IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 160 of 2009

BETWEEN : **DEO CONSTRUCTION DEVELOPMENT CO. LTD** a duly incorporated company having its registered office at 11 Kennedy Street, Martintar, Nadi.

PLAINTIFF

AND : **PORT DENARAU MARINA LIMITED** P O Box 023, Port Denarau, Fiji Islands

1st DEFENDANT

AND : **AVOSER LIMITED** a duly incorporated company having its registered office at Westfield City, Nadi Airport, Fiji.

2nd DEFENDANT

(Ms) Nilema Samantha for the Plaintiff
Mr. Vinisoni Filipe for the Second Defendant

Date of Hearing : - 28th November 2016
Date of Ruling : - 03rd March 2017

RULING

(A) INTRODUCTION

(1) The matter before me stems from the inter party Summons filed by the Plaintiff, pursuant to **Order 18, rule 18 of the High Court Rules, 1988** and the inherent jurisdiction of the Court for an Order that paragraphs 3 (b), 21, 22, 23 and 24 of the

Second Defendant's Statement of Defence be struck out and dismissed on the following grounds;

(a) It does not disclose reasonable grounds of Defence.

(b) Certain reliefs pleaded are frivolous or vexatious and / or

(c) It is otherwise an abuse of the process of the Court

(2) The Plaintiff relied on the Affidavit sworn by 'Vimal Deo', the Managing Director of the Plaintiff Company.

(3) The application for striking out is strongly opposed by the Second Defendant. The Second Defendant filed an 'Affidavit in answer' sworn by 'Ananth Reddy', the Director of the Second Defendant Company.

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

(B) THE FACTUAL BACKGROUND

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

On 27th June 2008, the Plaintiff and the First Defendant entered into an agreement for the construction of a terminal building at the Port Denarau Marina Complex.

The Plaintiff agreed to design and build the terminal building for the First Defendant for a total price of $1,990,560.00.

By a written agreement dated 30th June, 2008, the Plaintiff hired the services of the Second Defendant to comply with all structural requirements and to attend to all structural engineering works and necessary inspections for the project and to proffer advice to the Plaintiff as to the proper construction of various stages of the project works.

The Plaintiff by its Statement of Claim alleged that during the course of construction, by a letter dated 06th May 2009, the First Defendant in breach of the agreement purported to terminate the agreement and forcefully ejected the Plaintiff's workmen from the building site by which date the Plaintiff had completed 63% of the construction. The Plaintiff further alleged that its invoices were not paid by the First Defendant and it has detained the Plaintiff's property, plant, machinery and equipment.

The First Defendant by its Statement of Defence alleged structural defects as the basis for the termination. The First Defendant denies that it has detained any of the Plaintiff's property.

The Plaintiff says that it relied on the Second Defendants inspection and reports for the construction of the First Defendant's terminal, as the Plaintiff had only proceeded in accordance with the structural integrity certificate issued by the Second Defendant.

Moreover, the Plaintiff says that in the event that the Plaintiff was in breach of the building contract with the First Defendant entitling the First Defendant to terminate the building contract such breach was due to breach of contract by the Second Defendant of the Contract between the Plaintiff and the Second Defendant.

The Plaintiff by its Statement of Claim alleged that the Second Defendant;

- Failed to properly draw up and provide plans for project.
- Failed to carry out proper instructions requiring rectification of any defective work.
- Failed to provide proper inspections to identify defects.

Therefore, the Plaintiff claims that it is entitled to the damages from the First and Second Defendant and indemnity from the Second Defendant from any claim the First Defendant may make against the Plaintiff.

The Second Defendant admits that it entered into an agreement with the Plaintiff. The Second Defendant says that;

- the Second Defendant's engineering work was limited to 'structural design' and ' structural work' inspections.
- the Second Defendant was not engaged to offer advice to the Plaintiff pertaining to proper construction of various stages of the project work.
- no approval was ever granted by the Second Defendant for faulty workmanship.
- the termination of the agreement between the Plaintiff and the First Defendant occurred due to other issues and not matters involving the Second Defendant.
- denies that it failed to give proper advice as required under the contract with the Plaintiff.

