IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 172 of 2015

BETWEEN : **RADHABAI** aka **RADHA BAI** of Malolo, Nadi, Domestic Duties as the Sole Executrix and Trustee in the Estate of Abhimanyou Lingam aka Abhimanyu Lingam late of Vuniyasi, Nadi, Market Vendor, Deceased.

PLAINTIFF

AND : **BALVEER SINGH** and **JAGINDRA SINGH** aka **JANIGINDAR SINGH** Trustees in the Estate of Gurdiyal Singh aka Gurudayal Singh aka Gurdial Singh aka Hardayal Singh of Wailoku, Suva.

DEFENDANTS

(Ms.) Arti Bandhana Swamy for the Plaintiff
Mr. Ritesh Chandra Singh for the Defendants

Date of Hearing : - 07th October 2016
Date of Ruling : - 20th January 2017

RULING

(A) INTRODUCTION

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

1. That the Writ of Summons and Statement of Claim dated 6th October 2015 and filed by the Plaintiff on 7th October 2015 be struck out for the following reasons:

i) The Plaintiff's claim is now statute barred;

ii) *The Plaintiff's claim is frivolous, vexatious, an abuse of the process of the Court and does not disclose a reasonable cause of action.*

2. *That the Plaintiff pay costs on a full Solicitor/client indemnity basis.*

(2) The Defendants relied on an Affidavit sworn by 'Balveer Singh' sworn on 17th December 2015.

(3) The application for 'striking-out' is strongly opposed by the Plaintiff. The Plaintiff filed an 'Affidavit in Reply' opposing the application followed by an 'Affidavit in Response' thereto.

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

(B) THE FACTUAL BACKGROUND

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

(2) The claim by the Plaintiff against the Defendants is based on the failure to properly carry out foreclosure process.

(3) To give the whole picture of the action, I can do no better than set out hereunder the averments and the assertions of the pleadings.

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

Para 1. *THAT the Plaintiff is the Executrix in the Estate of Abhimanyou Lingam aka Abhimanyu Lingam (hereinafter referred to as "the said deceased").*

2. *THAT the Defendants are the Executors and Trustees in the Estate of Gurdiyal Singh aka Gurudayal Singh aka Gurdial Singh aka Hardayal Singh (hereinafter referred to as "Gurdial Singh")*

3. *THAT the said deceased was the lessee of the land comprised in Crown Lease Number 12891 known as Nacaqara & Navo in the District of Nadi, containing an area of 4399m² (hereinafter referred to as "the said land")*

4. *THAT the said Gurdial Singh had registered a mortgage over the said land, being mortgage number 404408 on the 18th of October 1996 over the said land.*

5. *THAT the said mortgage was varied wherein the interest rate was increased to 12 per cent per annum on the 18th of October 1996.*

6. *THAT on the 4th of February 2000 the Defendants made an application by virtue of the said mortgage for foreclosure over the said land which application was registered against the memorial of the lease for the said land on the 2nd of March 2000.*

7. *That the application for foreclosure was made in breach of Section 73, 74 and 75 of the Land Transfer Act and Section 79 of the Property Law Act.*

PARTICULARS

(a) *No final notice of the Defendants intention for foreclosure was served on the deceased.*

(b) *The application for foreclosure was not advertised as required under Section 74 of the Land Transfer Act.*

(c) *No actual auction for the sale of the said land took place.*

(d) *The Certificate of the Auctioneer is erroneous and a sham.*

(e) *The Registrar of Titles advertisement was published after the date of registration of the application of the foreclosure on the lease of the said land.*

8. *THAT no order for foreclosure under the Land Transfer Act has been endorsed on the lease of the said land and the Plaintiff remains the registered lessee of the said land.*

9. *THAT as consequence there is no valid, proper and legal foreclosure of the said land.*

10. *THAT the Defendants have been uplifting all income from the said land and all debts owed, if any, under the said mortgage is now satisfied.*

11. *THAT Gurdial Singh also obtained assignment and appropriated illegally and wrongfully all claims and interests held by the deceased with the Common Wealth Bank of Australia and the Defendants are now beneficiaries of the same.*

12. *THAT the Plaintiff has notified the Defendant of the matters complained of hereinabove.*

13. *THAT due to the actions of the Defendant the Plaintiff has have suffered loss and damage as the Defendants have illegally taken control and possession of the said land.*

14. *THAT the Plaintiff has not been able to utilise the said land for her benefit and the benefit the Estate of the said deceased since sometimes in 2000.*

(4) Wherefore, the Plaintiff seeks the following reliefs;

a) *A Declaration that the Application for An Order for Foreclosure applied against the land comprised in Crown Lease Number 12891 is invalid and of no legal consequence and be cancelled from the memorial of the lease of land comprised in Crown Lease Number 12891.*

b) *An order that the Defendant prepare, produce and file in this Honourable Court an affidavit verifying, accounts of all income and expenses in relation to the revenue received from the land comprised in Crown Lease Number 12891.*

c) *An order that the Defendant prepare, produce and file in this Honourable Court an affidavit verifying, accounts of all income and expenses in relation to the revenue received from shares held under the name of Abhimanyou Lingam aka Abhimanyu Lingam with the Commonwealth Bank of Australia.*

d) *The Defendants pay to the Plaintiff monies received from the income from the revenue collected from the land comprised in Crown Lease Number 12891 and all monies paid by Commonwealth of Australia.*

e) *Damages.*

f) *Interest on any monetary award.*

g) *Costs of this action on client/solicitor indemnity basis.*

h) *Any further or other orders as this Honourable Court may deem fit in the circumstances.*

(C) THE LAW

(1) Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing **"striking-out"**. Rather than refer in detail to various authorities, I propose to set out hereunder important citations, which I take to be the principles remain in play.

(2) Provisions relating to striking out are contained in **Order 18, rule 18 of the High Court Rules, 1988 .** Order 18, rule 18 of the High Court Rule reads;

> *18. – (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action or anything in any pleading or in the indorsement, on the ground that –*

(a) *it discloses no reasonable cause of action or defence, as the case may be; or*

(b) *it is scandalous, frivolous or vexatious; or*

(c) *it may prejudice, embarrass or delay the fair trial of the action; or*

(d) *it is otherwise an abuse of the process of the court;*

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

(3) No evidence shall be admissible on an application under paragraph (1) (a).

