IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

CIVIL ACTION NO. HBC 285 of 2023

BETWEEN : **HOLLY ANN HARMON** of 10 Juniper Street, Berwick PA 18603, United States of America, Nursing Assistant.

PLAINTIFF

AND : **ANARE QAMANILEQA LAQETA RAUBECI** of Nadi.

FIRST DEFENDANT

AND : **CONNECTING WORLDS (FIJI) PTE LIMITED** a limited liability Company having its registered office at Wailoaloa Beach, Nadi

SECOND DEFENDANT

Before : Master P. Prasad

Counsels : Ms. N. Choo for Plaintiff
Ms. R. Chand for 2nd Defendant

Date of Hearing : 9 April 2025

Date of Decision: 29 August 2025

RULING

(Strike out and Security for costs)

1. Through her Statement of Claim (**SOC**), the Plaintiff seeks compensation for injuries and damages allegedly sustained due to the actions of the 1st Defendant. She asserts that she was raped by the 1st Defendant aboard a yacht owned by the 2nd Defendant, and contends that the 2nd Defendant bears vicarious liability for the 1st Defendant's conduct, which was committed in the course of his employment

2. On 23 February 2024, the 2nd Defendant filed a Summons to Strike Out the Plaintiff's Statement of Claim pursuant to Order 18 Rule 18 (1) (a), (b), (c) and (d) of the High Court Rules (**HCR**) and the inherent jurisdiction of this Court.

3. On 13 March 2024, the 2nd Defendant filed another Summons seeking Security for Costs from the Plaintiff. Both the Summons were supported by respective

Affidavits sworn by one Mr. Luc Delhumeau (**Luc**) in his capacity as the Director of the 2nd Defendant. The Plaintiff filed a single Affidavit in Opposition, to which the 2nd Defendant filed an Affidavit in Reply sworn by Luc.

4. Both the Summons were heard together wherein parties made oral submissions and filed written submissions as well.

Preliminary Issue

5. At the hearing, the 2nd Defendant's counsel raised a preliminary issue regarding the Affidavit in Opposition filed by the Plaintiff wherein it stated that it was deposed by the Plaintiff "at *Suva*" whereas it was witnessed by a Notary Public in the State of Montana, United States of America (**USA**).

6. The Plaintiff's counsel submitted that this was a typographical error and an oversight as the said affidavit was prepared by the Plaintiff's counsel in Suva and then sent for execution by the Plaintiff in the USA. The counsel submitted that the Court can grant permission for the use of the said affidavit pursuant to Order 41 Rule 4 of the HCR.

7. This Court accepts and agrees with the Plaintiff's counsel's submissions. It is not disputed that the Plaintiff resides in the USA and has deposed her affidavit there. The reference to '*Suva*' is evidently a typographical oversight and is not overtly prejudicial to the 2nd Defendant.

8. Therefore, I find that this Court can consider the Affidavit in Opposition filed by the Plaintiff. I will now deal with both Summons.

Summons to Strike out

Order 18 Rule 18 (1) (a), (b), (c) and (d)

9. The relevant rule which the Defendant is relying on is Order 18 Rule 18 (1) (a) of the HCR.

10. Order 18 rule 18 provides:

> *"18 (1)The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –*
> *(a) it discloses no reasonable case of action or defence, as the case may be;*
> *(b) it is scandalous, frivolous or vexatious;*
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
> *(d) it is otherwise an abuse of the process of the Court,*

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

11. The following excerpts from the 1997 Supreme Court Practice provide the scope of the rule together with guiding factors when dealing with an application for the strike out of a pleading.

12. Footnote 18/19/3 of the 1997 Supreme Court Practice reads:

> *"Striking out or amendment—The rule also empowers the Court to amend any pleading or indorsement or any matter therein. If a statement of claim does not disclose a cause of action relied on, an opportunity to amend may be given, though the formulation of the amendment is not before the Court (CBS Songs Ltd v. Amstrad [1987] R.P.C. 417 and [1987] R.P.C. 429). But unless there is reason to suppose that the case can be improved by amendment, leave will not be given (Hubbuck v. Wilkinson [1899] 1 Q.B. 86, p.94, C.A.). Where the statement of claim presented discloses no cause of action because some material averment has been omitted, the Court, while striking out the pleading, will not dismiss the action, but give the plaintiff leave to amend (see "Amendment," para. 18/12/22), unless the Court is satisfied that no amendment will cure the defect (Republic of Peru v. Peruvian Guano Co. (1887) 36 Ch.D. 489)."*

13. Footnote 18/19/7 of the 1997 Supreme Court Practice reads:

> *"Exercise of powers under this rule—It is only in plain and obvious cases that recourse 18/19/7 should be had to the summary process under this rule, per Lindley M.R. in Hubbuck v. Wilkinson [1899] 1 Q.B. 86, p.91 (Mayor, etc., of the City of London v. Horner (1914) 111 L.T. 512, C.A.). See also Kemsley v. Foot [1951] 2 K.B. 34; [1951] 1 All E.R. 331, C.A., affirmed [1952] A.C. 345, H.L. It cannot be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action (Wenlock v. Moloney [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871, C.A.)."*