(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 Ors (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 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 Second Defendant 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 Plaintiff in this application is 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) At the commencement of the oral hearing before the court for the application for striking out, Counsel for the Plaintiff raised a preliminary objection to the

"admissibility" of the Second Defendant's 'Affidavit in Answer' sworn on 23rd November 2015.

The preliminary objection raised is this;

> *"The Affidavit in answer was sworn on 23rd November, 2015 before Mr Wasu S.Pillay. Mr Pillay is the principal in the practice of Gordon Co. Gordon & Co happen to be the City Agents for the 2nd Defendant's Solicitors on record namely Haniff Tuitoga. This can be seen from the backing to the documents filed in this action by the 2nd Defendant. The Plaintiff therefore submits that the Affidavits in Answer filed is defective and cannot be used or relied upon for the purposes of the opposing this application by the Plaintiff."*

In response, Counsel for the Second Defendant says;

> *"We accept that Reddy's Affidavit is not in compliance with Order 41 Rule 8 of the high Court Rules. We submit that Deo' Affidavit does not comply with Order 49 Rule 1 of the high Court Rules and should not be used without leave of the Court."*

I cannot simply brush aside the "preliminary point" raised by Counsel for the Plaintiff.

I remind myself that, the Court is bound as a matter of law, to take into account in exercising the Court's discretion, the preliminary point advanced by Counsel for the Plaintiff in arguments.

See;

- **Australian Wire Industries (Pvt) Ltd v Nicholson**
  (1985) 1 NSWCCR 50
- **Sullivan v Department of Transport**
  (1978) 20 ALR 323
- **Baldwin & Francis v Patents Apparel Tribunal**
  (1959) AC 663

Therefore, the question is, what is the 'admissibility' of the Second Defendant's 'Affidavit in Answer' sworn on 23rd November 2015.

(5) On my perusal of the Second Defendant's Affidavit in Answer, it is observed that it was sworn before Mr. Wasu S.Pillay. He is the principal in the Gordon & Co., the city agents for the Second Defendant's Solicitors.

So, I should come to Order 41, rule 8 which I quote;

Affidavit not to be sworn before barrister and solicitor of party, etc.(O.41, r.8)

8. No affidavit shall be sufficient is sworn before the barrister and solicitor of the party on whose behalf the affidavit is to be used or before any agent, partner or clerk of that barrister and solicitor.

The wording of Order 41, rule 8 of the High Court Rules is unmistakeably clear to me.

I am abundantly clear in my mind that the Second Defendant's Affidavit in Answer is not in compliance with Order 41, rule 8 of the High Court Rules, because it was sworn before an agent of the solicitor for the Second Defendant. I uphold the preliminary objection raised to the Second Defendant's Affidavit in Answer.

In the Court's view, the defect in the Affidavit is fundamental which cannot be cured by the use of the Court's discretion, under Order 41, rule 4 of the High Court Rules, 1988.

I am clearly of opinion that the Second Defendant's Affidavit in Answer is a nullity.

The Affidavit is worthless and not to be relied upon. It ought not to be received in evidence in any shape whatever. Therefore, I give it no weight whatsoever. Thus, whole of the Affidavit is expunged.

This approach accords with the following judicial decisions.

- **Singh v Chaudary**
  (2005) FJHC 363

- **Denarau Corporation Ltd v Deo**
  (2015) FJHC 112

The matters raised in the Plaintiff's affidavit in support for striking out remain uncontroverted and untraversed. In the absence of an Affidavit to Oppose, I hold the inference inescapable that the Second Defendant does not oppose the Plaintiff's Summons for striking out the Defence.

See; **Jai Prakash Narayan v Savita Chandra**
Civil Appeal No:- 37 of 1985

The Second Defendant submits that the Plaintiff's Affidavit in Support (Vimal Deo's Affidavit) does not comply with Order 41, rule 9 (2) of the High Court Rules and should not be used without leave of the Court. Counsel for the Second Defendant complains that the Plaintiff's Affidavit is not endorsed as it should have been in accordance with Order 41, rule 9 (2) of the High Court Rules.

