IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 114 of 2022

BETWEEN:

JITENDRA NARAYAN SINGH
PLAINTIFF

AND:

JADISH NARAYAN SINGH aka JUGDEESH NARAYAN SINGH, INDIRA WATI and MADHUKAR NARAYAN SINGH
DEFENDANTS

AND:

REGISTRAR OF TITLES
NOMINAL 2ND DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSEL:
Babu Singh & Associates for the plaintiff
Cromptons Solicitors for the Defendants
Attorney General's Chamber for the Nominal 2nd Defendant

Date of Hearing:
No Hearing – Written Submission

Date of Ruling:
10th June 2024

RULING

01. There are two summonses pending before this Court for ruling.

I. Summons filed 09/11/2022 by the Plaintiff for leave to amend the Amended Writ of Summons and the Statement of Claim filed on 28/04/2022. This summons has been supported with the Affidavit of Jitendra Narayan Singh sworn on the 20/10/2022 as annexed to the affidavit of Sandhya Devi filed on the 09/11/2022.

II. Summons filed by the Defendant on the 07/03/2023 with the Affidavit in Support and Affidavit in Opposition of Jagdish Narayan Singh sworn on the 07/03/2023 as annexed to the affidavit of Taina Seruwaia filed on the 07/03/2023. This summons, in short, is seeking the following orders from the Court,

1) That the Plaintiffs action and the proposed amendment to the claim to be struck out and dismissed with costs pursuant to Order 18 Rule 18 (1) (a) to (d) of the High Court Rules.
2) If the Plaintiffs action is not struck out, then an order be granted for the Director of Lands to be added as a Defendant in this action pursuant to Order 15 Rule 6 (2) (b)
3) And an order that the Plaintiff give security for costs, to the satisfaction of the Court, on the ground that the Plaintiff is ordinarily resident out of jurisdiction

02. Both parties have filed and served their affidavits for and against the said summonses and upon the direction of the Court have filed comprehensive written submissions. Counsels for both the parties moved from Court to rule on both the summonses together in one ruling based on the affidavit evidence and the written submissions. The Court shall accordingly proceed to rule on both the above summonses as follows.

03. Pursuant to the Plaintiffs Affidavit in Support of the summons filed on the 09/11/2022, the Plaintiff has clearly outlined the proposed amendments and has also annexed a draft of the proposed Amended Writ and the Statement of Claim.

04. Pursuant to this affidavit, the proposed amendments are to correct some typographical errors in the Writ and the Statement of Claim (SOC) and to add and/or delete several paragraphs in the SOC to bring more clarity to the same. These paragraphs have been clearly outlined with the proposed amendments cited as against the current paragraphs in the SOC, in the said Supporting Affidavit of the Plaintiff.

05. The 1st named Defendant in his Affidavit in Support and Affidavit in Opposition sworn on the 07/03/2023 has submitted his objections to the Plaintiffs application for Leave to Amend the Writ and Statement of Claim at paragraph 12 of the said affidavit.

06. Paragraph 12 of the 1st named Defendant reads as follows,

> *"12. I refer the Affidavit in Support deposed by the Plaintiff on 20 October 2022 and annexed to the Affidavit of Sandhaya Devi filed on 9 November 2022 and say that amendments sought* (sic) *to be made as proposed do not prevail over the undeniable fact that the Plaintiff was not a citizen of Fiji at the time the lessor of the land, the Director of Lands, made a decision in accordance with the prevalent law."*

07. It is clear from the above paragraph in the Affidavit in Opposition of the 1st named Defendant that the objections to the Plaintiffs application to amend the Writ and the Statement of Claim is based generally on one of the grounds relied upon by the Defendant in support of his Striking Out application. The Court notes that there are, however, no specific objections submitted as against the proposed amendments.

08. Before coming to the Defendants summons filed on the 07/03/2023, I shall summarize the claim of the Plaintiff and the defence of the 1st named Defendant.

09. Plaintiff claims that the 1st named Defendant, the late Rajendra Narayan Singh are siblings and were beneficiaries of the estate of their father, late Shiu Narayan Singh. The estate of Shiu Narayan comprised of the property under the Crown Lease No. CL 1188 Lot1S1301. As per the last will of their father, the Plaintiff claims that the said property was to be equally shared among the three siblings.

10. The Plaintiff further claims that prior to the expiry of the lease for the said property, he had contacted the 1st named Defendant and had requested him to get the lease extended under all three siblings' name. However, the Plaintiff claims that when the lease had expired the Director of Lands had written to the parties that the lease cannot be extended in the name of a non-resident, as the Plaintiff was an Australian citizen, however, has advised that if the Plaintiff obtains dual citizenship, then the lease could be issued in his name too.