14. Footnote 18/19/11 of the 1997 Supreme Court Practice on no reasonable cause of action or defence reads:

> *"Principles—A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688; [1970] 1 All E.R. 1094, C.A.). So long as the statement of claim or the particulars (Davey v. Bentinck [1893] 1 Q.B. 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out (Moore v. Lawson (1915)*

31 T.L.R. 418, C.A.; Wenlock v. Moloney [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871, C.A.);..."

15. The legal principles regarding striking out pleadings are clear and widely understood. The Court of Appeal in ***National MBF Finance v Buli*** [2000] FJCA 28 determined the principles for strike out. In ***Attorney-General v Shiu Prasad Halka*** 18 FLR 210 at 214 Justice Gould V.P. in his judgment expressed *"that the summary procedure under O.18, r.19 is to be sparingly used and is not appropriate to cases involving difficult and complicated questions of law."*

16. Justice Winter (as his Lordship then was) in ***Ah Koy v Native Land Trust Board*** [2005] FJHC 49 aptly stated:

> *"The practice in Fiji of preemptively applying to strike out a claim is wrong and must cease. Counsels ability to overlook the purpose of this summary procedure is astounding. The expense to the administration of justice, let alone clients, is a shameful waste of resources....*
>
> *Apart from truly exceptional cases the remedy should not be granted. The approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be provided at trial. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so upon a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of such a factual contention....*
> *The rule of law requires the existence of courts for the determination of disputes and that litigants have the right to use the court for that purpose. The courts will be alert to their processes being used in a way that results in an oppression or injustice that would bring the administration of justice into disrepute. However, the court cannot and must not deny proper access to justice by the glib use of a summary procedure to pre-emptorily strike out an action no matter how weak or poorly pleaded the Statement of Claim supporting the case is....*
>
> *It is not for the court in deciding whether there is a reasonable cause of action to go into the details of the issues that are raised by the parties. This summary jurisdiction of the court was never intended to be exercised by a detailed examination of the facts of the case at a mini hearing to see whether the plaintiff really has a good cause of action merely a sufficient one. This is not the time for an assessment of the strengths of either case. That task is reserved for trial. The simple fact that these parties engaged in argument by opinion over statutory interpretation must bring into existence a mere cause of action raising some questions fit to be decided by a judge."*

17. The clear and unambiguous wording of Order 18 Rule 18 indicates that the power to strike out pleadings is discretionary rather than obligatory.

18. For the first ground to consider under Order 18 Rule 18 (1) (a), the Court may only conclude an absence of a reasonable cause of action on the pleadings itself with no evidence being admissible. His Lordship Chief Justice Mr. A.H.C.T. Gates (as His Lordship then was) held in **Razak v Sugar Corporation Ltd** [2005] FJHC 720 that:

> *"To establish that the pleadings disclose no reasonable cause of action, regard cannot be had to any affidavit material [Order 18 r.18(2)]. It is the allegations in the pleadings alone that are to be examined: Republic of Peru v Peruvian Guano Company [1887] UKLawRpCh 186; (1887) 36 Ch.D 489 at p.498".*

19. The pleadings suggest that the Plaintiff initiated this proceeding against the 1st Defendant for personal injuries arising from an alleged rape. The Plaintiff further alleges that the 2nd Defendant is vicariously liable for the conduct of the 1st Defendant, which was committed within the scope of the 1st Defendant's employment.

20. It is the 2nd Defendant's counsel's position that the Plaintiff's SOC does not comply with the requirements of Order 18 Rule 11, and bears no reasonable cause of action against the 2nd Defendant as it fails to plead the following:

    a. Specific tort not identified.
    b. Employment relationship between the two Defendants is not pleaded to show the alleged wrongful conduct occurred within the scope of any employment or any independent legal duty owed by the 2nd Defendant.
    c. The allegations against the 2nd Defendant are unclear and incapable of supporting a claim in tort.
    d. The defects in the SOC are incapable of being amended.

21. The 2nd Defendant's counsel relied on the cases of ***McKellar v Container Terminal Management Services Ltd*** [1999] FCA 1103 (13 August 1999) and ***Dakuna v Laucala Island Resort Ltd*** [2017] FJHC 10; HBC150.2015 (20 January 2017).

22. The Plaintiff's counsel submitted that in ***Dakuna*** [supra] the Court had observed that the pleadings therein had not included a separate cause of action for vicarious liability and there was no pleading in the statement of claim for other causes of action under Health and Safety Act and Employment Relations Act. As a result of those deficiencies, the entire statement of claim therein was struck out. Counsel further states that unlike in ***Dakuna***, in the current SOC, paragraph [43] clearly states the particulars of the alleged duty of care owed by

the 2nd Defendant in not putting any precautionary or security measures and ensuring that the Plaintiff was not endangered by the 2nd Defendant's staff.