Footnote 18/19/3 of the 1988 Supreme Court Practice reads;

"It is only plain and obvious cases that recourse should be had to the summary process under this rule, per Lindley MR. in Hubbuck v Wilkinson(1899) 1 Q.B. 86, p91 Mayor, etc., of the City of London v Homer (1914) 111 L.T, 512, CA). See also Kemsley v Foot and Qrs (1952) 2KB. 34; (1951) 1 ALL ER, 331, CA. affirmed (195), AC. 345, H.L .The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable " (Att – Gen of Duchy of Lancaster v L. & N.W. Ry Co (1892)3 Ch 274, CA). The summary remedy under this rule is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process or the case unarguable (see per Danckwerts and Salmon L.JJ in Nagle v Feliden(1966) 2. Q.B 633, pp 648, 651, applied in Drummond Jackson v British Medical Association(1970)1 WLR 688 (1970) 1 ALL ER 1094, (CA) .

Footnote 18/19/4 of the 1988 Supreme Court Practice reads;

"On an application to strike out the statement of claim and to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues are in dispute (Wenlock v Moloney) [1965] 1. WLR 1238; [1965] 2 ALL ER 87, CA).

*It has been said that the Court will not permit a plaintiff to be "driven from the judgment seat" except where the cause of action is obviously bad and almost incontestably bad (per Fletcher Moulton L.J. in **Dyson v Att. – Gen [1911] 1 KB 410 p. 419).**"*

(4) In the case of **Electricity Corporation Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641,** it was held;

*"The jurisdiction to strike out a pleading for failure to disclose a cause of action is to be sparingly exercised and only in a clear case where the Court is satisfied that it has **all the requisite material to reach a definite and certain conclusion**; the Plaintiff's case must be so clearly untenable that it could not possibly success and the Court would approach the application, assuming that all the allegations in the statement of claim were factually correct"*

(5) In the case of **National MBF Finance (Fiji) Ltd v Buli [2000] FJCA 28; ABU0057U.98S (6 JULY 2000),** it was held;

"The law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the Court".

(6) In **Tawake v Barton Ltd** [2010] FJHC 14; **HBC 231 of 2008 (28 January 2010),** Master Tuilevuka (as he was then) summarised the law in this area as follows;

*"The jurisdiction to strike out proceedings under Order 18 Rule 18 is guardedly exercised in exceptional cases only where, on the pleaded facts, the plaintiff could not succeed as a matter of law. It is not exercised where legal questions of importance are raised and where the cause of action must be so clearly untenable that they cannot possibly succeed (see **Attorney General –v- Shiu Prasad Halka 18 FLR 210 at 215**, as per Justice Gould VP; see also **New Zealand***

Court of Appeal decision in Attorney –v- Prince Gardner [1998] 1 NZLR 262 at 267."

(7) His Lordship Mr Justice Kirby in **Len Lindon –v- The Commonwealth of Australia (No. 2) S. 96/005** summarised the applicable principles as follows:-

a) *It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the court, is rarely and sparingly provided.*

b) *To secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action ... or is advancing a claim that is clearly frivolous or vexatious...*

c) *An opinion of the Court that a case appears weak and such that is unlikely to succeed is not, alone, sufficient to warrant summary termination... even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and arguments and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.*

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

e) *If, notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a Court will ordinarily allow that party to reframe its pleading.*

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

(8) In **Paulo Malo Radrodro v Sione Hatu Tiakia & others, HBS 204 of 2005,** the Court stated that:

> *"The principles applicable to applications of this type have been considered by the Court on many occasions. Those principles include:*
>
> *a) A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered – Lord Pearson in* ***Drummond Jackson v British Medical Association*** *[1970] WLR 688.*
>
> *b) Frivolous and vexatious is said to mean cases which are obviously frivolous or vexatious or obviously unsustainable – Lindley Li in* ***Attorney General of Duchy of Lancaster v L.N.W Ry*** *[1892] 3 Ch 274 at 277.*
>
> *c) It is only in plain and obvious cases that recourse would be had to the summary process under this rule – Lindley MR in* ***Hubbuck v Wilkinson*** *[1899] Q.B 86.*
>
> *d) The purpose of the Courts jurisdiction to strike out pleading is twofold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice; defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.*
>
> *e) "The first object of pleadings is to define and clarify with position the issues and questions which are in dispute between the parties and for determination by the Court. Fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that the opposing parties can bring evidence on the issues disclosed –* ***ESSO Petroleum Company Limited v Southport Corporation*** *[1956] A.C at 238" –* ***James M Ah Koy v Native Land Trust Board & Others*** *– Civil Action No. HBC 0546 of 2004.*
>
> *f) A dismissal of proceedings "often be required by the very essence of justice to be done"..... – Lord Blackburn in* ***Metropolitan – Pooley [1885] 10 OPP Case 210 at 221*** *- so as to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless allegation – Lorton LJ in* ***Riches v Director of Public Prosecutions*** *(1973) 1 WLR 1019 at 1027"*

g) *A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered – Lord Pearson in* ***Drummond Jackson v British Medical Association*** *[1970] WLR 688.*

h) *Frivolous and vexatious is said to mean cases which are obviously frivolous or vexatious or obviously unsustainable – Lindley Li in* ***Attorney General of Duchy of Lancaster v L.N.W Ry*** *[1892] 3 Ch 274 at 277.*

i) *It is only in plain and obvious cases that recourse would be had to the summary process under this rule – Lindley MR in* ***Hubbuck v Wilkinson*** *[1899] Q.B 86.*

j) *The purpose of the Courts jurisdiction to strike out pleading is twofold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice; defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.*

k) *"The first object of pleadings is to define and clarify with position the issues and questions which are in dispute between the parties and for determination by the Court. Fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that the opposing parties can bring evidence on the issues disclosed –* ***ESSO Petroleum Company Limited v Southport Corporation*** *[1956] A.C at 238" –* ***James M Ah Koy v Native Land Trust Board & Others*** *– Civil Action No. HBC 0546 of 2004.*

l) *A dismissal of proceedings "often be required by the very essence of justice to be done"..... – Lord Blackburn in* ***Metropolitan – Pooley [1885] 10 OPP Case 210 at 221-*** *so as to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless allegation – Lorton LJ in* ***Riches v Director of Public Prosecutions*** *(1973)1 WLR 1019 at 1027"*

(9) **In Halsbury's Laws of England ,Vol 37, page 322** the phrase **"abuse of process"** is described as follows:

"An abuse of process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of

vexatious or oppression or for ulterior purposes, or, more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of an abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court."

(10) The phrase "**abuse of process**" is summarised in **Walton v Gardiner (1993) 177 CLR 378** as follows:

> *"Abuse of process includes instituting or maintaining proceedings that will clearly fail proceedings unjustifiably oppressive or vexatious in relation to the defendant, and generally any process that gives rise to unfairness"*

(11) In **Stephenson –v- Garret [1898] 1 Q.B. 677** it was held:

> *"It is an abuse of process of law for a suitor to litigate again over an identical question which has already been decided against him even though the matter is not strictly res judicata".*

(D) ANALYSIS

(1) Let me now turn to the application bearing in my mind the above mentioned legal principles and the factual background uppermost in my mind.

