

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Case No HBC 222 of 2022

BETWEEN: **HASMUKH LAL** of 10 Jetha Lal Street off Naranji Road,
Tamavua, Suva, Board Director.

Appellant

AND: **THE UNIVERSITY OF THE SOUTH PACIFIC** a statutory body
established under the University of the South Pacific Charter, Cap
266 and having its registered address at Laucala Campus,
University of the South Pacific, Private Mail Bag, Suva.

Respondent

JUDGMENT

For the Appellant: *Ms. C. Naicker*

For the Respondent: *Mr. F. Haniff & Ms. R. Garry*

Date of Hearing: *30th June 2025*

Date of Judgment: *9th July 2025*

Introduction

1. This is an appeal from a ruling of the Master striking out the Appellant/Plaintiff's writ on 30th July 2024 pursuant to Order 18 Rule 18(1)(a) of the High Court Rules.
2. The appellant advanced 11 grounds of appeal in his Notice and Grounds of Appeal which I will deal with shortly.

The Writ

3. I have set out in detail below the Writ filed by the Appellant/Plaintiff as impugned ruling of the Master cannot be viewed in isolation and requires the writ to be examined in detail.

4. The Appellant was the Chief Executive Officer of the Pacific Technical and Further Education (TAFE) of the University of the South Pacific (the University). Following allegations of misconduct, abuse of office and mismanagement raised by Vice Chancellor Professor Paul Ahluwalia against the former Vice Chancellor, Professor Chandra and the University Senior Executives, including the Appellant/Plaintiff, a New Zealand firm of accountants was hired to investigate the allegations, and they filed a report called the BDO Report containing their findings.
5. The Appellant/Plaintiff alleges that on 21st April 2021, the USP Council, which governs the University, met to discuss the contents of the BDO Report and the Council agreed that the contents of the report would not be released to the public.
6. President Lionel Aingimea, President of Nauru was the Chancellor of the Council Body from July 2020 until June 2021.
7. The Appellant /Plaintiff alleges that on or about the 9th of September 2021, the President of Nauru, the Honourable Lionel Aingimea breached the Council's directive and the University's Code of Conduct by tabling part of the contents of the BDO report during a Parliamentary speech in Nauru, thus breaching the confidentiality expected of the University Council.
8. The Appellant/Plaintiff alleges that as a result of the breach of duty of confidentiality by the University, the Plaintiff has faced continuous contempt and reputational harm from the public.

The Summons to Strike Out

9. The Defendant filed its summons to strike out the application on 12th August 2022 on the grounds that (a) it discloses no reasonable cause of action; (b) that it is scandalous, frivolous or vexatious on the grounds that the Republic of Nauru is the more convenient forum to hear the claim; (c) and that the statement of claim is otherwise an abuse of process of the court as the matters pleaded are domestic in nature and not justiciable in the High Court of Fiji. The summons was filed pursuant to Order 18, Rule 18(1) of the High Court Rules.

The Ruling

10. The parties filed written submissions and the Master and the parties on 29th February 2024 agreed that the Ruling be given based on the written submissions. The ruling was delivered on 30th July 2024. In his ruling the Mater started with the statement of claim, then set out Order 18, Rule 18 (1)(a) of the High Court Rules which gives him the power

to strike out or amend any pleadings on the grounds that it discloses no reasonable cause of action. He then examines the authorities in particular the following:

- a. No affidavit material to be taken into account: *Razak v Fiji Sugar Corporation Ltd* [2005] FJHC 720; HBC 208.1998l (25th February 2005);
- b. A reasonable cause of action means a cause of action with some chance of success, when only the allegations in the statement of case is considered: Halsbury's Laws of England (4th Edition) in Vol 37 at para 18 and 24 (*Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094 at 1101) per Lord Pearson;
- c. The court may not use its power under this rule for the reason it is weak: *The power to strike out is a summary power "which should be exercised only in plain and obvious cases" where the cause of action was plainly unsustainable: Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094 at 1101)
- d. In his discussion or analysis of the evidence, the Master said he could not find any link between the leak of the BDO report by a third party (President Aingimea) and the University; that the statement of claim is "absurdly ambiguous on what grounds the Plaintiff is seeking damages from the Defendant; that if there is any cause of action, it is the University who might have a cause of action against the third party;
- e. The Master concluded that based on the facts pleaded in the statement of claim, he could not find that the alleged action of a third party in leaking the BDO report can be considered as giving rise to any cause of action in law to the Plaintiff to claim damages against the Defendant. The master then concluded that based on this, it is his considered view that the claim disclosed no reasonable cause of action, and it is therefore unsustainable and a fit case to exercise his discretionary power pursuant to Order 18 Rule 18(1)(a) of the High Court Rules and strike out the whole of the action.