23. The Plaintiff's counsel further relied on ***Courts (Fiji) Ltd v Patel*** [2024] FJSC 8; CBV0012.2022 (26 April 2024) and ***Ravunidakua v Attorney-General of Fiji*** [2007] FJHC 160; Civil Action HBC 006 of 2006 (8 March 2007) to advance their submissions that the SOC clearly reflects the cause of action against the 2nd Defendant.

24. The Plaintiff's counsel also submitted that the 2nd Defendant had failed to request for particulars from the Plaintiff pursuant to Order 18 Rule 11 (6). The counsel relied on ***Relcorp Ltd v Naisoso Property Sales (Fiji) Pte Ltd*** [2020] FJHC 933; HBC09.2018 (13 November 2020) in support of this.

25. Moreover, the Plaintiff's counsel submitted that the current pleadings were sufficient to allow the 2nd Defendant to prepare a defence and conduct a trial, and any perceived lack of details and particulars could be cured through an amendment.

26. The relevant paragraphs of the SOC with assertions on the cause of action against the 2nd Defendant are as follows:

> *"2. The 1st Defendant was a cook for the 2nd Defendant."*
>
> ...
>
> *"4. The Plaintiff and her partner had engaged the services of the 2nd Defendant to take them for a yacht trip."*
>
> ...
>
> *"6. After picking the Plaintiff and her partner up the 2nd Defendant's owner Luc Delhumeau "Luc" assured them that they would have an awesome time and they were in great hands as he had arranged his two best crew members for our trip.*
>
> *"7. An employee of the 2nd Defendant then took the Plaintiff and her partner to where the 2nd Defendant's yacht "Gipsea" was anchored and there the Plaintiff met the Captain and the 1st Defendant who was introduced as the 2nd Defendant's cook."*
>
> ...
>
> *"42. As a consequence of the conduct of the 1st Defendant the Plaintiff was raped and suffered severe trauma and injuries as well as suffering ongoing mental stress.*
>
> *43. The 2nd Defendant was vicariously liable for the conduct of its employee and failed in its duty of care towards the Plaintiff.*

Particulars of breach of duty of care

(a) The 2nd Defendant employed a violent rapist as part of its crew.
(b) The 2nd Defendant did not put into place any precautions or security measures to protect the Plaintiff from such an incident.
(c) At all material times the yacht was owned by the 2nd Defendant and was under its control and command.
(d) The 1st Defendant was working in the kitchen of the yacht when he raped and caused injuries to the Plaintiff.

44. As a consequence of the actions of the 1st Defendant the Plaintiff has suffered injuries and damages.

...

"49. For the rape and injuries that the Plaintiff suffered she seeks general, aggravated and punitive damages against both Defendants."

27. The Plaintiff has also given certain particulars of the general damages and medical injuries in her SOC.

28. It was held in ***Ratumaiyale v Native Land Trust Board*** *[2000] FJLawRp 66; [2000] 1 FLR 284 (17 November 2000)* that:

*"It is clear from the authorities that the Court's jurisdiction to strike out on the grounds of no reasonable cause of action is to be used sparingly and only where a cause of action is obviously unsustainable. It was not enough to argue that a case is weak and unlikely to succeed, it must be shown that no cause of action exists (**A-G v Shiu Prasad Halka** [1972] 18 FLR 210; **Bavadra v Attorney-General** [1987] 3 PLR 95. The principles applicable were succinctly dealt by Justice Kirby in **London v Commonwealth [No 2]** 70 ALJR 541 at 544 - 545. These are worth repeating in full:*

*1. It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the Court, is rarely and sparingly provided (**General Street Industries Inc v Commissioner for Railways (NSW)** [1964] HCA 69; (1964) 112 CLR 125 at 128f; **Dyson v Attorney-General** [1911] 1 KB 410 at 418).*

*2. To secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action (**Munnings v Australian Government Solicitor** (1994) 68 ALJR 169 at 171f, per Dawson J.) or is advancing a claim that is clearly frivolous or vexatious; (**Dey v. Victorian Railways Commissioners** [1949] HCA 1; (1949) 78 CLR 62 at 91).*

3. An opinion of the Court that a case appears weak and such that it is unlikely to succeed is not alone, sufficient to warrant summary

*termination. (**Coe v The Commonwealth** (1979) 53 ALJR 403; (1992) 30 NSWLR 1 at 5-7). Even a weak case is entitled to the time of a court. Experience reaches that the concentration of attention, elaborated evidence and argument and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.*

*4. Summary relief of the kind provided for by O 26, r 18, for absence of a reasonable cause of action, is not a substitute for proceeding by way of demurrer. (**Coe v The Commonwealth** (1979) 53 ALJR 403 at 409). If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do so in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.*