(2) Before I pass to consideration of submissions, let me record that counsel for the Plaintiff and the Defendants in their written submissions have done a fairly exhaustive study of judicial decisions and other authorities which they considered to be applicable.

I interpose to mention that I have given my mind to the oral submissions made by counsel, helpful written submissions and the judicial authorities referred to therein.

(3) The Defendants in this application are relying on **Order 18, Rule 18 of the High Court Rules of Fiji, 1988** and **the inherent jurisdiction of the court**. Order 18, rule 18 states that:

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

(4) The Defendants primary argument runs essentially as follows;

I focus on paragraphs 4.1 to 4.9 and 4.13 and 4.17 of the Defendants written submissions:

Para 4.1 STATUTE BARRED

4.2 The Defendants submit to this Honourable Court that the Plaintiff's action is statute barred and should not be sustained.

4.3 The Plaintiff is trying to challenge the validity of the Foreclosure which occurred in 2000.

4.4 In the Statement of Claim, the Plaintiff is also asking for accounts of all income and expenses in relation to the revenue received from the land comprised in Crown Lease No. 12891 and from shared held under the name of late Abhimanyou Lingam with the Commonwealth Bank of Australia.

4.4 The claim by the Plaintiff goes back some 15 years ago which the Defendants say that the Plaintiff's claim is out of time and statue barred.

4.5 When the Foreclosure was done by the Mortgagee in 2000, the Mortgagor (Abhimanyou) did not challenge the same and neither did he file any action during his lifetime against the Mortgagee.

4.6 The Plaintiff became the Executrix and Trustee of the Estate of Abhimanyou on 28th April, 2014 and she filed this proceedings on 7th October, 2015.

4.7 *The Defendants submit that no proceedings should be instituted after the expiration of the limitation period in respect of the contract as per the Limitation Act which states as follows:*

4.8 *The Plaintiff's action falls out of the above provision and therefore, the action should not stand and ought to be struck out.*

4.9 *The Plaintiff is also asking for accounts which go back beyond year 2000. Section 4 (2) of the Limitation Act states;*

> *"(2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action."*

4.13 *The Defendants submit that the Plaintiff cannot open the issue of validity of Foreclosure which was registered in 2000 except in the case of fraud which is not the case in this mater. The Plaintiff has not pleaded any fraud and therefore her claim should not be sustained.*

4.17 *The Defendants respectfully submit to this Honourable Court that the Plaintiff's action is clear breach of the Limitation Act and Court should ot allow the Plaintiff to proceed with this action in light of the case authorities cited above. It is also a trite law that no litigation should proceed after expiration of the limitation period.*

(5) In *adverso*, Counsel for the Plaintiff submitted; (I focus on paragraph (1), (5) and (14) of the Plaintiff's written submissions)

Para (1) *The Defendant in its application alleges that the Plaintiff's Statement of claim is statute barred. However, the Defendant has failed to plea specific Sections under the Limitation Act and how the Plaintiffs claim is statute barred in their Statement of Defence.*

(5) *Therefore the Defendants failing to specifically plead the Sections under Limitation Act, can not raise the same in the present application or in the Defence. The Defendant it is submitted to rely on the specific section needed to make a specific plea in the statement of defence.*

(14) *The Plaintiff in its Affidavit in reply has clearly outlined at paragraph 4 how the foreclosure was not carried out in accordance with law which is Sections 73, 74 and 75 of the Land Transfer Act and Section 79 of the Property Law Act. That till-to-date no order for foreclosure has been registered against the Title. Further no notice was served to the Plaintiff's deceased husband and that the advertisement was not proper and also the there was no advertisement for the auction for mortgage sale and no auction actually took place as required The Plaintiff further in the affidavit in reply stated that as soon as she came to be aware of her rights to the said property, she has filed this action. In addition, the said property is under the possession of the Defendant and they have been*

uplifting the rental from the said property for last 15 years and till to-date the Defendant had failed to provide any accounts. (Refer paragraph 7 and 8 of the Affidavit in reply). Most significant in the Plaintiff's argument is that the foreclosure is not complete hence the time has not started to run to challenge any foreclosure.

(6) **Determination**

(i) As noted above, the Courts rarely will strike out a proceeding. It is only in exceptional cases where, on the pleaded facts, the Plaintiff could not succeed as a matter of law or where the cause of action is so clearly untenable that it cannot possibly succeed will the courts act to strike out a claim.

In this regard, I am inclined to be guided by the decision of the New Zealand Court of Appeal in **"Lucas & Sons (Nelson Mail) v O. Brien** (1978) 2 N.Z.L.R 289 as being a convenient summary of the correct approach to the application before the court. It was held;

> *"The Court must exercise .....jurisdiction to strike out pleadings sparingly and with great care to ensure that a Plaintiff was not improperly deprived of the opportunity for a trial of his case. **However, that did not mean that the jurisdiction was reserved for the plain and obvious case; it could be exercised even when extensive argument was necessary to demonstrate that the Plaintiff's case was so clearly untenable that it could not possibly succeed."***
>
> (Emphasis added)

Where, a claim to strike out depends upon the decision of one or more difficult points of law, the court should normally refuse to entertain such a claim to strike out. But, if in a particular case the court is satisfied that the decision of the point of law at that stage will either avoid the necessity for trial altogether or render the trial substantially easier and cheaper ; the court can properly determine such difficult point of law on the striking-out application. In considering whether or not to decide the difficult question of law, the court can and should take into account whether the point of law is of such a kind that it can properly be determined on the bare facts pleaded or whether it would not be better determined at the trial in light of the actual facts of the case; **See;** ***Williams & Humber Ltd v H Trade markers (jersey) Ltd (1986) 1 All ER 129 per Lord Templeman and Lord Mackay.***

Returning back to the instant case, in my view, the facts pleaded in the Statement of Claim are appropriate to determine a question of law.

A striking-out application proceeds on the assumption that the facts pleaded in the Statement of Claim are true. That is so even although they are not or may not be admitted. However, it is permissible to refer to Affidavit evidence where the evidence is undisputed and is not inconsistent with the pleadings.