11. Plaintiff submits that without disclosing this fact to the Plaintiff, the 1st named Defendant had acted negligently and/or fraudulently and had colluded with the other sibling and had proceeded to obtain the renewed lease on the said property only under the names of the 1st named Defendant and the late Rajendra Narayan Singh.

12. Thus, the Plaintiff claims that he was negligently and/or fraudulently deprived of his interest in the said property and has accordingly brought this action for damages under negligence and fraud.

13. The reliefs sort as per the Plaintiffs Amended Statement of Claim are as follows:

(a) Special damages in the sum of $1,500.00;

(b) General damages for;

(i) Negligence

(ii) Fraud

(c) An order that the 1st Defendant is restrained from selling, transferring and or dealing whatsoever with the new State Lease 21097;

(d) An order for declaration that the Plaintiff is entitled to his shares/ interest of 1/3 in the Estate of Shiu Narayan Singh;

(e) An order that the Plaintiff is entitled to share in the new State Lease No. 21097;

(f) That the 1st Defendant is to provide to the Plaintiff all accounts in respect of the estate of Shiu Narayan Singh forthwith;

(g) That the Nominal Defendant register the Plaintiff as the owner of 1/3 share in the State Lease No. 21907; or

(h) Alternatively, cancel such State Lease No. 21907;

(i) Interest pursuant to (Miscellaneous Provisions) (Death and Interest) Cap 27;

(j) Indemnity Costs;

(k) Further or any other relief this Honourable Court deems just.

14. Pursuant to the Statement of Defence of the 1st named Defendant, it is stated that the estate property of late Shiu Narayan Singh was fully administered and distributed among the beneficiaries as joint owners of the said property. It is further claimed that the 1st named Defendant now holds no property in the capacity of an executor/trustee of the estate of late Shiu Narayan Singh.

15. It is further claimed by the 1st named Defendant that when the lease of the said property, Crown Lease No. CL1188 Lot 6 of Section 21, was to expire Messrs. Sherani & Company was acting on behalf of the Plaintiff and that the Plaintiff was aware of all the communications with the Director of Lands. He denies the allegations

of negligence and/or fraud and further submits that he was not acting as an agent or servant of the Plaintiff regarding the renewal of the said property.

16. It is also submitted by the 1st named Defendant that the Director of Lands refused to extend the lease on the said property in the name of the Plaintiff in accordance with the law, as he was at the time not a Fijian citizen.

17. Having thus summarized the claim and the defence in this cause, I shall now move on to consider the summons filed by the 1st named Defendant on the 07/03/2023. As per the application for Striking Out, the application has been made pursuant to Order 18 Rule 18 (1) (a), (b), (c) and (d) on the following grounds.
    a) That it discloses no reasonable cause of action.
    b) Is scandalous, frivolous and/or vexatious.
    c) That it prejudices, embarrass, or delay the fair trial.
    d) Is otherwise an abuse of the process of the court.

18. 1st named Defendant submits that as the subject property is no longer an estate property of the late Shiu Narayan Singh, owing to the fact that the estate was fully administered and distributed among the beneficiaries, the Plaintiff now has no legal interest as a beneficiary of the same.

19. It is further submitted that the said property was owned by all three siblings after it was fully administered and distributed among the three siblings pursuant to the will of their father, and the lease on the said property expired afterwards. As such the Plaintiff is solely responsible for having the lease extended on his share of the property as a joint owner.

20. Moreover, the 1st named Defendant has submitted that at the time of the renewal of the lease, the Plaintiff was not a Fiji citizen and thus he could not legally obtain a lease under his name on the said property.

21. Furthermore, it is submitted that the Plaintiff was, at all material times, represented by a solicitor, namely Sherani & Co., and thus he was aware of all the communications between the Director of Lands and the parties regarding the said property. Thus, it is submitted that there's no basis for the allegations of negligently and/or fraudulently withholding any communications from the Director of Lands from the Plaintiff.

22. Based on the above facts, the 1st named Defendant argues that the Plaintiff has no cause of action against him and that further this action is frivolous, vexatious and or otherwise an abuse of process of the court.

23. The Plaintiff has submitted that these facts, as submitted by the 1st named Defendant, relate to triable issues between the parties and thus opposes the application for the striking out, based on affidavit evidence.

24. The 1st named Defendant, in the alternative, has moved from Court, if the application for striking out is not successful, to have the Director of Lands joined as a Defendant in these proceedings as the lessor of the subject land is the Director of Lands.