So I should come to Order 41, rule 9 (2) which I quote;

Filing of affidavits (O.41, r.9)

> ***9.*** *(2) Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court.*

I perused the Plaintiff's affidavit. I observed that the Plaintiff's Affidavit bears an endorsement at the foot of the final page as to whose behalf it was filed.

This satisfies the requirement of Order 41, rule 9 (2).

See; **Kim Industries Ltd, In Re (No.1) (2000) (1) FLR 141**

Therefore, I cannot uphold the Second Defendant's objection to the Plaintiff affidavit in support of the **Summons** for striking out.

(6) Leave all that aside for a moment!

The Plaintiff filed Summons to strike out paragraphs 3(b), 21, 22, 23 and 24 of the Second Defendant's Statement of Defence filed on 30th September 2015. The Plaintiff filed Summons pursuant to Order 18, rule 18 of the High Court Rules, 1988 and seeks to strike out the said paragraphs on the following grounds;

(a) It does not disclose reasonable grounds of defence.

(b) Certain reliefs pleaded are frivolous or vexatious and / or

(c) It is otherwise an abuse of process of the Court

For the sake of completeness, paragraphs 3(b), 21, 22, 23 and 24 of the Second Defendant's Statement of Defence filed on 30th September 2015, is reproduced below in full.

Para 3. As to the allegations in paragraph 3 of the Claim, the 2nd Defendant:

(b) says that its lawyers, Haniff Tuitoga will refer to the agreement dated 30 June 2008 at the trial proper as to its true meaning and effect.

21. *The 2nd Defendant says that some of the allegations in the Claim do not contain sufficient details. It therefore reserves the right to request further and better particulars – and to file an Amended Defence upon receipt of those particulars.*

22. *The 2nd Defendant reserves the right to apply to set aside the ex parte Order of 16 April 2015.*

23. *The action against the 2nd Defendant is frivolous, vexatious and an abuse of process of this Honourable Court – on the ground that it is statute barred. The 2nd Defendant therefore reserves the right to apply to strike out the action as against it.*

24. *The 2nd Defendant says that AK Lawyers should be restrained from acting for the Plaintiff on the ground that it has obtained certain information from the 2nd Defendant's Director (Ananth Aviram Reddy) and there is a real risk that this information may be used to the 2nd Defendant's detriment. The information provided to AK Lawyers attracts an element of trust which requires protection. If AK Lawyers is not restrained, there will be an undue risk of unfairness or disadvantage which the circumstances might reveal to exist. The 2nd Defendant therefore reserves the right to apply for an injunction to have AK Lawyers restrained from acting as solicitors for the Plaintiff.*

The Plaintiff contends that; (I focus on paragraph 5.2, 5.3 and 5.4 of the Plaintiff's submissions)

Para 5.2 *As to paragraph 3(b) we submit that a Defence is the means by which a Defendant plead its defence and not it's Lawyers defence. At paragraph 3(b) the 2nd Defendant states "it's lawyers .....will refer...". If thought necessary the proper form of pleading would be "the Defendant will refer to etc....". Even this is not strictly correct as any document will have to be proved in the usual way. It does not require one to say this in pleadings.*

5.3 *As to paragraph 21, 22 and 23 we submit that a pleading must disclose reasonable defence or a cause of action. However, in this case the 2nd Defendant has pleaded extraneous factors in relation to its Defence to the Amended Statement of Claim filed by the Plaintiff. IT is not a defence to state the 2nd Defendant's intention to file further applications in Court. The rules are clear if and when an application is to be filed precedents, rules and forms are available to go about doing it. Is is not a Defence and should not form part of the 2nd Defendant's Defence to the Plaintiff's claim.*

5.4 *As for paragraph 24 of the 2nd Defendants Defence we submit that it is irregular for the 2nd Defendant to plead such matters in its Defence. The High Court rules provides means whereby it could have objected to AK Lawyers acting for the Plaintiff. To date no such applications have been made despite the Mr Reddy stating in his affidavit that an application will be filed. That affidavit was sworn*

on 23rd November, 2015 it is now August, 2016. Over 9 months have elapsed. In any event it is not a defence to object to a Solicitor from acting for a particular client. The 2nd Defendant appears to have overlooked the whole purpose of pleadings and have raised issues which are irrelevant to the case.