Attorney-General v McVeagh [1995] (1) NZLR 558 at 566. The Court said:

> ***The Court is entitled to receive Affidavit evidence on a striking-out application, and will do so in a proper case.*** *It will not attempt to resolve genuinely disputed issues of fact and therefore will generally limit evidence to that which is undisputed. Normally it will not consider evidence inconsistent with the pleading, for a striking-out application is dealt with on the footing that the pleaded facts can be proved; see* ***Electricity Corporation Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641, 645-646, Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries [1993] 2 NZLR 53*** *at pp 62-63, per Cooke P. But there may be a case where an essential factual allegation is so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further.*
>
> (Emphasis added)

One word more, as I indicated earlier, the Defendant's application is made under Order 18, Rule 18 of the High Court Rules, 1988 **and under the inherent jurisdiction of the Court.** Therefore, it is permissible to refer to Affidavit evidence.

In **Khan v Begum (2004) FJHC 430**, Hon. Justice John Connors said;

> *Quite part from the jurisdiction conferred by the Rules to strike out frivolous and vexatious pleadings and action where the cause of action is not revealed, the court also has a separate inherent jurisdiction, which is, relied on to control proceedings and to prevent an abuse of its process. Under the inherent jurisdiction, the court can, as it can under the provisions of the Rules, stay or dismissed proceedings which are an abuse of process as being frivolous or vexatious or which fail to show a reasonable cause of action.*
> *It is said that the fact the court has this inherent jurisdiction is one of the characteristics which distinguishes the court from the other institutions of the government. It is a jurisdiction, to be exercised summarily and as I have said, is in addition to the jurisdiction conferred by the Rules.*
>
> ***It is not in issue that if a party relies solely upon Order 18 Rule 18 then no evidence may be considered by the court in making its determination but that limitation does not apply where the applicant relies upon the inherent jurisdiction of the court.***

(Emphasis added)

Therefore, it is permissible to refer to Affidavit evidence, in addition to the facts pleaded in the Statement of Claim.

(ii) The issues for consideration by the Court are the same whether pursuant to the Rules or in reliance of the inherent jurisdiction. They might summarise as to whether there is a reasonable cause of action.

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

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

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

What is a "Cause of Action"?

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

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

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

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

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

so, secondly do the material facts alleged if proved, give rise to a right to a remedy.

(7) With that in my mind, let me now move to consider the Defendant's application for 'striking-out'. The Defendant's most critical argument is that the Plaintiff's Action is statute barred.

(8) The Plaintiff at paragraph 7 to 14 of the Statement of Claim avers that;

Para 7. *That the application for foreclosure was made in breach of Section 73, 74 and 75 of the Land Transfer Act and Section 79 of the Property Law Act.*

PARTICULARS

(a) *No final notice of the Defendants intention for foreclosure was served on the deceased.*

(b) *The application for foreclosure was not advertised as required under Section 74 of the Land Transfer Act.*

(c) *No actual auction for the sale of the said land took place.*

(d) *The Certificate of the Auctioneer is erroneous and a sham.*

(e) *The Registrar of Titles advertisement was published after the date of registration of the application of the foreclosure on the lease of the said land.*

8. *THAT no order for foreclosure under the Land Transfer Act has been endorsed on the lease of the said land and the Plaintiff remains the registered lessee of the said land.*

9. *THAT as consequence there is no valid, proper and legal foreclosure of the said land.*

10. *THAT the Defendants have been uplifting all income from the said land and all debts owed, if any, under the said mortgage is now satisfied.*

11. *THAT Gurdial Singh also obtained assignment and appropriated illegally and wrongfully all claims and interests held by the deceased with the Common Wealth Bank of Australia and the Defendants are now beneficiaries of the same.*

12. *THAT the Plaintiff has notified the Defendant of the matters complained of hereinabove.*

13. *THAT due to the actions of the Defendant the Plaintiff has have suffered loss and damage as the Defendants have illegally taken control and possession of the said land.*

14. *THAT the Plaintiff has not been able to utilise the said land for her benefit and the benefit the Estate of the said deceased since sometimes in 2000.*

(9) Wherefore, the Plaintiff claims from the Defendants;

a) *A Declaration that the Application for An Order for Foreclosure applied against the land comprised in Crown Lease Number 12891 is invalid and of no legal consequence and be cancelled from the memorial of the lease of land comprised in Crown Lease Number 12891.*

b) *An order that the Defendant prepare, produce and file in this Honourable Court an affidavit verifying, accounts of all income and expenses in relation to the revenue received from the land comprised in Crown Lease Number 12891.*

c) *An order that the Defendant prepare, produce and file in this Honourable Court an affidavit verifying, accounts of all income and expenses in relation to the revenue received from shares held under the name of Abhimanyou Lingam aka Abhimanyu Lingam with the Commonwealth Bank of Australia.*

d) *The Defendants pay to the Plaintiff monies received from the income from the revenue collected from the land comprised in Crown Lease Number 12891 and all monies paid by Commonwealth of Australia.*

e) *Damages.*

f) *Interest on any monetary award.*

g) *Costs of this action on client/solicitor indemnity basis.*

h) *Any further or other orders as this Honourable Court may deem fit in the circumstances.*

(10) I note annexure and marked 'B', 'D' and 'E' of the Affidavit of "Radhabai" (the Plaintiff) filed on 20th May 2016.

It seems tolerably clear that the application for an Order for Foreclosure was registered on 02nd March 2000 on the Crown Lease No:- 12891. Dealing with the question this far, I would hold that in spite of the force with which Counsel for the Plaintiff put her submission, it is wrong to argue that '*the foreclosure is not complete hence the time has not started to run to challenge any foreclosure*'.

Moreover, in accordance with Section 74 of the Land Transfer Act, the Registrar of Titles issued a Public Notice for Foreclosure to advertise in the News Paper.

The late Abhimanyou Lingam did not object and/or obtained an Injunction restraining the Mortgagee from exercising their rights and/or to restrain them to proceed with the Foreclosure.

Late Abhimanyou Lingam passed away on 29th May, 2009. Since year 2000 when the Foreclosure was registered till May, 2009 the late Abhimanyou during his lifetime has not filed any action challenging the validity of the Foreclosure.

The Plaintiff issued the Writ against the Defendants on 7th October, 2015. After a slumber of 15 long years the Plaintiff is now challenging the validity of the Foreclosure and seeking an account of the income derived from the said property and the Estate of Abhimanyou Lingam. Equity aids the vigilant and not those who slumber over their rights.

The Plaintiff does not allege fraud. The Plaintiff alleges that here has been a breach of Section 73, 74 and 75 of the Land Transfer Act and seeks a declaration that the foreclosures granted in year 2000 which was 15 years ago is invalid and be cancelled accordingly. Moreover, the Plaintiff is claiming for accounts which go back beyond year 2000.