25. Moreover, the 1st named Defendant has moved for security for costs based on the grounds that the Plaintiff is ordinarily resident out of jurisdiction.

26. In response to the above applications for joinder of the Director of Lands and for security for costs the Plaintiff has submitted that he has no claim against the Director of Lands and hence there is no necessity to join the Director of Lands as a defendant in the case.

27. It is further submitted by the Plaintiff that he is agreeable to provide security for costs at the rate of $ 5000.00 in the matter.

28. I shall consider the law relating to the amendment of pleadings pursuant to Order 20 of the High Court Rules.

29. It should first be noted here that as observed at paras 5 to 7 of this ruling, this Court finds that the objections by the 1st named Defendant over the application for amendment of the writ and the statement of claim is generally based on the grounds of the striking out application and there are no specific objections on the same.

30. Order 20 rule 5 of the High Court Rules provides for the court's power to grant leave to amend the pleadings. The Plaintiff filed its instant summons under this rule. The rule provides:

> *"Subject to Order 15, Rule 6, 8 and 9 and the following provisions of this rule, the Court may at any stage of the proceedings allow the Plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."*

31. The above rule in its plain meaning gives a broad discretion to the court to allow amendment of pleading at any stage of proceedings, and such discretion should be exercised in accordance with the well-settled principles. I shall consider the settled principles of law in this regard and for clarity highlight some of the well noted cases forthwith.

32. **Lord Keith of Kinkel** delivering the opinions of the House of Lords in ***Ketteman and others v Hansel Properties Ltd*** *[1988] 1 All ER 38***,** held at page 48 that:

> *"Whether or not a proposed amendment should be allowed is a matter within the discretion of the judge dealing with the application, but the discretion is one that falls to be exercised in accordance with well-settled principles".*

33. The court should be guided by its assessment of where justice lies when exercising this discretion in each case. **Lord Griffiths,** in that above case, concurring with **Lord Keith of Kinkel,** held at page 62**.**

> *"Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so".*

34. There are several authorities that set out the guiding principles on the question of amendment. See **Jenkins L. J.** *in* ***R. L. Baker Ltd v Medway Building & Supplies Ltd*** *[1958] 3 All E.R. 540. P. 546).*

> *"I repeat the second half of the rule "and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." I do not read the word "shall" there as making the remaining part of the rule obligatory in all circumstances, but there is no doubt whatever that it is a guiding principle of cardinal importance on this question that, generally speaking, all such amendments ought to be made "as may be necessary for the purpose of determining the real questions in controversy between the parties."* (Underlining added).

35. The courts and the tribunals exist for the very purpose of deciding the rights of the parties in each case. The duty that casted on them is to decide the matters in controversy between the parties. It, therefore, follows that all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. See **Bowen L.J.** in ***Cropper v. Smith****(1883)26 Ch. D. 700* stated at pages 710 and 711.

36. The practice of Bramwell L.J., which His Lordship expressly mentioned in ***Tildesley v. Harper*** *(1878) 10 Ch. D. 393*, at pages 396 and 397, clearly sets the principle that can guide the court in exercising the discretion on amendment of pleading. His Lordship held that:

> *"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by this blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise."*

37. When exercising the discretion, the court is bound to look into the injury or the injustice that the proposed amendment may cause to the other party, irrespective of the delay that can be compensated through the appropriate cost. "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs" (per Brett M.R.in ***Clarapede v. Commercial UnionAssociation*** *(1883) 32 WR 262, p263*).

38. However, the overall assessment of where justice lies should be guiding the court in exercising the discretion on amendment. There are many diverse factors to be considered in this regard, and it should be noted that, justice cannot always be measured in terms of money and the cost and the time of application too, be considered, the rule allows the application at any stage of the proceeding, because it is the discretion in any event.

39. **LORD BRANDON OF OAKBROOK,** in the case of ***Ketteman and others v Hansel Properties Ltd (supra)*** having analyzed the authorities, summarized the proposition and stated at page 56 as follows:

> *The effect of these authorities can, I think, be summarised in the following four propositions. First, all such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided. Second, amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Third, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourth, there is no injustice to the other party if he can be compensated by appropriate orders as to costs.*

40. The Supreme Court Practice of 1999, under the heading **'General principles for grant of leave to amend'** at page 379, summarized the principles developed by the English courts on the amendment of pleadings. These principles have, frequently, been applied by the courts in Fiji in exercising the discretion on amendment of pleading (see: **National Bank of Fiji v Naicker [2013] FJCA 106; ABU0034.2011 (8 October 2013); Colonial National Bank v Naicker,**[2011] FJHC 250; HBC 294. 2003 (6 May 2011)).