*5. If notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a court will ordinarily allow that party to reframe its pleadings. (**Church of Scientology v Woodward [1982] HCA 78; (1980) 154 CLR 25** at 79). A question has arisen as to whether O 26 r 18 applies only part of a pleading. (**Northern Land Council v The Commonwealth** (1986) 161 CLR 1 at 8). However, it is unnecessary in this case to consider that question because the Commonwealth's attack was upon the entirety of Mr. Lindon's statement of claim; and*

6. The guiding principle is, as stated in O 26, r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit.

29. As discussed in ***London v Commonwealth [No 2]*** [supra], the mere fact that a case is weak and not likely to succeed is not a ground for striking out. A court should not dismiss or strike out a case simply because a plaintiff's arguments or evidence may not be particularly strong or because the case may face challenges in succeeding at trial. Instead, courts generally allow cases to proceed to trial where there is a reasonable basis for the claim, even if it is not guaranteed to succeed, so that all relevant evidence and arguments can be fully examined and evaluated in the appropriate legal proceedings.

30. The Plaintiff pleads vicarious liability in her SOC. Vicarious liability does not depend on an employer's fault rather on his role, and in the present matter the Plaintiff's SOC does plead facts relating to the 2nd Defendant's role. In this regard, the pleading as it currently stands does disclose a cause of action against the 2nd Defendant and does raise some questions to be decided at the trial of the action.

31. It is also noteworthy that the 2nd Defendant did not previously seek additional and more specific details (particulars) from the Plaintiff before filing the current Summons. If the 2nd Defendant perceived that it needed better particulars to draft its Statement of Defence, the same could have been requested from the Plaintiff earlier.

32. I therefore find that there is a reasonable cause of action, and any lack of detail or clarity can be addressed and clarified through a request/application for further and better particulars.

33. Having already determined that there is a reasonable cause of action in this SOC, I will now proceed to consider and address the remaining grounds raised by the 2nd Defendant i.e. that the SOC is scandalous, frivolous or vexatious; an abuse of process of the Court; and will prejudice, embarrass or delay fair trial.

34. The 2nd Defendant's counsel made no submissions on how the Plaintiff's claim is scandalous, frivolous and vexatious but only submitted on the fact that the 2nd Defendant is not vicariously liable for the actions of the 1st Defendant.

35. In this regard, Luc filed an Affidavit in Support and an Affidavit in Reply on behalf of the 2nd Defendant. These affidavits are admissible under Order 18 Rule 18 (1) (b), (c) and (d) to support the 2nd Defendant's application.

36. The 2nd Defendant stated the following in its Affidavit in Support:

    a. The Plaintiff's solicitor on 21 August 2023 wrote to the 2nd Defendant claiming compensation for the Plaintiff on the grounds that the 2nd Defendant was vicariously liable for actions of the 1st Defendant who was his employee.
    b. On 31 August 2023, the 2nd Defendant responded to the Plaintiff's solicitor stating: (i) the criminal matter against the 1st Defendant was still pending before the Lautoka High Court; (ii) that there are stringent tests to establish vicarious liability and case law supports the fact that "*any unauthorised acts by any persons on board our vessels cannot invoke liability on the part of our Company*"; (iii) that the Plaintiff violated the strict booking and cancellation policy as they supplied and insisted on consumption of alcohol by the crew on board; and (iv) that the 2nd Defendant cannot be held liable for alleged acts or subsequent alleged acts once its booking and cancellation policy and operational practices are violated (**2nd Defendant's Letter**).
    c. That the 1st Defendant was at no point in time an employee of the 2nd Defendant but an independent contractor.
    d. The 2nd Defendant also complied with tax requirements for the engagement of the 1st Defendant.

e. It is an abuse of court process for the Plaintiff to have filed this proceeding when the criminal action against the 1st Defendant is still pending.
f. The Plaintiff's claim is ambiguous and does not disclose any legally recognisable claim against the 2nd Defendant.

37. In this case, apart from the 2nd Defendant's Letter wherein its disputing vicarious liability, the 2nd Defendant has annexed copies of 2 computer printouts (**Printouts**) marked as "*A4*" in its Affidavit in Support. The 2nd Defendant refers to these Printouts as evidence of the 2nd Defendant's filings with the Fiji Revenue and Customs Services (**FRCS**) for a service agreement with the 1st Defendant. The Printouts refer to the payment periods for January and February 2023 respectively and states the type of payment as being for a "*contract*". The payee name is reflected as "*Mr. Anare Qa*". The Printouts are not endorsed by FRCS confirming the validity of the same and neither do they state anywhere that those payments are somehow related to the 2nd Defendant. Even the name of the payee does not reflect the 1st Defendant's full name.