As correctly pointed out by Counsel for the Defendants, the Plaintiff's Claim is obnoxious to Section 4 (1) and (2) of the Limitation Act and therefore statute barred.

Section 4 (1) and 4 (2) of the Limitation Act provides;

> *4. (1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say –*
>
> *(a) actions founded on simple contract or on tort;*
> *(b) actions to enforce a recognizance;*
> *(c) actions to enforce an award, where the submission is not by an instrument under seal;*
> *(d) actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture:*
>
> *Provided that –*
>
> *(2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.*
>
> *(3) An action upon a speciality shall not be brought after the expiration of twelve years from the date on which the cause of action accrued:*

Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

It seems to me perfectly plain that the Plaintiff's cause of action arose outside the current period of limitation. On the Statement of Claim it is clear that the Plaintiff's cause of action is statute barred. The Defendants intend to rely on the Limitation Act. The Defendants tell the court that they propose to plead the statute, and on the uncontested facts, there is no reason to think that the Plaintiff can bring herself within the exceptions set out in the Limitation Act. There is nothing before the Court to suggest that the Plaintiff could escape from the defence.

Thus, the Plaintiff's claim is unenforceable. The object of Order 18, rule 18 of the High Court Rules , 1988 is to ensure that Defendants shall not be troubled by claims against them which are bound to fail having regard to the uncontested facts. Therefore, the Plaintiff's claim will be struck out as being frivolous, vexatious and an abuse of process of the Court.

In **Halsbury's Laws of England** Vol 28 4th Edition at pages 316 – 317 state as follows;

"(iv) Account

698. Period of limitation and accrual of cause of action. An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action. This rule has effect subject to the provisions relating to the effect of disability, acknowledgement, part payment, fraud and mistake; and it does not apply to certain actions by beneficiaries as regards which the prescribed periods of limitation are expressly excluded. Where by the terms of a contract, express or implied, made between the Plaintiff and the Defendant, the Defendant is liable to account only on demand, a cause of action accrues when a demand is made"

The **Supreme Court practice, 1995,** states at page 332,

Thus where the statement of claim discloses that the cause of action arose outside the current period of limitation and it is clear that the Defendant intends to reply on the Limitation Act and there is nothing before the Court to suggest that the Plaintiff could escape from that Defence, the claim will be struck out as being frivolous, vexations and an abuse of the process of the Court ***(Riches v Director of Public Prosecutions [1973] 1 W.L.R. 1019; [1973] 2 All E.R. 935, C.A.,*** *as explained in Ronex Properties Ltd. v. John Laing Construction Ltd.*

I am comforted by the rule of law enunciated in the English Court of Appeal case of **Riches v. Director of Public Prosecutions [1973] 2 All ER 935** . In that case the Court held that:

> *"When the statement of claim discloses that the cause of action arose outside the current period of limitation and it is clear that the Defendant intends to rely on the Limitation Act and there is nothing before the Court to suggest that the Plaintiff could escape from that defense, the claim will be struck out as being frivolous, vexation and an abuse of the process of the court."*

> *"I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no cause of action, the limitation objection should or could prevail. In principle I cannot see why not. If there is any room for an escape from the statute, well and good, if it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitation and must fail ..."*

> *The object of RSC Ord. 18, r19 (which is equivalent to our O.18, r 18) is to ensure that defendants shall not be troubled by claims against them which are bound to fail having regard to the uncontested facts. One of the uncontested set of facts which arises from time to time is when on the statement of claim it is clear that the cause of action is statute barred and the defendant tells the court that he proposes to plead the statute and, on the uncontested facts, there is no reason to think that the plaintiff can bring himself within the exceptions set out in the Limitation Act 1939. In those circumstances it is pointless for the case to go on so that the defendant can deliver a defense. The delivery of the defense occupies time and wastes money; and even more useless and time-consuming from the point of view of the proper administration of justice is that there should then have to be a summons for direction and an order for an issue to be tried and for that issue to be tried before the inevitable result is attained."*

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

The Plaintiff's claim is not recognised by law and therefore unenforceable. The Plaintiff's claim is bound to fail having regard to the uncontested facts. I am of the opinion that the proceedings are vexatious and are an abuse of process of the Court.

(11) For the reasons which I have endeavoured to explain, I venture to say beyond per - adventure that the Plaintiff's Statement of Claim does not raise debatable questions of facts. Therefore, it is competent for the Court to dismiss the action on the ground that it discloses no reasonable cause of action against the Defendants. Fundamentally, courts are required to determine cases on merits rather than dismissing them summarily on procedural grounds.

It is a fundamental principle of any civilized legal system that all parties in a case are entitled to the opportunity to have their case dealt with at a hearing at which they or their representative are present and heard.

At this juncture, I bear in mind the "**caution approach**" that the court is required to exercise when considering an application of this type.

I remind myself of the principles stated clearly in the following judicial decisions.

In Dev. v. Victorian Railways Commissioners (1949) HCA 1; (1949) 78CLR 62, 91 Dixon J said:

> *"A case must be very clear indeed to justify the summary intervention of the court ... once it appears that there is a real question to be determined whether of fact or of law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process."*

In Agar v. Hyde (2000) 201 CLR 552 at 575 the High Court of Australia observed that:

> *"It is of course well accepted that a court should not decide the issues raised in those proceedings in a summary way except in the clearest of cases. Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way and after taking advantage of the usual interlocutory processes."*

I am of course mindful that a case must be very clear indeed to justify summary intervention of the Court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional circumstances.

I have no doubt personally and I am clearly of the opinion that this is a case for the summary intervention of the Court. The decision of the point of law at this stage will certainly avoid the necessity for trial against the Defendants. This action against the Defendants must be dismissed.

In the circumstances, I certainly agree with the sentiments which are expressed inferentially in the Defendants submissions. I must confess that I am not in the least impressed by the proposition advanced by the Plaintiff.

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

I could see nothing to change my opinion even on the basis of exhaustive work contained in "**Commentary on Litigation**" by "**Cokes**", and "**A practical approach to Civil Procedure**", by "**Stuart Sime**", Thirteenth Edition.

Accordingly, there is no alternate but to dismiss the Plaintiff's action and the Statement of Claim to protect the Defendants from being further troubled, to save the Plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merits.

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

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

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

Order 62, Rule (37) of the High Court Rules empower courts to award indemnity costs **at its discretion.**

For the sake of completeness, Order 62, Rule (37) is reproduced below.