The Grounds of Appeal

11. The Appellant filed the following grounds of appeal:
 - a. Error in Application on Vicarious Liability;
 - b. Failure to Apply the Test of Course of Employment and Close Connection;
 - c. Misapplication of the Doctrine of Non-Delegable Duty;
 - d. Contradictory Findings on the Discretionary Power to Strike Out;

- e. Improper Dismissal of Claim for Damages;
- f. Misrepresentation of the High Court Rules;
- g. Failure to Consider the Principles of Natural Justice;
- h. Erroneous Application of the “No reasonable cause of action test;”
- i. Overlooking the importance of Public Policy Considerations;
- j. Failure to apply the principles of equity; and
- k. Erroneous Dismissal of Claim of Institutional negligence.

The Submissions

12. The appeal was heard on 30th June 2025. Counsel for the Appellant had started addressing the court when she was asked if she had any written submissions. She told the court that these were being prepared and at the end of her oral submissions, she tendered the written submissions which did not address her grounds of appeal as set out above. Instead, she submitted that the Master erred in the following respects:
- a. Failed to apply the correct legal threshold to summary strike out applications under Order 18, Rule 18 of the High Court Rules;
 - b. Failed to appreciate that the pleadings on a generous and fair reading, disclose arguable causes of action in defamation, breach of duty of care, breach of fiduciary duty, breach of statutory confidentiality, and violation of constitutional rights;
 - c. Failed to consider whether deficiencies in pleading (if any) could be cured by amendment rather than striking out the entire action;
 - d. Failed to give sufficient weight to the pleaded facts establishing institutional responsibility for the unauthorised disclosure by the Chancellor;
 - e. By improperly substituting summary strike out jurisdiction for a determination on contested questions of fact and law which should have been resolved at trial; and
 - f. By denying the Appellant the opportunity to vindicate his rights and reputation through judicial process.

ANALYSIS

13. A comparison of the grounds of appeal that was filed, and the skeleton of the Appellant’s Counsel’s written submissions clearly show that they are completely different. The purpose of setting out the grounds of appeal in the notice of appeal is to ensure fairness by allowing the Respondent to prepare for the appeal and not be caught by surprise on the day. The Court also has to familiarise itself with the relevant law including the authorities before coming to the hearing so it can follow the arguments presented and ask pertinent questions.
14. An appellant may not amend the grounds of appeal without the leave of the court as set out in Order 59 Rule 15 of the High Court Rules: -

Amendment of Notice of Appeal and Cross-Appeal

15(1) *A notice of appeal or cross-appeal may be amended by or with the leave of the court.*

(2) *An application for amendment under paragraph (1) shall be by way of a summons filed and served on each of the parties to the appeal not less than 14 days before the date on which the appeal is listed for hearing.*

15. I will therefore deal with each of the grounds of appeal that was filed; the arguments made in support of the ground and the relevant law and analysis.
16. When an application to strike out is made at this stage of the proceedings, the court will have to take the pleadings at its highest and work from the premise that the facts as pleaded are true.

FIRST GROUND OF APPEAL—ERROR IN APPLICATION OF VICARIOUS LIABILITY—*That the Learned Master erred in failing to apply the doctrine of vicarious liability, which remains applicable to the Respondent under Fijian Law. This doctrine holds that an employee is liable for the wrongful act of its employees if those acts are closely connected to their employment. The Master’s failure to address this principle in relation to the Respondent’s conduct constitutes a significant legal oversight.*

The Law on Vicarious Liability

17. The law of vicarious liability makes a Defendant liable for the acts of another. As explained by the Court of Appeal in *Land Transport Authority v Naicker [2024]*¹ quoting Lord Pearce in *Imperial Chemicals Industries Ltd. V. Shatwell [1965] A.C. 565, 685*: -

“the doctrine of vicarious liability has not grown from any very clear, logical or legal principle but from social convenience and rough justice.’ The rule for employers’ liability for his employees act under the common law was adopted not by way of an “exercise in analytical jurisprudence but as a matter of policy.[2].

18. Vicarious liability in its true sense in Fiji is restricted to relationships of employer/employee where the employer is liable in certain situations for the tortious acts of the employee. The policy reasons for this is explained by the Court of Appeal as:

1. *The employer has deeper pockets [3] (‘financial’ basis)*
2. *The employer is empowered to select the employee and control the tasks to be performed by the employee [4] in order to meet the requirements and standards of the business operations (‘control’ basis)*

¹ FJCA 137; ABU053.2023 (26 July 2024)

- 3 *The employer stands to generate profits from the employee's work and hence should also bear the potential liabilities [5] ('enterprise liability' basis)*
4. *The employer is more able to insure against liabilities arising from legal actions by third parties and spread the losses more efficiently [6] ('loss distribution' basis)²*
19. In *Bird v DP (a pseudonym) [2024] HCA 41 (13 November 2024)* the High Court of Australia explained the term "vicarious liability" in the common law as used in three different relationships, namely (i) where there is an agent/principal relationship; (ii) where there is a non-delegable duty as for example between a hospital and patient; and (iii) where there is a relationship of employee and employer. I will cover each of these as there are several grounds of appeal that rely on vicarious liability.

