IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 147 of 2014

BETWEEN : **ESALA VULAt/a VEILOMANI TRANSPORT**

PLAINTIFF

AND : **MERCHANT BANK OF FIJI LIMITED t/a MERCHANT FINANCE**

DEFENDANT

Appearances : Vakaloloma& Associates for the Plaintiff
Reddy & Nandan Lawyers for the Defendant

Before : Acting Master S. F. Bull

Ruling : 09 December 2016

RULING

1. I must apologize to the parties for the delay in delivering judgment.

2. The Plaintiff seeks the striking out of the Plaintiff's statement of claim on the grounds that
   (i) it does not disclose a reasonable cause of action, and/or;
   (ii) it is vexatious and frivolous, and/or;
   (iii) it is an abuse of the process of the Court.

3. In support of the application is an affidavit sworn by a clerk in the employ of the Plaintiff's solicitors, deposing that there is no entity such as Merchant Bank of Fiji Ltd registered with the Registrar of Companies; that the Plaintiff had earlier filed an action based on the same facts relied on in this action; that the Defendant had in that action filed a defence as well as a counterclaim; that that action had

been struck out with costs yet to be paid; that no appeal has been filed against that decision of the Court, and that she has been advised by the Defendant's solicitor that this action is frivolous, vexatious, and an abuse of the court process.

4. The Plaintiff opposes the application, averring that this action comprises a "totally different" cause of action from that in the earlier action; that the earlier action had been struck out for not disclosing a reasonable cause of action in fraud; that he has since paid costs ordered in that action, and; that there is no need for him to appeal the Court's earlier decision dismissing its claim since the ruling there did not stop him from filing another 'statement.'

Preliminary objection

5. The Plaintiff raises objection with the swearingof the affidavit in support by a law clerk. Reliance is placed on case authorities where the Court had criticised the swearing of affidavits by law clerks. (*Dr. Ramon Fermin Angco v Dr. Sachid Mudaliar & Others* Civil Action No. 26 of 1997 per Madraiwiwi J; *Clark v Zip Fiji*Civil Action No. HBC 05 of 2010 at [20] per Balapatabendi J; *Varani v Aanuka Island Resort Ltd* Civil Action No. 161 of 2012 per Ajmeer J)

6. In reply, the Defendant submits that the clerk's affidavit does not touch on any matters between the Plaintiff and Defendant in respect of their contractual arrangements; that she gives evidence of a search conducted by his office and therefore she is the right person to swear the affidavit.

7. In *Deo v Singh* Civil Action No. 423 of 2004, Singh J stated:

> The swearing of affidavits by solicitor's clerks in contested proceedings appears with alarming regularity before the courts. Arun Kumar says he was duly authorized by defendants to dispose the contents. There is no authority annexed to the affidavit. Order

41 Rule 1 sub-rule 4 requires affidavit to be expressed in "first person". The affidavit put before the court is more like a statement of defence in its wording rather than being expressed in first person. Swearing of affidavits by solicitors' clerk on contested matters should be a rare exception and the reason why the party is unable to depose ought to be explained.

8. In *Glenore Ltd v Global Premium Services Ltd* Civil Action No. 148 of 2009L, Inoke J dealt with an application for injunction supported by the affidavit of a clerk employed by the plaintiff's solicitors. Referring to the said affidavit, the Court stated:

> It has been said before by the Judges of the High Court and the Court of Appeal that such a practice is not acceptable. However, I am prepared to accept this affidavit because the plaintiff has given the clerk a written authorization for the clerk to swear the affidavit on its behalf due to the urgency of this application. Noting that the plaintiff operates a hotel on one of the outlying islands, it is understandable.

9. In*Ausfurn Fiji Ltd v Director of Lands*Civil Action No. HBC 68 of 2012, Master Nanayakkara said:

> In the **Supreme Court Practice (1967) (The White Book)** the following note appears at page 117:
>
> *'The affidavit may be made by the Plaintiff or by any person duly authorised to make it. If not made by the Plaintiff, the affidavit itself must state that the person making it is duly authorised to do so-* ***Chingwin -v- Russell***(1910) 27 T.L.R. 21".