41. The Fiji Court of Appeal in ***Reddy Construction Company Ltd v Pacific Gas Company Ltd*** *[1980] FJLawRp 3; [1980] 26 FLR 121 (27 June 1980),* succinctly summarized the test applicable and held that:

> *"The primary rule is that leave may be granted at any time to amend on terms if it can be done without injustice to the other side. The general practice to be gleaned from reported cases is to allow an*

amendment so that the real issue may be tried, no matter that the initial steps may have failed to delineate matters. Litigation should not only be conclusive once commenced, but it should deal with the whole contest between the parties, even if it takes some time and some amendment for the crux of the matter to be distilled. The proviso, however, that amendments will not be allowed which will work an injustice is also always looked at with care. So in many reported cases we see refusal to amend at a late stage particularly where a defence has been developed and it would be unfair to allow a ground to be changed".

42. Again, in ***Sundar v Prasad*** *[1998] FJCA 19; Abu0022u.97s (15 May 1998)* the Fiji Court of Appeal further emphasized the test and stated how the balance to be made between the interest of the party seeking the amendment and the other side which incurs the cost. The Court unanimously held that:

> *Generally, it is in the best interest of the administration of justice that the pleadings in an action should state fully and accurately the factual basis of each party's case. For that reason amendment of pleadings which will have that effect are usually allowed, unless the other party will be seriously prejudiced thereby (G.L. Baker Ltd. v. Medway Building and Supplies Ltd [1958] 1 WLR 1231 (C.A.)). The test to be applied is whether the amendment is necessary in order to determine the real controversy between the parties and does not result in injustice to other parties; if that test is met, leave to amend may be given even at a very late stage of the trial (Elders Pastoral Ltd v. Marr (1987) 2 PRNZ 383 (C.A.)). However, the later the amendment the greater is the chance that it will prejudice other parties or cause significant delays, which are contrary to the interest of the public in the expeditious conduct of trials. When leave to amend is granted, the party seeking the amendment must bear the costs of the other party wasted as a result of it.*

43. The proposed amendment is to bring more clarity to the pleadings in the Statement of Claim and further to correct typographical errors in the Writ. This in my view shall necessarily assist in deciding the issues between the parties. The facts alleged in the said amendments in fact are questions of fact to be decided by way of evidence in a proper trial and will certainly help the parties in deciding their issues.

44. In my view, the said amendments shall not prejudice the Defendant as his position can be properly dealt with in the trial. If the amendment is allowed, it shall not cause injustice to the Defendant, as the Defendant does have the right to amend his Statement of Defence, if this proposed amendment to the Statement of Claim is allowed.

45. I shall now consider the law relating to striking out a cause pursuant to Order 18 Rule 18 (1) of the High Court Rules 1988.

46. Order 18 Rule 18 (1) of the High Court Rules 1988 reads as follows.

Striking out pleadings and indorsements (O.18, r.18)

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.

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

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

47. Master Mohamed Azhar, in the case of **Veronika Mereoni v Fiji Roads Authority:** HBC 199/2015 [Ruling; 23/10/2017] has succinctly explained the essence of this Rule in the following words.

"At a glance, this rule gives two basic messages, and both are salutary for the interest of justice and encourage the access to justice which should not be denied by the glib use of summery procedure of pre-emptory striking out. Firstly, the power given under this rule is permissive which is indicated in the word "may" used at the beginning of this rule as opposed to mandatory. It is a "may do" provision contrary to "must do" provision. Secondly, even though the court is satisfied on any of those grounds mentioned in that rule, the proceedings should not ***necessarily*** *be struck out as the court can, still, order for amendment. In* ***Carl Zeiss Stiftung v Rayner & Keeler Ltd*** *(No 3) [1970] Ch. 506, it was held that the power given to strike out any pleading or any part of a pleading under this rule is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea.* ***MARSACK J.A.*** *giving concurring judgment of the Court of Appeal in* ***Attorney General v Halka [1972] FJLawRp 35; [1972] 18 FLR 210 (3 November 1972)*** *held that:*

"Following the decisions cited in the judgments of the Vice President and of the Judge of the Court below I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 Rule 19 should be very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised".