Agency

20. The first of these is one of agency where the act of a person is attributable to the Defendant on the basis that the acts were done for the Defendant with his express or implied authorisation as explained by the High Court of Australia in *Bird v DP (a pseudonym) [2024] HCA 41 (13 November 2024)*:-

For this form of liability, based on vicarious acts or vicarious conduct, the expression "vicarious liability" is inapposite.[14] Thus, in contrast to true vicarious liability, it is not the liability, but the acts of the agent that are attributed to the principal appears to be the basis of the claim against the Defendant.³

21. The Plaintiff in his statement of claim did not allege that President Aingimea was an agent of the University so this basis for "vicarious liability" cannot be a basis for a claim against the university and fails as a ground of appeal.

Non-Delegable Duty

22. The second area where vicarious liability has been used in cases is a non-delegable duty:

A "non-delegable" or "personal" duty of care is "a duty ... of a special and 'more stringent' kind".[32] It is not merely a duty to take care, but a "duty to ensure that reasonable care is taken";[33] to "ensure that the duty is carried out";[34] or to "procure the careful performance of work [assigned] to others".[35] Liability for breach of a non-delegable duty is therefore direct – not vicarious.[36]⁴

23. Such a duty may arise out of a relationship of hospital and patient, a school and pupil and employer and employee where the nature of the relationship where the Defendant has "*assumed particular responsibility to ensure that care is taken, rather than merely to take reasonable care....*] A "core instance" of a non-delegable duty at common law is

² Ibid para 22

³ *Bird v DP (a pseudonym) [2024] HCA 41 (13 November 2024)* at para 36

⁴ Ibid para

the duty that an employer usually owes to employees to provide a safe system of work.[41] Under that non-delegable duty, the employer is liable for any negligence on the part of its independent contractor or employee in failing to adopt a safe system of work.[42]

24. President Aingimea was not an employee of the University at the time he allegedly breached the duty not to disclose and therefore he cannot be held liable for it in tort and therefore the university cannot be “vicariously liable” to the Plaintiff. There was no allegation in the pleadings that President Aingimea was an agent of the University.

Vicarious Liability in its True or Proper Sense

25. Vicarious liability in its third sense is when an employer is found liable for the wrongdoing of an employee as was explained by the High Court of Australia in *Bird v DP (a pseudonym) [2024] HCA 41 (13 November 2024)* at para 44:

*The third area of law where the expression “vicarious liability” has been used, and where its use is apposite, involves cases of secondary liability **based on attribution of liability, not attribution of the acts**, of a wrongdoer to a Defendant. This is vicarious liability in its true or proper sense – liability based on the attribution of the liability of another.[54] As is self-evident, vicarious liability is a form of strict liability, whereby a Defendant is held liable for the wrongs of another, despite the Defendant being free of fault.[55]*

26. The first requirement of the law of vicarious liability in its true sense is that there must be a relationship of employer and employee between the University and President Aingimea. The pleadings clearly show that at the time President Aingimea allegedly released parts of the BDO report in Parliament in Nauru on 21st September 2019, he was no longer an employee of the University, so he was an independent third party. The University cannot be vicariously liable for any tortious act of an independent third party and it is therefore not necessary to delve into the intricate requirements of the law of vicarious liability.
27. Clearly, the Plaintiff does not have a cause against the University in vicarious liability in any of the three relationships discussed above. It is a fatal mistake in the pleadings and cannot be cured by an amendment.

Direct Liability

28. The University is not a natural person and cannot act except through an employee or agent. The University council had protected the BDO report by prohibiting the release of the report to the public. Nowhere in the pleadings is it alleged that any properly authorised employee or agent of the University breached that resolution. The pleadings


clearly show the contrary – that the University Council on 21st April 2019 had directed that the BDO report be not released to the public. There is therefore no direct liability of the Defendant University.

Conclusion

29. For the reasons given, I find that the Plaintiff had no cause of action against the University. This was not a question of a weak case that could be cured by amendments. All the other arguments advanced in the grounds of appeal or argued at the appeal hearing are therefore irrelevant and the appeal should be dismissed.

Orders

30. The appeal is dismissed with costs summarily assessed at \$1,000.00


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Penijamini R Lomaloma
Acting Puisne Judge