38. Moreover, there are two more documents attached to the Printouts in annexure "*A4*" and they are documents titled "*Professional Service Statement for the Month of January 2023*" (**Statement A**) and "*Professional Service Statement for the Month of February 2023*" (**Statement B**) respectively. Both documents are signed by Luc and the contents of Statement A states that "*Mr. Anare Raubeci...has received online banking payments totalling to $600.00 in the Month of January 2023 while engaged as an independent service provider (chef/crew) by Connecting Worlds (Fiji) PTE Limited*". The content of Statement B is similar with the month being referred to as "*February 2023*". Insufficient details in the Affidavit in Support on both statements make it difficult for this court to ascertain the purpose for which the statements were made and the reason for them to be adduced by the 2nd Defendant.

39. The 2nd Defendant's counsel relied on the above documents, i.e. the Printouts and both statements, to reinforce its submissions that the 1st Defendant was not an employee of the 2nd Defendant but an independent contractor.

40. The Plaintiff's counsel submitted the following in response: (i) the documents annexed as "*A4*" in the 2nd Defendant's Affidavit in Support are challenged on the grounds of authenticity and these documents need verification at trial; (ii) the FRCS documents state the date of withholding tax as 2020 whereas the payments refer to January and February 2023; and (iii) the 2nd Defendant's Letter admits that the 1st Defendant was a "crew" which in turn substantiates that the 1st Defendant was an employee.

41. The Plaintiff's counsel further submitted that the determination of whether the 1st Defendant was an employee or an independent contractor is an issue best left for trial.
42. The doctrine of vicarious liability is discussed by Master Azhar (as His Lordship then was) in ***Sharma v Air Pacific Ltd (trading as Fiji Airways)*** [2021] FJHC 382; HBC122.2017 (14 December 2021) as follows:

> *29. The doctrine of vicarious liability represents not a tort, but a rule of responsibility which renders one person liable for the torts committed by another. Most common application of vicarious liability is in employer and employee relationship. The employers are held liable for what their employees did for their (employers') purposes and benefit. The law either considers that the employees' actions are those of the employers, or the law says that the employers are liable for the actions of their employees. Lord Justice Rix in* ***Viasystems (Tyneside) v Thermal Transfer (Northern) Ltd*** *[2006] QB 510 stated at paragraph 55 that:*
>
> > *The concept of vicarious liability does not depend on the employer's fault but on his role. Liability is imposed by a policy of the law upon an employer, even though he is not personally at fault, on the basis, generally speaking, that those who set in motion and profit from the activities of their employees should compensate those who are injured by such activities even when performed negligently.*
>
> *30. In order to establish vicarious liability, firstly the wrongdoer must be the employee as opposed to an independent contractor, secondly, the employee must have committed the tort, and finally the tort must have been committed in the course of the employment. The underlying legal policy was explained by House of Lords in* ***Dubai Aluminium Co Ltd v Salaam*** *[2002] UKHL 48; [2003] 2 AC 366. Lord Nicholls held at paragraph 21 of his speech that:*
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> > *The underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on. When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged.*
> > ...
>
> *33. The courts have moved from strict interpretation of employer and employee relationship based on contract of employment and started to examine the relationship between first and second defendant and the*

connection between second defendant and the act or omission of first defendant. Lord Justice Hughes in ***Various Claimants v The Catholic Child Welfare Society and the Institute of Brothers of the Christian Schools & Others*** *[2010] EWCA Civ 1106, observed that, the test requires the synthesis of two stages and held at paragraph 37 that:*

> *The extent of vicarious liability is therefore much more difficult to define than is the root rationale for it when it exists. Whether it exists or not in any particular case will depend on a two-stage enquiry. The first stage is to examine the relationship between D1 and D2. The second is to examine the connection between D2 and the act or omission of D1 which is in question. Both are fact sensitive, and it is a judgment upon a synthesis of the two which is required."*

43. In ***Sharma*** [supra], while dismissing an application for strike out made under Order 18 rule 1 (a), (b) and (d) wherein one of the grounds was that the defendant was not vicariously liable for the actions of another defendant, Master Azhar held as follows:

> *"37. Firstly, the contention of the defendant company that, the ATS staff - an independent contractor - reported plaintiff to the police is disputed and the court cannot come to a conclusion merely examining two contradictory averments of both parties. Secondly, even if it is accepted that an ATS staff was an independent contractor, the court cannot hold that, the plaintiff sued the wrong defendant and strike out his action, because, the common law courts have moved from strict interpretation of employment contracts and developed various tests to determine vicarious liability, as discussed above. Two stages test of Lord Justice Hughes, and test of close connection laid down by House of Lords should be examined by the court before coming to any conclusion.*
>
> *38. The court has to examine the relationship between the defendant and ATS and its employees; and the connection between the defendant and act or omission of employee of ATS. All these issues to be determined by the trial judge and not by this court in a summary manner on mere affidavits of the parties. It is the settled law that, the jurisdiction to strike out proceedings under Order 18 rule 18 should not be exercised where legal questions of importance and difficulty are raised."*

44. The above rationale is equally applicable to the current matter. In order to determine whether the 2nd Defendant is vicariously liable for the actions of the 1st Defendant, the Court will have to examine the relationship/connection

between the 1st and the 2nd Defendant, the role of the 2nd Defendant and the act or omission of the 1st Defendant.