10. In this case, a clerk employed by the Defendant's solicitors swore the affidavit in support of the striking out application. The affidavit does not say she was duly authorised to swear the affidavit, nor is there anything before the Court showing she had authority from the Defendant Company to do so. These are contested proceedings. The Courts have held it improper for law clerks to aver affidavits on behalf

of the parties in such proceedings. Nothing is said as to why the Defendant itself (through an agent) is unable to depose the affidavit in support.

11. In light of the authorities above, and in the absence of authority for the clerk to swear the affidavit for the Defendant, I disregard the affidavit in support and give to it no weight in my determination of this application.

The law

On striking out

12. Order 18 rule 18 of the HCR provides:

> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –
> a) it discloses no reasonable cause of action or defence, as the case may be; or
> b) it is scandalous, frivolous or vexatious; or
> 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.
>
> (2) No evidence shall be admissible on an application under paragraph (1) (a).

13. Apart from the power to strike out under the High Court Rules (Order 18 rule 18 above), the Court also has an inherent jurisdiction to strike out proceedings that are frivolous, vexatious or an abuse of the process of the Court, "to control proceedings and prevent an abuse of its process." (*Khan v Begum*Civil Action No. HBC0153 of 2003L; also *NBF Asset Management Bank v Taveuni Estates* Civil Action No. HBC 543 of 2004)

14. In _Pratap v. Christian Mission Fellowship_[2006] FJCA 41; ABU0093J.2005 (14 July 2006) the Court (per Barker, Henry, and Scott JJA), stated that the High Court "undoubtedly has the power to dismiss or permanently stay proceedings before it which it finds to be an abuse of its process", but said that it is "a power which must be exercised with considerable caution."

15. In _Hubbuck v Wilkinson_ [1889] 1 Q.B. 86 at page 91, Lindley MR stated:

> It is only in plain and obvious cases that recourse should be had to the summary process under Order 18 Rule 18 (1) of the Rules of the High Court. This was affirmed in Kemsley v Foot &Ors [1952] A.C. 345.

Frivolous and vexatious

16. In _NBF Asset Management Bank v Taveuni Estates Ltd_ (supra), the Court stated:

> The terms "frivolous" and "vexations" (sic) are not defined in the High Court Rules. In accordance with the rules of statutory interpretation, those words should be given their ordinary meaning. In the Shorter Oxford English Dictionary frivolous means "of little or no weight or importance, paltry, not with serious attention or (in law, pleading) manifestly futile". Vexatious means "causing or tendency to cause vexation (i.e. something causing annoyance, irritation, dissatisfaction or disappointment) or (legal) actions being instituted without sufficient grounds for the purpose of causing trouble or annoyance to the defendant". I accept that it is only necessary to establish that the pleading be either frivolous or vexations for the Court to exercise its discretion.

On abuse of process

17. _Halsbury's Laws of England_ 4th Edition Vol 37 para 434 has this to say about abuse of process:

> An abuse of the process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the process is misused. In such a case, even if the pleading or indorsement does not offend any of the other specified grounds for striking out, the facts may show that it

> constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or indorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court.

18. *In Stephenson v Garnett*[1898] 1 QB 677 CA at 680, A.L.Smith LJ stated:

> In my opinion the learned judge at chambers ought to have exercised the inherent jurisdiction which he undoubtedly possesses of staying the action on the ground that it is frivolous and vexatious and an abuse of the process of the Court. I do not rest my decision upon the ground that the matter is res judicata, for I do not think it can be said that it is. I put my decision on the ground that the identical question raised in this action was raised before the county court judge upon an application for an order to tax the costs of the action in the county court, and was heard and determined by him. The county court judge had jurisdiction to hear and determine the question upon that application, and it is perfectly clear from the evidence before him that the question there was the same as that now raised in this action, namely, whether the deed of release was obtained by fraud. The plaintiff was present at the hearing before the county court judge, and had every opportunity of putting forward his case. The judge heard evidence upon the question and decided it. The issue now sought to be raised in this action has been determined by a court of competent jurisdiction, and the case of *Reichel v Magrath* (1776) 2 Sm. L. C. 10th ed. P. 713 and *Macdougall v Knight* 25 Q.B.D.1 shew that it would be an abuse of process of the Court to allow a suitor to litigate over again the same question which has been already decided against him.