Amount of Indemnity costs (O.62, r.37)

37.- *(1) The amount of costs to be allowed shall (subject to rule 18 and to any order of the Court) be in the discretion of the taxing officer.*

G.E. Dal Pont, in "Law of Costs", Third Edition, writes at Page 533 and 534;

'Indemnity' Basis

"Other than in the High Court, Tasmania and Western Australia, statute or court rules make specific provision for taxation on an indemnity basis. Other than in the Family Law and Queensland rules – which define the 'indemnity basis' in terms akin to the traditional 'solicitor and client basis' – the 'indemnity basis' is defined in largely common terms to cover all costs incurred by the person in whose favour costs are ordered except to the extent that they are of general law concept of 'indemnity costs'. The power to make such an order in the High Court and Tasmania stems from the general costs discretion vested in superior courts, and in Western Australia can arguably moreover be sourced from a specific statutory provision.

Although all costs ordered as between party and party are, pursuant to the 'costs indemnity rule', indemnity costs in one sense, an order for 'indemnity costs', or that costs be taxed on an 'indemnity basis', is intended to go further. Yet the object in ordering indemnity costs remains compensatory and not penal. References in judgments to a 'punitive' costs order in this context must be seen against the backdrop of the reprehensible conduct that often justifies an award of indemnity costs rather than impinging upon the compensatory aim. Accordingly, such an order does not enable a claimant to recover more costs than he or she has incurred."

Now let me consider what authority there is on this point.

The principles by which Courts are guided when considering whether or not to award indemnity costs are discussed by Hon. Madam Justice Scutt in "**Prasad v Divisional Engineer Northern** (No. 02)" (2008) FJHC 234.

As to the **"General Principles"**, Hon. Madam Justice Scutt said this;

- *A court has 'absolute and unfettered' discretion vis-à-vis the award of costs but discretion 'must be exercised judicially': **Trade Practices Commission v. Nicholas Enterprises** (1979) 28 ALR 201, at 207*
- *The question is always 'whether the facts and circumstances of the case in question warrant making an order for payment of costs other than by reference to party and party': **Colgate-Palmolive Company v. Cussons Pty Ltd** [1993] FCA 536; (1993) 46 FCR 225, at 234, per Sheppard, J.*
- *A party against whom indemnity costs are sought 'is entitled to notice of the order sought': **Huntsman Chemical Company Australia Limited v. International Cools Australia Ltd** (1995) NSWLR 242*
- *That such notice is required is 'a principle of elementary justice' applying to both civil and criminal cases: **Sayed Mukhtar Shah v. Elizabeth Rice and Ors** (Crim Appeal No. AAU0007 of 1997S, High Court Crim Action No. HAA002 of 1997, 12 November 1999), at 5, per Sir Moti Tikaram, P. Casey and Barker, JJA*
- *'... neither considerations of hardship to the successful party nor the over-optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs. But additional costs may be called for if there has been reprehensible conduct by the party liable': **State v. The Police Service Commission; Ex parte Beniamino Naviveli** (Judicial Review 29/94; CA Appeal No. 52/95, 19 August 1996), at 6*
- *Usually, party/party costs are awarded, with indemnity costs awarded only 'where there are exceptional reasons for doing so': **Colgate-Palmolive Co. v. Cussons Pty Ltd** at 232-34; **Bowen Jones v. Bowen Jones** [1986] 3 All ER 163; **Re Malley SM; Ex parte Gardner** []2001] WASCA 83; **SDS Corporation Ltd v. Pasonnay Pty Ltd &Anor** [2004] WASC 26 (S2) (23 July 2004), at 16, per Roberts-Smith, J.*
- *Costs are generally ordered on a party/party basis, but solicitor/client costs can be awarded where 'there is some special or unusual feature of the case to justify' a court's 'exercising its discretion in that way': **Preston v. Preston** [1982] 1 All ER 41, at 58*
- *Indemnity costs can be ordered as and when the justice of the case so requires: **Lee v. Mavaddat** [2005] WASC 68 (25 April 2005), per Roberts-Smith, J.*
- *For indemnity costs to be awarded there must be 'some form of delinquency in the conduct of the proceedings': **Harrison v. Schipp** [2001] NSWCA 13, at Paras **[1], [153]***

- *Circumstances in which indemnity costs are ordered must be such as to 'take a case out of the "ordinary" or "usual" category ...":**MGICA (1992) Ltd v. Kenny & Good Pty Ltd (No. 2)** (1996) 140 ALR 707, at 711, per Lindgren J.*
- *'... it has been suggested that the order of costs on a solicitor and client basis should be reserved to a case where the conduct of a party or its representatives is so unsatisfactory as to call out for a special order. Thus, if it represents an abuse of process of the Court the conduct may attract such*

*an order': **Dillon and Ors v. Baltic Shipping Co. ('The Mikhail Lermontov')**(1991) 2 Lloyds Rep 155, at 176, per Kirby, P.*

- *Solicitor/client or indemnity costs can be considered appropriately 'whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known ... he had no chance of success': **Fountain Selected Meats (Sales) Pty Ltd v. International Produce Merchants Ltd & Ors**[1988] FCA 202; (1998) 81 ALR 397, at 401, per Woodward, J.*
- *Albeit rare, where action appears to have commenced/continued when 'applicant ... should have known ... he had no chance of success', the presumption is that it 'commenced or continued for some ulterior motive or ... [in] willful disregard of the known facts or ... clearly established law' and the court needs 'to consider how it should exercise its unfettered discretion': **Fountain Selected Meats**, at 401, per Woodward, J.*
- *Where action taken or threatened by a defendant 'constituted, or would have constituted, an abuse of the process of the court', indemnity costs are appropriate: **Baillieu Knight Frank (NSW) Pty Ltd v. Ted Manny Real Estate Pty Ltd** (1992) 30 NSWLR 359, at 362. per Power, J.*
- *Similarly where the defendant's actions in conducting any defence to the proceedings have involved an abuse of process of the court whereby the court's time and litigant's money has 'been wasted on totally frivolous and thoroughly unjustified defences': **Baillieu Knight Frank**, at 362, per Power, J.*

- *Indemnity costs awarded where 'the defendant had prima facie misused the process of the court by putting forward a defence which from the outset it knew was unsustainable ... such conduct by a defendant could amount to a misuse of the process of the court': **Willis v. Redbridge Health Authority** (1960) 1 WLR 1228, at 1232, per Beldam, LJ*
- *'Abuse of process and unmeritorious behaviour by a losing litigant has always been sanctionable by way of an indemnity costs order inter parties A party cannot be penalised [for] exercising its right to dispute matters but in very special cases where a party is found to have behaved disgracefully or where such behaviour is deserving of moral condemnation, then indemnity costs may be awarded as between the losing and winning parties': **Ranjay Shandil v. Public Service Commission** (Civil Jurisdiction Judicial Review No. 004 of 1996, 16 May 1997), at 5, per Pathik, J. (quoting Jane Weakley, 'Do costs really follow the event?' (1996) **NLJ** 710 (May 1996))*
- *'It is sufficient ... to enliven the discretion to award [indemnity] costs that, for whatever reasons, a party persists in what should on proper consideration be seen to be a hopeless case': **J-Corp Pty Ltd v. Australian Builders Labourers Federation Union of Workers (WA Branch)(No. 2)** (1993) 46 IR 301, at 303, per French, J.*
- *'... where a party has by its conduct unnecessarily increased the cost of litigation, it is appropriate that the party so acting should bear that increased cost. Persisting in a case which can only be characterised as "hopeless" ... may lead the court to [determine] that the party whose conduct gave rise to*