45. Hence, I agree with the Plaintiff's counsel's submissions on this point that this issue is best left to be determined by the trial judge and not by this Court in a summary manner on affidavits. These are critical issues that require thorough examination and presentation of evidence during trial.

46. In the light of the above, I am of the view that this matter is not a plain and obvious case which warrants a dismissal of the Plaintiff's claim. This Court also finds that the Plaintiff's claim against the 2nd Defendant is not scandalous, frivolous and vexatious.

47. Accordingly, the 2nd Defendant's Summons to Strike Out the Plaintiff's SOC is dismissed.

48. I will now address the Summons for Security for Costs.

Security for costs

49. Order 23 of the HCR gives a discretion to the Court to order for security for cost and deals with the other connected matters. While Rule 1 deals with the discretion of the Court, Rules 2 and 3 deal with the manner in which the Court may order security for cost and additional powers of the Court. Rule 1 reads as follows:

> ***Security for costs of action, etc (O.23, r.1)***
>
> *1.-(1) Where, on the application of a defendant to an action or other proceedings in the High Court, it appears to the Court –*
>
> *(a) that the plaintiff is ordinarily resident out of the jurisdiction, or*
>
> *(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a normal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or*
>
> *(c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or*
>
> *(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,*
>
> *Then, if having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.*
>
> *(2) The court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the Court that the failure to state his*

address or the mis-statement thereof was made innocently and without intention to deceive.

(3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.

50. The Court's decision regarding the amount of security a party must provide is not governed by strict rules. Instead, it relies on the Court's discretion to determine a fair and just amount based on the specific circumstances of each case.

51. In ***Nair v Sudhan*** [2019] FJHC 567; HBC88.2015 (11 June 2019), Master Azhar (as His Lordship then was) has given a comprehensive review of the law applicable to security for cost orders and I gratefully adopt the same. Master Azhar outlined a non-exhaustive set of principles at paragraph [25] that should guide the court when considering a security for costs application:

a. *"Granting security for cost is a real discretion and the court should have regard to all the circumstances of the case and grant security only if it thinks it just to do so (**Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd**[1] (supra); **Porzelack K G v. Porzelack (UK) Ltd**[2] (supra).*

b. *It is no longer an inflexible or a rigid rule that plaintiff resident abroad should provide security for costs (**The Supreme Court Practice 1999**).*

c. *Application for security may be made at any stage (**Re Smith** (1896) 75 L.T. 46, CA; and see **Arkwright v. Newbold** [1880] W.N. 59; **Martano v Mann** (1880) 14 Ch.D. 419, CA; **Lydney, etc. Iron Ore CO. v. Bird** (1883) 23 Ch.D. 358); **Brown v. Haig** [1905] 2 Ch. 379. Preferably, the application for security should be made promptly (**Ravi Nominees Pty Ltd v Phillips Fox**[3] (supra).*

d. *The delay in making application may be relevant to the exercise of discretion; however, it is not the decisive factor. The prejudice that may be caused to the plaintiff due to delay will influence the court in exercising its discretion (**Jenred Properties Ltd v. Ente Nazionale Italiano per il Tuismo**[4] (supra); **Ross Ambrose Group Pty Ltd v Renkon Pty Ltd**[5] (supra); **Litmus Australia Pty Ltd (in liq) v Paul Brian Canty and Ors**[6] (supra)).*

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[1] [1973] 2 All ER 273.
[2] (1987) 1 All ER 1074.
[3] (1992) 10 ACLC 1314.
[4] 1985) Financial Times, October 29, CA.
[5] [2007] TASSC 75.
[6] [2007] NSWSC 670 (8 June 2007).

e. *The purpose of granting security for cost is to protect the defendant and not to put the plaintiff in difficult. It should not be used oppressively so as to try and stifle a genuine claim (**Corfu Navigation Co. V. Mobil Shipping Co. Ltd**[7] (supra); **Porzelack K G v. Porzelack (UK) Ltd** (supra). Denial of the right to access to justice too, should be considered (**Olakunle Olatawura v Abiloye**[8] (supra)).*

f. *It may be a denial of justice to order a plaintiff to give security for the costs of a defendant who has no defence to the claim (**Hogan v. Hogan** (No 2) [1924] 2 Ir. R 14). Likewise, order for security is not made against the foreign plaintiffs who have properties within the jurisdiction (**Redondo v. Chaytor**[9] (supra); **Ebbrard v. Gassier**[10] (supra)).*

g. *The court may refuse the security for cost on inter alia the following ground (see: **The Supreme Court Practice 1999** Vol 1 page 430, and paragraph 23/3/3;*

1. *If the defendant admits the liability.*
2. *If the claim of the plaintiff is bona fide and not sham.*
3. *If the plaintiffs demonstrates a very high probability of success. If there is a strong prima facie presumption that the defendant will fail in his defence.*
4. *If the defendant has no defence.*

h. *The prospect of success, admission by the defendants, payment to the court, open offer must be taken into account when exercising the discretion. However, the attempt to reach settlement and "without prejudice" negotiations should not be considered (**Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd** (supra); **Simaan Contracting Co. v. Pilkingoton Glass Ltd**[11] (supra).*

i. *In case of a minor the security for cost will be awarded against the parent only in most exceptional cases (**Re B. (Infants)**)."*

Is the Plaintiff ordinarily resident out of jurisdiction?

