conviction that the plaintiff has a positive obligation and a responsibility to disclose after-acquired documents (in the sense, the documents which come into existence or are first acquired after a list or affidavit has been served) which are relevant to an issue in the proceedings and which are not privileged for the purposes of the discovery rules.

2. The plaintiff has a positive obligation and a responsibility to correct errors in discovery already given, by way of a further affidavit, once the error becomes know (that is to disclose relevant documents which were in fact in the party's possession custody or power at the time he previously gave discovery).

3. Thus, there is no need to obtain leave of the Court to disclose after-acquired documents or to correct errors in discovery, because the plaintiff is under positive obligation.

[E] ORDERS

I make the following orders;

(a) I dismiss the defendants' application for an Order for striking out the affidavit verifying plaintiff's 2nd and 3rd supplementary list of documents.

(b) The plaintiff may produce in evidence and rely on any document listed in the Affidavit Verifying Plaintiff's 2nd Supplementary List of Documents filed on 12th March, 2019 and the Affidavit Verifying Plaintiff's 3rd Supplementary List of Documents filed on 21-03-2019 **except for**;

(i) the documents the court excluded from being produced in evidence including Dr Devere's Report dated 16-04-2014.

(ii) special damages documents.

(iii) documents relating to litigation costs.

(c) There can be no reliance at the trial on expert reports not disclosed within 10 weeks after the close of the pleadings. Dr. Devere, Dr. Flume, Dr. Rose and Dr. Roy may be called to testify about their care and treatment of the plaintiff and may attest to the plaintiff's medical conditions and treatments. They cannot or should not offer a medical opinion outside the scope of their personal observations and treatment of the Plaintiff. They may not veer into expert testimony territory without adherence to all applicable disclosure rules. Not only will Courts exclude physicians who are trying to "disguise" themselves as fact witnesses in order to circumvent the protocol for experts, the move may also affect the Doctor's credibility in the eyes of a fact finder.

(d) The plaintiff may adduce hearsay evidence from the following documents ;

(*) David L. Flume's Notice to Mr. Maopa dated 06-06-2017.

(*) David L Flume's letter of 01/01/2019.

(*) Email from David Flume to Ann Haworth dated 06/02/2019.

(*) Handwritten Statement given by Shashi Shankar dated 05/11/2009.

(e) The case to be mentioned on 23-08-2019 to fix a hearing date for plaintiff's summons filed on 04/04/2019 for :

(1) revocation or variation of order dated 30/01/2017 and 14/09/2017.

(2) to file and serve particulars of special damages in relation to plaintiff's medical expenses.

(3) to enter judgment against 2nd and 3rd defendants on liability in accordance with the admission made in the affidavit of Viliame B. Vodonaivalu filed on 20/03/2019 at paragraph (9).

(f) Costs reserved.

16/08/2019.

.....

Jude Nanayakkara
[Judge]

At Lautoka,
Friday, 16th August, 2019