In response, the Second Defendant says; (I focus on paragraphs 09, 10, 11 and 12 of the Second Defendant's submissions)

Para 9. *We submit that there is nothing irregular about paragraph 3. The Solicitors for the second Defendant will refer to the contents, effect and meaning of the agreement at the date of the hearing. The Plaintiff relies on an agreement between the Plaintiff and the second Defendant in its pursuit to hold the second Defendant liable for the alleged losses the Plaintiff and the first Defendant had suffered. Obviously the meaning and effect of the agreement is an issue which will be determined at the trial proper.*

10. *As to paragraph 21, 22, 23 and 24 we submit that there is nothing irregular with the contents thereof. In any event, the Plaintiff is given a notice of the second Defendant's intentions. No doubt it is open to the second Defendant's to make the necessary applications. However, we submit that there is nothing stopping the second Defendant from making such pleadings.*

11. *Furthermore, we submit that the Plaintiff has not pointed out any law to support its application and or show that such pleadings are forbidden. Any issues arising out of any applications that the second Defendant will make will be for the Court to decide.*

12. *Therefore, we humbly submit that there is nothing frivolous and vexatious about the concerned paragraphs. We further submit that the said paragraphs do raise issues and matters that will at some stage require the Court to determine upon the second Defendants application. We also submit that the said paragraphs are not an abuse of the process of this honourable Court. We also wish to point out that the Plaintiff has in no way been prejudiced in this case nor has it shown how it has been prejudiced.*

(7) **Scandalous, frivolous and vexatious**

In **NBF Asset Management Bank v Taveuni Estates Ltd, 2011, FJHC 755** 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.

Abuse of process

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 court.*

Bearing all that uppermost in my mind, let me now move to consider the substantive submissions.

The paragraph 3(b) of the Statement of Defence states that the Solicitors for the Second Defendant will refer to the agreement dated 30th June 2008 at the trial.

The question is, is this **Statement** relevant to the issues between the parties?

I am totally at a loss to understand how this **statement** is expected to be relevant to the Plaintiff's cause of action set up against the Second Defendant.

On 27th June 2008, the Plaintiff and the First Defendant entered into an agreement for the construction of a terminal building at the Port Denarau Marina Complex.

The Plaintiff agreed to design and build the terminal building for the First Defendant for a total price of $1,990,560.00.

By a written agreement dated 30th June, 2008, the Plaintiff hired the services of the Second Defendant to comply with all structural requirements and to attend to all structural engineering works and necessary inspections for the project and to proffer

advice to the Plaintiff as to the proper construction of various stages of the project works.

The Plaintiff by its Statement of Claim alleged that during the course of construction, by a letter dated 06th May 2009, the First Defendant in breach of the agreement purported to terminate the agreement and forcefully ejected the Plaintiff's workmen from the building site by which date the Plaintiff had completed 63% of the construction. The Plaintiff further alleged that its invoices were not paid by the First Defendant and it has detained the Plaintiff's property, plant, machinery and equipment.

The First Defendant by its Statement of Defence alleged structural defects as the basis for the termination. The First Defendant denies that it has detained any of the Plaintiff's property.

The Plaintiff says that it relied on the Second Defendants inspection and reports for the construction of the First Defendant's terminal, as the Plaintiff had only proceeded in accordance with the structural integrity certificate issued by the Second Defendant.

Moreover, the Plaintiff says that in the event that the Plaintiff was in breach of the building contract with the First Defendant entitling the First Defendant to terminate the building contract such breach was due to breach of contract by the Second Defendant of the Contract between the Plaintiff and the Second Defendant.