*the costs should bear them in full': **Quancorp Pty Ltd &Anor v. MacDonald &Ors**[1999] WASC 101, at Paras **[6]-[7]**, per Wheeler, J.*

- *However, a case should not be characterised as 'hopeless' too readily so as to support an award of indemnity costs, bearing in mind that a party 'should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain' for 'uncertainty is inherent in many areas of law' and the law changes 'with changing circumstances': **Quancorp Pty Ltd &Anor v. MacDonald &Ors** [1999] WASC 101, at Paras **[6]-[7]**, per Wheeler, J.*
- *The law reports are replete with cases which were thought to be hopeless before investigation but were decided the other way after the court allowed the matter to be tried: **Medcalf v. Weatherill and Anor** [2002] UKHL 27 (27 June 2002), at 11, per Lord Steyn*
- *Purpose of indemnity costs is not penal but compensatory so awarded 'where one party causes another to incur legal costs by misusing the process to delay or to defer the trial and payment of sums properly due'; the court 'ought to ensure so far as it can that the sums eventually recovered by a plaintiff are not depleted by irrecoverable legal costs': **Willis v. Redbridge Health Authority,** at 1232, per Beldam, LJ*
- *Actions of a Defendant in defending an action, albeit being determined by the trial judge as 'wrong and without any legal justification, the result of its own careless actions', do 'not approach the degree of impropriety that needs to be established to justify indemnity costs ... [R]egardless of how sloppy the [Defendant] might well have been in lending as much as $70,000 to [a Plaintiff], they had every justification for defending this action ... The judge was wrong to award [indemnity costs] in these circumstances. He should have awarded costs on the ordinary party and party scale': **Credit Corporation (Fiji) Limited v. Wasal Khan and Mohd Nasir Khan** (Civil Appeal No. ABU0040 of 2006S; High Court Civil Action No. HBC0344 of 1998, 8 July 2008), per Pathik, Khan and Bruce, JJA, at 11*

***Defining 'Improper', 'Unreasonable' or 'Negligent' Conduct in Legal Proceedings as Guide to Indemnity Costs Awards:** Cases where 'wasted costs' rules or 'useless costs' principles have been applied against solicitors where their conduct in proceedings has led to delay and/or abuse of process can provide some assistance in determining whether conduct in proceedings generally may be such as to warrant the award of indemnity costs. These cases specifically relate to solicitors' conduct rather than directly touching upon the indemnity costs question; nonetheless the analysis or findings as to what constitutes conduct warranting an award of costs can be helpful. See for example:*

- ***Ridehalgh v. Horsefield and Anor**[1994] Ch 205*
- ***Medcalf v. Weatherill and Anor**[2002] UKHL 27 (27 June 2002)*
- ***Harley v. McDonald** [2001] 2 AC 678*
- ***Kemajuan Flora SDN Bh v. Public Bank BHD &Anor**(High Court Malaya, Melaka, Civil Suit No. 22-81-2001, 25 January 2006)*

- ***Ma So So Josephine v. Chin Yuk Lun Francis and Chan Mee Yee*** *(FACV No. 15 of 2003, Court of Final Appeal Hong Kong Special Administrative Region, Final Appeal No. 15 of 2003 (Civil)(On Appeal from CACV No. 382 of 2002, 16 September 2004)*
- ***SZABF v. Minister for Immigration (No. 2)*** *[2003] FMCA 178*
- ***Heffernan v. Byrne*** *[2008] FJCA 7; ABU0027.2008 (29 May 2008)*

Some of the matters referred to include:

- *At the hearing stage, the making of or persisting in allegations made by one party against another, unsupported by admissible evidence 'since if there is not admissible evidence to support the allegation the court cannot be invited to find that it has been proved, and if the court cannot be invited to find that the allegation has been proved the allegation should not be made or should be withdrawn:* ***Medcalf v. Weatherill and Anor****, at 8, per Lord Bingham*

- *At the preparatory stage, in relation to such allegations – not necessarily having admissible evidence but there should be 'material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it:* ***Medcalf v. Weatherill and Anor****, at 8, per Lord Bingham*
- *Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples of wasting the time of the court or an abuse of its processes resulting in excessive or unnecessary costs to litigants:* ***Harley v. McDonald****, at 703, Para* ***[50]*** *(English Privy Council)*
- *Starting an action knowing it to be false is an abuse of process and may also involve knowingly attempting to mislead the court:* ***Ma So So Josephine v. Chin Yuk Lun Francis and Chan Mee Yee*** *(FACV No. 15 of 2003, Court of Final Appeal Hong Kong Special Administrative Region, Final Appeal No. 15 of 2003 (Civil)(On Appeal from CACV No. 382 of 2002, 16 September 2004), at Para* ***[43]****, per Ribeiro, PJ (Li, CJ, Bokhary and Chan, PJ and Richardson, NPJ concurring)*
- *Lending assistance to proceedings which are an abuse of the process of the court – using litigious procedures for purposes for which they were not intended, 'as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest' or evading rules intended to safeguard the interests of justice 'as by knowingly failing to make full disclosure on ex parte application[s] or knowingly conniving at incomplete disclose rue of*

*documents': **Ridehalgh v. Horsefield** [1994] Ch 205, at 234, per Bingham, MR*

- *Initiating or continuing multiple proceedings which amount to abuse of process: **Heffernan v. Byrne** [2008] FJCA 7; ABU0027.2008 (29 May 2008), per Hickie, J.*

***Specific Circumstances of Grant/Denial Indemnity Costs:** Specific instances supporting or denying the award of indemnity costs include:*