19. In *NBF Asset Management Bank v Taveuni Estates Ltd* (supra), Calanchini J (as then was) stated:

> A pleading is usually regarded as an abuse of the process of the Court if it raises an issue that has already been litigated between the parties. In *Raijieli Naqarase -v- The*

Public Trustee of Fiji (1994) 40 FLR 215 Pathik, J observed at page 217:

> *"I also agree that to institute the present action (civil action 168/94) which is the same as the said action 49/93 and covering the same subject matter is an abuse of the process of the Court."*

20. In *Razak v Fiji Sugar Corporation Ltd* Civil Action No. HBC 208 of 1998L at [11] (Decision of 23 February 2005), Gates J (as His Lordship then was) stated:

> It would be an abuse of process for the plaintiff to bring a second action for the same cause of action after disobedience of peremptory orders had resulted in the dismissal of the first action: *Janov v Morris [*1981] 3 All ER 780. It is said the process is misused thereby. Re-litigating a question, even though the matter is not strictly res judicata has been held to be an abuse of process: *Stephenson v Garnett* [1898] 1 QB 677 CA. In that case the suitor was the same person and he sought to re-open a matter already decided against him.

Analysis

21. The issues for the Court's determination are:
    (i) whether there is a reasonable cause of action;
    (ii) whether the claim is frivolous and vexatious, and/or;
    (iii) whether the statement of claim constitutes an abuse of the process of the Court.

Is there a reasonable cause of action?

22. The test in determining the existence of a reasonable cause of action is whether the cause of action "has some chance of success when only the allegations in the pleadings are considered." (*Drummond-Jackson -v- British Medical Association* (1970) 1 WLR 688)

23. No evidence is admissible in an application strike out on the basis of no reasonable cause of action and "only the allegations in the

statement of case are considered." (Order 18 rule 18 (2); Drummond, supra, at 696; [1970] 1 All ER 1094 at 1101)

24. In considering whether the statement of claim discloses a reasonable cause of action, Lord Millet in *Three Rivers District Council v Bank of England* [2001] 2 All E.R. 513 stated there are two principles at play, the first being a matter of pleading. Here, Order 18 rule 11 is relevant:

> (1) Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words-
>
> *(a)* Particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
> *(b)* where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

25. In *Bhagwat Prasadv Nazar Singh, Pyara Singh, Jarnail Singh & Mohan Singh* [1992] ABU 2/91 (apf HBC 427/81L) 18 August 1992 the Court (per Helsham, Tikaram & Kapi, JJA) stated:

> It is settled law and practice that any allegation of fraud must be expressly pleaded together with the facts, matters and circumstances relied on to support the allegation.
>
> As pointed out by 'Odgers' Principles of Pleading & Practice in Civil Actions in the High Court of Justice' (22nd Ed. p. 100), the acts alleged to be fraudulent should also be set out and then it should be stated that those acts were done fraudulently. (*See Re Rica Gold Washing Co* (1879) 11 Ch.d. 36).

26. *The Supreme Court Rules 1988* at 18/12/2 states:

> The Court will require of him who makes a charge that he shall state that charge with as much definiteness and particularity as may be done, both as regards time and place (per Lord Penzance in *Marriner v. Bishop of Bath and Wells* [1893] P. 145...

27. Turning now to the rules on pleadings, Order 11 rule 6 of the High Court Rules provides that "every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits."