The Plaintiff by its Statement of Claim alleged that the Second Defendant;

- Failed to properly draw up and provide plans for project.
- Failed to carry out proper instructions requiring rectification of any defective work.
- Failed to provide proper inspections to identify defects.

Therefore, the Plaintiff claims that it is entitled to the damages from the First and Second Defendant and indemnity from the Second Defendant from any claim the First Defendant may make against the Plaintiff.

The Second Defendant admits that it entered into an agreement with the Plaintiff. The Second Defendant says that;

- the Second Defendant's engineering work was limited to 'structural design' and ' structural work' inspections.
- the Second Defendant was not engaged to offer advice to the Plaintiff pertaining to proper construction of various stages of the project work.

- ❖ no approval was ever granted by the Second Defendant for faulty workmanship.

- ❖ **the termination of the agreement between the Plaintiff and the First Defendant occurred due to other issues and not matters involving the Second Defendant.**

- ❖ denies that it failed to give proper advice as required under the contract with the Plaintiff.

As I understand the Second Defendant's pleadings, the essence of the Defence is that the termination of the agreement between the Plaintiff and the first Defendant occurred due to other reasons and not matters involving the Second Defendant.

Does the **statement** at paragraph 3(b) of the Statement of Defence, (viz, *Haniff Tuitoga will refer to the agreement dated 30 June 2008 at the trial proper as to its true meaning and effect)* has any tendency to prove that the termination of the agreement between the Plaintiff and the 1st Defendant occurred due to other issues and not matters involving the Second Defendant?

How could this **Statement** provide a defence to the Plaintiff's Claim? Every pleading shall contain as concisely as may be a Statement of the material facts on which the party pleading relies.

A reasonable defence would mean a defence with some chance of success when only the allegations and pleadings are to be considered. (See; **Singh v Singh, 2014, FJHC 305**).

I am abundantly clear in my mind that the statement mentioned at paragraph 3(b) of the Statement of Defence is utterly immaterial. The paragraph 3(b) is clearly unnecessary because the Second Defendant is not going to ask any relief grounded on paragraph 3(b) of the Statement of Defence. The Statement is not relevant to any issue. I cannot help seeing that the Statement at paragraph 3(b) being unnecessary, frivolous and vexatious.

It is not for me to point out to the Second Defendant how it might frame its Statement of Defence. But this Court has a duty to discharge towards the public and the Solicitors, in taking care that its records are kept free from irrelevant matters.

Therefore, I must unhesitatingly order paragraph 3(b) of the Second Defendant's Statement of Defence to be expunged.

In paragraph 21 and 22 in the Statement of Defence, the Plaintiff is given a Notice of the Second Defendant's intention to request further and better particulars, set aside the exparte order of court dated 16th April 2015 and to amend the Statement of Defence.

I am totally at a substantial loss to understand how a notice of the Second Defendant's **intentions** have any tendency to prove that the termination of the agreement between the Plaintiff and the First Defendant occurred due to other issues and not matters involving the Second Defendant? .One word more, how could the intentions stated at paragraph 21 and 22 of the Statement of Defence provide a defence to the Plaintiff's Statement of Claim?

In my view, the Second Defendant's intentions are unnecessary because the Second Defendant is not going to ask any relief grounded on that.

I am quite clear that the Second Defendant's intentions stated at paragraph 21 and 22 of the Statement of Defence have no tendency to prove anything relevant to the case.
I cannot help seeing that the Second Defendant's intentions stated at paragraph 21 and 22 of the Statement of Defence being unnecessary, vexatious and frivolous.
It would be an abuse of the practice of the Court to permit such Statements to remain upon record.

All that I can do is to direct these Statements to be struck off the record of the Court.

The paragraph 23 of the Statement of Defence says that the action against the Second Defendant is statute barred. Order 18, rule 10 of the High Court Rules, 1988 provides;

'A party may by his pleading raise any point of Law'.

Therefore, there is no irregularity as to the contents of paragraph 23 of the Statement of Defence.

The paragraph 24 of the Statement of Defence says that the AK Lawyers should be restrained from acting for the Plaintiff and the Second Defendant intends to apply for a restraining Order because A.K. Lawyers have obtained certain information from the Second Defendant's director and there is real risk that this information may be used to the Second Defendant's detriment.