- *Indemnity costs follow per a '**Calderbank** offer', that is, where a party makes an offer or offers prior to trial, which is/are refused, and that party succeeds at trial on a basis which is better than the prior offer: **Calderbank v. Calderbank**[1975] 3 WLR 586*
- *However, no indemnity costs awarded where **Calderbank** letter contains no element of compromise, making it not unreasonable for the party not to accept the offer. The question is '... whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs ...': **SMEC Testing Services Pty Ltd v. Campbelltown City Council** [2000] NSWCA 323, at Para[37], per Giles, JA Hence, if the* offer is not a genuine offer of compromise and/or there is no appropriate opportunity provided to consider and deal with it, then no indemnity costs follow: **Richard Shorten v. David Hurst Constructions P/L; D. Hurst Constructions v. RW Shorten** [2008] Adj LR 06/17 (17 June 2008), per Einstein, J. (NSW Supreme Court, Equity Division T&C List); **Leichhardt Municipal Council v. Green** [2004] NSWCA 341, at Paras**[21]-24], [36]**, per Santow, JA, Stein, JA (concurring); **Herning v. GWS Machinery Pty Ltd (No. 2)** [2005] NSWCA 375, at Paras**[4]-[5]**, per Handley, Beazley and Basten, JJA; **Elite Protective Personnel v. Salmon** [2007] NSWCA 322, at Para **[99]; Donnelly v. Edelsten**[1994] FCA 992; [1994] 49 FCR 384, at 396

- *Indemnity costs awarded:*
  - *upon a winding-up petition's being presented on a debt known to the petitioner to be genuinely disputed on substantial grounds;*
  - *the clearly established law being that a winding up order will not be granted in such circumstances, meaning that the petitioner 'had no chance of successfully obtaining a winding up order';*
  - *where in these circumstances the filing of the petition 'constituted a deliberate tactical manipulation of the winding up process by the [petitioner, the State Government Insurance*

Commission 'SGIC'] for the purposes of bringing very substantial pressure to bear' on Bond Corp Holdings 'BCH';

- *this in the circumstances meant that the 'filing of the petition was an abuse of process of the court in the true sense of that expression';*
- *the discretion to stay the petition should not be exercised because this would 'cause BCH serious harm' meaning it would be 'extremely difficult for BCH to be able to conduct its business normally if the petition [were] not dismissed': citing* ***Re Lympne Investments*** *[1972] 1 WLR 523, at 527, per Megarry, J.; also* ***Re Glenbawn Park Pty Ltd*** *[1977] 2 ACLR 288, at 294, per Yeldham, J.*
- *an abuse of process 'having been established in the circumstances outlined, justice requires the award of solicitor and client, or, rather, "indemnity" costs' so that 'the SGIC should be ordered to pay all the costs incurred by BCH except insofar as they are of an unreasonable amount or have been unreasonably incurred, so that, subject to [these] exceptions, BCH be completely indemnified by the SGIC for its costs', citing* ***Foundation Selected Meats (Sales) Pty Ltd v. International Produce Merchants*** *[1988] FCA 202; (1988) 81 ALR 397, at 410, per Woodward J.:* ***Re Bond Corp Holdings Ltd*** *(1990) 1 ACSER 350, at 13, per Ipp, J.*

- *Indemnity costs are appropriate where an applicant (in an unfair dismissal):*
  - *'insists' over a respondents' objections that an application should proceed to trial rather than await the outcome of other possible litigation (including a police investigation);*
  - *fails repeatedly, despite allowances, to meet deadlines for lodgment of a witness statement;*
  - *fails to advise her lawyers of her whereabouts so denying them of the ability to inform the court of reasons for seeking an unqualified adjournment less than a week prior to trial;*
  - *fails to comply with directions to provide a current address, consult a medical specialist and obtain a report of fitness to attend the trial;*
  - *fails to appear at the final hearing when on notice that the application will be dismissed in event of such failure:* ***Nicole Pender v. Specialist Solutions Pty Ltd*** *(No. B599 of 2004. 17 May 2005), per Bloomfield, Commissioner*

- *Indemnity costs denied as against a Plaintiff who discontinued a claim for a permanent injunction to restrain a Defendant's industrial action, where the Defendant had filed a chamber summons seeking to have the Plaintiff's claim struck out as an abuse of process:*

Cooperative Bulk Handling Ltd v. Australian Manufacturing Workers Union (WA Branch)*(Unreported, WASC, Lib. No. 970190, 30 April 1997), per Wheeler, J.*

- *Indemnity costs cannot be awarded in a criminal appeal, albeit 'in criminal appeals, as in civil cases, unreasonable conduct by the unsuccessful party might increase a usual award': **Sayed Mukhtar Shah v. Elizabeth Rice and Ors** (Crim Appeal No. AAU0007 of 1997S, High Ct Crim Action No. HAA02 of 1997, 12 November 1999), at 4, per Sir Moti Tikaram, P., Casey and Barker, JJA*

- *Indemnity costs awarded then reversed on appeal where solicitor held liable for costs (under a 'wasted costs' order) in initiating action for clients where solicitor taken to have known that the basis of the clients' action was wholly false"*

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

Indeed, as was set out by in ***Carvill v HM Inspector of Taxes*** (Unreported, United Kingdom Special Commissioners of Income Tax, 23 March 2005,Stephen Oliver QC and Edward Sadler)(Bailii:[2005]UKSPCSPC00468,http://www.bailii.org/cgibin/markup.cgi?doc=/uk/cases/UKSC/2005/SPC00468.html),"*reprehensible conduct*" requires two separate considerations (at paragraph 11):

"The party's conduct must be unreasonable, but with the further characteristic that it is unreasonable to an extent or in a manner that it earns some implicit expression of disapproval or some stigma."

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

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

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

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

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

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

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

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

> ***"However, neither considerations of hardship to the successful party nor the over optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs.*** *But additional costs may be called for if there has been reprehensible conduct by the party liable – see the examples discussed in Thomson v. Swan Hunter and Wigham Richardson Ltd [1954] 2 All ER 859 and Bowen-Jones v. Bowen Jones [1986] 3 All ER 163."*
>
> (Emphasis added)

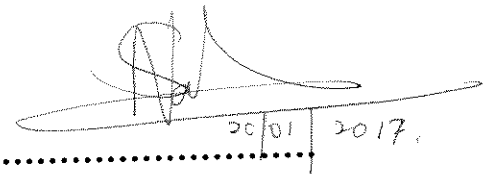
On the strength of the authority in the aforementioned three (03) cases, I venture to say beyond a per-adventure that neither considerations of hardship to the Defendants nor the over optimism of the unsuccessful Plaintiff would by themselves justify an award beyond party and party costs.

(E) ORDERS

(1) The Plaintiff's Writ of Summons and Statement of Claim filed against the Defendants is struck out. Civil Action No:- HBC 172 of 2015 is hereby struck out.

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

I do so order!



Jude Nanayakkara
Master.

At Lautoka.
20th January 2017.