28. In Bruce v. Odhams Ltd.(1936) 1 KB 697 at 712, Scott L.J stated:

> ...the word 'material' means necessary for the purpose of formulating a complete cause of action; and if any one 'material' fact is omitted, the statement of claim is bad; it is 'demurrable' in the old phraseology, and in the new is liable to be 'struck out'...

Fraud

29. The House of Lords in Three Rivers District Council v Bank of England(supra) set out how an action in fraud should be pleaded and proved. Said Lord Millet at p. 578:

> It is well established that fraud or dishonesty...must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts are consistent with innocence...This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.

> It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means 'dishonestly' or 'fraudulently', it may not be enough to say 'wilfully' or 'recklessly'. Such language is equivocal...
>
> The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the Court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the Court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.

30. The reason for this rigorous approach was explained by Lord Hobhouse in <u>*Three Rivers*</u> (supra) at pp. 569 - 570 as follows:

> The law quite rightly requires questions of dishonesty be approached more rigorously than other questions of fault. The burden of proof remains the civil burden – the balance of probabilities – but the assessment of the evidence has to take account of the seriousness of the allegations and, if that be the case, any unlikelihood that the person accused of dishonesty would have acted in that way. Dishonesty is not to be inferred from evidence which is equally consistent with mere negligence. At the pleading stage the party making the allegation of dishonesty has to be prepared to particularise it and, if he is unable to do so, his allegation would be struck out. The allegation must be made upon the basis of evidence which will be admissible at the trial. This common sense proposition has recently been re-emphasised by the Court of Appeal in *Medcalf v Mardell* (2001) Times, 2 January, in which Peter Gibson LJ said: "The material

evidence must be evidence which can be put before the Court to make good the allegation." Evidence which cannot be used in Court cannot be relied upon to justify the making of the allegation of dishonesty.

31. The Plaintiff appears to me to be pleading several causes of action in fraud, in paragraphs 10, 26, 38, 45, 53, 57, and 62 of the statement of claim. Each involves a loan contract between the parties at different times for the purchase by the Plaintiff of vehicles on sums loaned to it by the Defendant, and with each involving the furnishing of security.

32. In paragraphs 10 (b) (c); 45 (b) - (f); 53 (a) (f); the Plaintiff appears to link his allegations of fraud to breach of contract, whilst paragraphs 10 (a); 26 (a) – (e); 38 (a) – (i); 45 (a) appears to me to be allegations of fraudulent misrepresentation and deceit on the part of the Defendant.

33. As a fraud, deceit is a tort (*Derry v Peek* [1889] UKHL 1; (1889) 14 App Cas 337), the limitation period for which is stated by section 4 (1) (a) of the Limitation Act Cap 35, to be 6 years from the date on which the cause of action accrued.

34. A cause of action in tort accrues from when the damage is first sustained. From the statement of claim, this would have been at the earliest, 2001 or latest, with the amalgamation of accounts in November 2003, and the seizure of vehicles shortly thereafter.

35. Clearly, whether the cause of action be for fraud in connection with breach of contract or for deceit, it is time barred under section 4 (1) (a) of the Limitation Act.

36. Section 15 of the Limitation Act however, provides for the postponement of the limitation period in cases of fraud and mistake, with time beginning to run only from the time the plaintiff discovers the fraud or mistake, or could have with reasonable diligence discovered it.

37. In addition, the Plaintiff has failed to plead material facts which together, constitute a cause of action in fraud. This is compounded by the lack of any pleading either placing reliance on, or meeting the requirements of section 15 of the Limitation Act.

38. In *Derry v Peek* (1886-90] All ER Rep 1 at 376, Lord Herschel stated:

> First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

39. Having considered Order 18 Rule 18 of the High Court Rules, the case authorities on Order 18 rule 18 (1) (a), as well as having exercised "considerable caution" that striking out should only be exercised in plain and obvious cases, I am satisfied that this is a plain and obvious case of lack of reasonable cause of action in fraud. The Plaintiff has not "distinctly alleged" (*Three Rivers*, supra) the fraud it claims against the Defendant and the claim lacks not only the material facts but also the necessary particulars supporting fraud.