I am totally at a loss to understand, how could this **allegation** at paragraph 24 could provide a defence to the Plaintiff's Claim? The Second Defendant is not asking any relief grounded on paragraph 24 of the Statement of Defence.

The allegation at paragraph 24 of the Statement of Defence does not have any tendency to prove anything relevant to the case.

The allegation contained in paragraph 24 of the Statement of Defence does not have any tendency to prove that the termination of the agreement between the Plaintiff and the First Defendant occurred due to other issues and not matters involving the Second Defendant.

The Second Defendant has no right to say ' *I will keep this charge in my Statement of Defence, though I ask no relief in respect of it*'.

The charge is clearly unnecessary because the Defendant says that it is not going to ask any relief grounded on that allegation.

The charge is clearly scandalous because it would affect the honour and the character of the Plaintiff's solicitors.

I cannot help seeing that the charge is unnecessary and scandalous and moreover I think it tends to embarrass the fair trial of the action, because if it stands the Plaintiff's solicitors would be bound to bring evidence to support their contradiction of the charge.

All I can do is to direct paragraph 24 of the Statement of Defence to be struck off the record of the Court.

(8) Finally, the Plaintiff 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 empowers 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."

Is there any authority 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"*

I observed that the oral and written submissions of Counsel for the Plaintiff has addressed why *'indemnity costs'* should be awarded **in the current proceedings for striking out.**

Reference is made to paragraphs 5 and 6 of Vimal Deo's Affidavit sworn on 13th October 2015;

Para 5. *I am aware that despite being advised of the irregularities by a letter dated 2nd October 2015 from the Plaintiff's Solicitors the Second Defendant's have failed to amend their Defence and have caused the Plaintiff to file the current application. I produce a copy of letter dated 2nd October, 2015 marked "VD=-2".*

6. *The Plaintiff as it has been put to unnecessary costs/expenses and therefore seeks full solicitor client indemnity costs from the Second Defendant and seeks an order in terms of the application herein.*

Nevertheless, the Court has not been pointed to any ***"reprehensible conduct"*** in relation to the **current proceedings for striking out.** Indeed, as was set out 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 Second Defendant in relation to the present proceedings before me.

In my view, the Second Defendant has done no more than to exercise its legal right to contest the Plaintiff's action. The **over optimism** of the unsuccessful Second Defendant does not approach the degree of impropriety that needs to be established to justify indemnity costs. The Second Defendant is not guilty of any conduct deserving of condemnation as disgraceful or as an abuse of process of the court and ought not to be penalised by having to pay indemnity costs.

In the context of the present case, I am comforted by the rule of law enunciated in the following decisions;

In **Ranjay Shandill v Public Service Commission** [Civil Jurisdiction Judicial Review No:- 004 of 1996] Pathik J held;

> *"[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."*

In **Quancorp PVT Ltd &0020Anor v. MacDonald &Ors** [1999] WASC 101, Wheeler J held;

> *".... '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"

Furthermore, is it a correct exercise of the Court's discretion to direct the Second Defendant to pay costs on an indemnity basis to the Plaintiff because the Plaintiff has incurred costs and expenses and had undergone hardships during the present proceedings for striking out ?

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 incurring costs, expenses and the strain and the hardship the litigation imposed on the Plaintiff nor the **over optimism of the unsuccessful Second Defendant** would by themselves justify an award beyond party and party costs.

I keep well in my mind what was set out 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."

(E) ORDERS

(1) The paragraphs 3(b), 21, 22 and 24 of the Second Defendant's Statement of Defence filed on 30th September 2015 is struck off the record of the Court.

(2) The Plaintiff's application for indemnity costs is refused.

(3) The Second Defendant is to pay costs of $1000.00 (Summarily assessed) to the Plaintiff within 14 days hereof.

HIGH COURT OF FIJI LAUTOKA

03/03/2017

Jude Nanayakkara
Master

At Lautoka
03rd March 2017