52. In ***Nair v Sudhan*** (supra) Master Azhar further discussed as follows:

> *" 21. It is prima facie rule that, the foreign plaintiffs, who bring the actions, ought to give security for cost. This rule is subject to certain exceptions, one being that, if there is property within the jurisdiction, which can reasonably regarded as available to meet the defendant's right to have cost paid, then there should be no order for security (per Greer L.J. in Kevokian v. Burney (No.2) (1937) 4 All E.R. 468 at 469C)."*

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[7] [1991] 2 Lloyd's Rep. 52.
[8] [2002] 4 All ER (CA).
[9] (1879) 40 L.T. 797.
[10] (1884) 28 Ch.D. 232.
[11] [1987] 1 W.L.R. 516; [1987] 1 All E.R. 345.

53. It is not a disputed fact that the Plaintiff is ordinarily resident out of the jurisdiction and the Plaintiff admits that she does not own any assets in Fiji.

Will granting security for costs stifle the Plaintiff's right?

54. The burden of showing impecuniosity rests upon the plaintiff seeking to resist the Order. (See ***Inox World Pty Ltd v Shopfittings (Fiji) Ltd*** [2016] FJHC 781; HBC100.2015 (12 September 2016)).

55. In an attempt to oppose an order for security for costs, the Plaintiff's counsel submitted that this application stifles the Plaintiff's claim in totality. The Plaintiff relies on the only fact that she was a tourist visiting Fiji and imposition of hefty costs will not only set a bad example for Fiji's tourism industry, but it will also fail in deterring individuals as the Defendants from committing such acts as those alleged in the SOC.

56. No evidence was provided through the Plaintiff's Affidavit in Opposition to support the assertion as to how her claim would be stifled. Consequently, the Plaintiff has failed to satisfy this Court that an order for security would prevent her from continuing the litigation. I therefore find that the Plaintiff has not discharged the onus as per ***Inox World Ltd*** (supra), and an order for costs will not stifle the Plaintiff's case.

Probability of success or failure

57. The Plaintiff's case is based on her alleged rape by the 1st Defendant while he was in the employment of the 2nd Defendant. The Plaintiff claims that the 1st Defendant has already been charged for the offence of rape by the Fiji Police Force *ipso facto* she has a high chance of success in this matter.

58. In this matter I am satisfied that the Plaintiff's claim is *prima facie* regular and discloses a reasonable cause of action. The 2nd Defendant has yet to put forward a Statement of Defence. However, from the 2nd Defendant's two Affidavits it is clear that the 2nd Defendant is disputing vicariously liability stemming from for the alleged actions of the 1st Defendant.

59. Given the inadequate material before this Court at this particular stage it is difficult to properly weight the matter in the balance – especially in relation to the probability of success of either the Plaintiff's or the Defendant's respective claims against each other. It will therefore be imprudent to delve into the substantive merits of the case at this time.

No delay in applying for security for costs

60. In this matter there has been no delay by the 2nd Defendant to file the Summons for Security for Costs. The Acknowledgment of Service was filed on 12 February 2024 and the said Summons was filed on 13 March 2024.

61. In light of the above, I hold that this is a fit and proper case for exercise of the Court's discretion in favour of the 2nd Defendant, and to order the Plaintiff to deposit some amount of money as security for cost.

62. The next issue is the quantum of the security to be ordered in this case.

Quantum

63. As stated earlier, there is no strict rule that dictates how a Court determines the amount of security a party may be required to provide. Typically, a Court exercises its discretion to set an amount it deems fair, taking into account all relevant circumstances of the case. In the case of ***Dominion Brewery Ltd v Foster*** 77 LT 507, Lindley MR said this at 508:

> *"It is obvious that, as to a question of quantum such as this, you cannot lay down any very accurate principle or rule. The only principle which, as it appears to me, can be said to apply to a case of the kind is this, that you must have regard, in deciding upon the amount of the security to be ordered, to the probable costs which the defendant will be put to so far as this can be ascertained. It would be absurd, of course, to take the estimate of the managing clerk to the defendant's solicitors and give him just what is asked for. You must look as fairly as you can at the whole case."*

64. The Supreme Court Practice 1999 (White Book), in Volume 1 at page 440, and in paragraph 23/3/39, explains this practice and states that:

> *"The amount of security awarded is in the discretion of the Court, which will fix such sum as it thinks just, having regard to all the circumstances of the case. It is not always the practice to order security on a full indemnity basis. If security is sought, as it often is, at an early stage in the proceedings, the Court will be faced with an estimate made by a solicitor or his clerk of the costs likely in the future to be incurred; and probably the costs already incurred or paid will only a fraction of the security sought by the applicant. At that stage one of the features of the future of the action which is relevant is the possibility that it may be settled, perhaps quite soon. In such a situation it may well be sensible to make an arbitrary discount of the costs estimated as probable future costs but there is no hard and fast rule. On the contrary each case has to be decided on its own circumstances and it may not always be appropriate to make such a discount (**Procon (Great Brotain) Ltd v. Provincial Building Co. Ltd** [1984] 1 W.L.R. 557; [1984] 2 All E.R. 368, CA). It is a great convenience to the Court to be informed what are the*

estimated costs, and for this purpose a skeleton bill of costs usually affords a ready guide (cited with approval by Lane J. in ***T.Sloyan & Sons (Builders) Ltd v. Brothers of Christian Instruction*** *[1974] 3 All E.R. 715 at 720)....*

"Sufficient" security or security that in all the circumstances of the case is just does not mean complete security. Where a defendant was seeking £147,000 by way of security and the judge ordered £10,000 the Court of Appeal declined to interfere as the judge had correctly taken into account that the delay by the defendant in making the application had deprived the plaintiff of time to collect the security and that the plaintiff's strong and genuine claim would be stifled by ordering a larger sum: Innovare Displays v. Corporate Booking Services [1991] B.C.C. 174, C.A

[emphasis added]

65. Luc's Affidavit in Support of the Summons for Security for Costs annexes as "*A4*" what is referred to in the said affidavit as a breakdown of the estimated legal costs amounting to a total of $60,000.00 of the 2nd Defendant's solicitors. I note that this table is not printed on any solicitor's official letterhead. The said document is a table referring to certain tasks, estimated costs and names of solicitors supposedly involved in the case. The sum of $60,000.00 includes: the cost of $3,500.00 for receiving instructions and filing Summons for strike out and security for costs; $5,500.00 for the strike out application preparation and hearing; $4,000.00 for settlement negotiations; $4,500.00 for summons for security for costs preparation and hearing; $3,500.00 for discoveries and pre-trial conference; $10,000.00 for trial preparations; $25,000.00 for trial; and $4,500.00 for closing submissions.

66. There are several cases, including ***Sunflower Aviation Ltd v Civil Aviation Authority of the Fiji Islands*** [2015] FJHC 336, ***Peters v Seashell @ Momi Ltd*** [2015] FJHC 581, ***Aerolink Air Services Pty Ltd v Sunflower Aviation Ltd*** [2014] FJHC 817, ***Neesham v Sonaisali Island Resort Ltd*** [2011] FJHC 642, and ***Bailiff v Tuivuna*** [2018] FJHC 909 where the Courts have required plaintiffs to deposit a substantial amount as security for costs. These cases may serve as reference points in determining an appropriate amount suited to the specific circumstances of the present case. However, they should not be regarded as rigid or binding precedents that constrain the Court's exercise of its discretion.

67. In an attempt to limit the quantum for security for costs to a reasonable and fair amount, the Plaintiff's counsel relied on ***Brzoska v Hideaway Resort Ltd*** [2009] FJHC 191; HBC347.2005 (4 September 2009) wherein Justice Inoke had held:

"I do not accept that costs on a "party-party" basis would amount to that much. The security that the Court orders is not for the whole of the costs that his law firm would charge the Resort. His law firm is only

entitled to costs if they successfully defend the claim and if the Court exercises its discretion and awards costs to them. Consistent with the costs awards that this court has so far ordered, assuming as he says, that this is a 5 day trial, costs would be closer to $5,000 than $100,000.00."

68. After having considered all the circumstances of the case, I am of the view that to order the amount of security for costs sought by the 2nd Defendant would be oppressive.

69. Instead, I order that the Plaintiff pay security for costs of a lesser sum of FJ$8,500.00, which I deem as a just and equitable amount.

Final Orders

70. Accordingly, I make the following orders:

(a) Summons to Strike out:

i. Summons to Strike Out filed by the 2nd Defendant is hereby dismissed; and
ii. Costs summarily assessed at $2,000.00 to be paid by the 2nd Defendant to the Plaintiff within 21 days from today.

(b) Summons for Security for Costs:

i. The Plaintiff should deposit a sum of FJ $8,500.00 at the High Court Registry within a month from today (by 29 September 2025);
ii. All proceedings in this cause shall be stayed forthwith if there is failure by the Plaintiff to deposit the security for costs as ordered in (b) (i) above; and
iii. The matter to be mentioned on 02 October 2025 to check on compliance of Order (b)(i) above by the Plaintiff.

HIGH COURT OF FIJI
LAUTOKA

P. Prasad
Master of the High Court

At Lautoka
29 August 2025