40. In any event, particulars are no substitute for failing to plead material facts. Thus in *Charlie Carter Pty Ltd v. The Shop Distributive & Allied* [1987] FCA 189, the Court stated at [51]:

> Particulars cannot be used to fill gaps in the statement of claim which ought to have been filled by appropriate statements of the various material facts together constituting the cause of action - Bruce v. Odhams Press Ltd. (supra); H. 1976 Nominees Pty. Ltd. v. Galli(1979) 40 FLR 242 at 246; Trade Practices Commission v. David Jones (Australia) Pty. Ltd. (1985) ATPR 40-607.

41. Even if I were to accept as proved the facts alleged by the Plaintiff in the statement of claim, these facts would still fall far short of disclosing a reasonable cause of action in fraud. The Plaintiff merely makes general allegations of fraud, which is not permitted under Order 18 Rule 11 of the High Court Rules.

42. Whilst the statement of claim implies a breach of contract, perhaps even negligence, apart from the absence of material facts supporting such causes of action, the Plaintiff is faced with an insurmountable obstacle in section 4 of the Limitation Act, which limits the institution of such actions to 6 years after accrual of the cause of action.

43. I have come to the firm conclusion that the statement of claim discloses no reasonable cause of action. Further, in light of section 4 of the Limitation Act, and the failure to plead pursuant to section 15 of the Limitation Act, the action is statute barred. I have not considered the question of whether an amendment could save the action, in light of the limitation issue, and also because the Plaintiff has not applied for amendment. In fact, the Plaintiff submits that "If the court finds in its totality that the statement of claim discloses no reasonable cause of action in the facts of the matter then the Court must strike out the pleadings."

44. The Plaintiff in his answering affidavit deposes that this action is "totally different from the earlier action". I have looked at the decision

in the said action, in *Vula v Merchant Bank of Fiji Ltd* Civil Action No. 22 of 2012. The Master summarizes in paragraph 5 the Plaintiff's action there as follows:

> The Plaintiff's claim is founded on four separate loan contracts that he had entered in with the Defendant to purchase four new trucks. Those four loan contracts were subsequently amalgamated into one contract on the 17th of November 2003. However, all those four trucks together with another truck owned by the Plaintiff which was given by him as a security for this loan contract were repossessed by the Defendant on the 22nd of January 2004. Plaintiff claims that he initially thought that the action of the Defendant was right. However, sometimes on or about 2009, he discovered some irregularities and discrepancies in those payments and contracts such as payment in advance, discrepancies in the amount of money borrowed and prices of the vehicles. The Plaintiff then instituted this action based on
> those discovered irregularities and discrepancies.

And later, at [21]:

> Upon careful consideration, it is obvious that the cause of action pleaded in the Statement of Claim is founded on breach of contract and statue barred pursuant to section 4 (1) of the Limitation Act. The Plaintiff also admitted that his cause of action is time barred in paragraph 33 of the Statement of Claim. The Plaintiff contended that section 4(1) of the Limitation Act is not applicable in this instance action since the cause of action is based on fraud, which allows the Plaintiff to institute this action pursuant to section 15 of the Limitation act.

45. The facts in support of this action are exactly the same as those pleaded in HBC 22 of 2012 where the Master had struck out the statement of claim and dismissed the action for abuse of process of the Court. In this action, the Plaintiff has sought to file afresh an action in fraud that was dismissed in HBC 22 of 2012 for the failure to plead particulars and for being time barred under ss. 4 and 15 of the Limitation Act.

46. In HBC 22 of 2012, the Defendant had filed a defence and counterclaim to the plaintiff's claim. (*Vula v Merchant Bank of Fiji Ltd*(supra) at [6]) When the Plaintiff's action was dismissed, the Defendant's counterclaim did not fall with it, for under Order 15 rule 2 (3), a counterclaim may be proceeded with "notwithstanding that judgment is given for the plaintiff in the action or that the action is stayed, discontinued or dismissed." (See also *Khan v Munaf* Civil Action No. HBC 9 of 2009.

47. In *McGown v Middleton* (1883) 11Q.B.D. 464 the Court said:

> If the Plaintiff discontinues this action, the counter claim remains on foot and proceeds to trial. In the case, the Plaintiff, being confronted with a counter-claim in excess of his claim discontinued and argued that the counter claim fell with his discontinuance. This would be true of a set-off but a counter claim taking effect as a cross-action is not affected by the fate of the Plaintiff's action.

48. In *Ledua v Colonial Life Fiji Ltd* Civil Action No. HBC 288 of 2004, the Master discussed amongst other things, the principle of res judicata or cause of action estoppels saying:

> A cause of action *estoppel* or *res judicata* or *estoppel per rem judicatem* arises where a party brings an action against a particular defendant in which a final judgment is delivered...There is a strict rule of law that the party cannot bring another action based on the same cause(s) of action against the same party.

49. The Master cited *Chamberlain -v- Deputy Commissioner of Taxation* [1988] HCA 21; [1988] 164 CLR 502 where the High Court of Australia stated at 511:

> The point of the present appeal is that the respondent brought an action against the appellant and recovered judgment against him. He obtained a judgment of the Court in which the cause of action upon which he relied

> merged, thereby destroying its independent existence so long as that judgment stood. <u>And, so long as that judgment stands, it is not competent for the respondent to bring further proceedings in respect of the same cause of action.</u> It is no answer to say that the Court might, if appropriate, stay the second action as an abuse of process. <u>The impediment goes deeper than that; res judicata may sustain a plea of abuse of process but in that case the appropriate remedy is to strike out the later action</u>... (My emphasis)

50. The action in HBC 22 of 2012 stands dismissed. The decision dismissing it has not been appealed against. As far as the Defendant's counterclaim is concerned, it remains on foot.For the Plaintiff therefore to bring another action based on the same facts and cause of action whilst the judgment in the earlier action stands undisturbed, and with the Defendant's counterclaim still extant, is not only an abuse of the Court's process for which the Courts have stated the remedy to be a striking out of the action. (*<u>Chamberlain</u>*, supra). It is also frivolous and vexatious.

<u>Conclusion</u>

51. The Plaintiff's statement of claim discloses no reasonable cause of action. In addition, the claim is statute barred under ss. 4 and 15 of the Limitation Act.

52. The bringing of this action whilst the decision of the Master in HBC 22 of 2012 still stands, and with the Defendant's counterclaim there still extant, is frivolous, vexatious, and an abuse of the Court's process.

53. I have considered costs. The Defendant has been twice vexed by the Plaintiff's actions and seeks costs on indemnity basis, or higher scale.

54. To justify an award of indemnity costs, the Court needs to be satisfied that the Plaintiff has conducted itself "wholly unreasonably in connection with the hearing" and that such conduct was "reprehensible...to signify the Court's condemnation as to the way the Plaintiff has conducted the litigation. (*<u>Tuidama v Devi</u>* Civil Action No.

HBC105.2008 (18 February 2009); _Rokotuiviwa v Seveci_ Civil Action No. HBC374.2007 (12 September 2008); _Singh v Naupoto_ (Unreported, High Court of Fiji at Suva, Civil Action No: HBC199 of 2008, 8 August 2008)

55. I am not satisfied that the Plaintiff has conducted himself in such a "reprehensible" manner such as to warrant the Court's condemnation and an award of indemnity costs. I note that the Defendant has not filed a defence and had promptly brought this application to strike out.

56. **Order**

1. The Plaintiff's statement of claim is struck out under Order 18 Rule 18 (1) (a) (b) (d) of the High Court Rules, and the writ of summons filed 03 June 2014 is dismissed.
2. Costs summarily assessed in the sum of $1,500in favour of the Defendant.

S.F. Bull
Acting Master