48. Pursuant to Order 18 Rule 18 (2), no evidence shall be admissible upon an application under Order 18 Rule 18 (1) (a), to determine if any pleading discloses no reasonable cause of action or defence. No evidence is admissible for this ground for the obvious reason that, the court can conclude absence of a reasonable cause of action or defence merely on the pleadings itself, without any extraneous evidence. His Lordship the

Chief Justice A.H.C.T. GATES (as His Lordship then was) in ***Razak v Fiji Sugar Corporation Ltd*** ***[2005] FJHC 720; HBC208.1998L (23 February 2005)*** held that:

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

49. Citing several authorities, Halsbury's Laws of England (4th Edition) in volume 37 at para 18 and page 24, defines the reasonable cause of action as follows:

"A reasonable cause of action means a cause of action with some chance of success, when only the allegations in the statement of case are considered" Drummond-Jackson v British Medical Association [1970] 1 ALL ER 1094 at 1101, [1970] 1 WLR 688 at 696, CA, per Lord Pearson. See also Republic of Peru v Peruvian Guano Co. (1887) 36 ChD 489 at 495 per Chitty J; Hubbuck & Sons Ltd v Wilkinson, Heywood and Clark Ltd [1899] 1 QB 86 at 90,91, CA, per Lindley MR; Hanratty v Lord Butler of Saffron Walden (1971) 115 Sol Jo 386, CA.

50. Given the discretionary power the court possesses to strike out under this rule, it cannot strike out an action for the reasons it is weak, or the plaintiff is unlikely to succeed, rather it should obviously be unsustainable. His Lordship the Chief Justice A.H.C.T. GATES in ***Razak v Fiji Sugar Corporation Ltd*** (supra) held that:
"The power to strike out is a summary power "which should be exercised only in plain and obvious cases", where the cause of action was "plainly unsustainable"; Drummond-Jackson at p.1101b; A-G of the Duchy of Lancaster v London and NW Railway Company [1892] 3 Ch. 274 at p.277."

51. It was held in ***Ratumaiyale v Native Land Trust Board*** ***[2000] FJLawRp 66; [2000] 1 FLR 284 (17 November 2000)*** that:
*"It is clear from the authorities that the Court's jurisdiction to strike out on the grounds of no reasonable cause of action is to be used sparingly and only where a cause of action is obviously unsustainable. It was not enough to argue that a case is weak and unlikely to succeed, it must be shown that no cause of action exists (**A-G v Shiu Prasad Halka** [1972] 18 FLR 210; **Bavadra v Attorney-General** [1987] 3 PLR 95. The principles applicable were succinctly dealt by Justice Kirby in **London v Commonwealth [No 2]** 70 ALJR 541 at 544 - 545.*

52. The Plaintiff in this case has raised two causes of actions in his Amended Statement of Claim, that of negligence and fraud. Plaintiff submits that the 1st named Defendant, though a co-owner of the subject land, negligently and/or fraudulently withheld information that, for the Plaintiff to have his lease extended for the share of the co-owned subject land, that he needed to obtain the dual citizenship for him to be identified as a Fiji citizen.

53. The 1st named Defendant has denied the above causes of action. However, the facts submitted by the 1st named Defendant in support of this striking out application are

disputed facts that can only be tested at a trial in proper via evidence. I do not find that any of the facts submitted by the 1st named Defendant, in support of this application, could render the Statement of Claim to be struck out pursuant to Order 18 Rule 18 (1) of the High Court Rules, summarily on untested affidavit evidence.

54. Especially, regarding the ground of no reasonable cause of action, pursuant to Order 18 Rule 18 (1) (a) of the High Court Rules, it should be noted that the evidence required to prove a cause of action and the particulars shall not matter at this stage of the case and shall not certainly be relevant under Order 18 Rule 18 (2) of the High Court Rules 1988. The evidence shall be considered only at a proper trial alone.

55. I therefore find that the first ground relied upon by the 1st named Defendant in the application for Striking Out is not made out and necessarily fails pursuant to the foregoing discussions.

56. If the statement of claim or defence contains degrading charges which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (see: **The White Book** Volume 1 (1999 Edition) at para 18/19/15 at page 350). Likewise, if the proceedings were brought with the intention of annoying or embarrassing a person or brought for collateral purposes or irrespective of the motive, if the proceedings are obviously untenable or manifestly groundless as to be utterly hopeless, such proceedings becomes frivolous and vexatious (per: Roden J in **Attorney General v Wentworth** (1988) 14 NSWLR 481, said at 491).

57. In The **White Book** in Volume 1 (1987 Edition) at para 18/19/14 states that:

> *"Allegations of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the issue (Everett v Prythergch (1841) 12 Sim. 363; Rubery v Grant (1872) L. R. 13 Eq. 443). "The mere fact that these paragraphs state a scandalous fact does not make them scandalous" (per Brett L.J. in Millington v Loring (1881) 6 Q.B.D 190, p. 196). But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (Blake v Albion Assurance Society (1876) 45 L.J.C.P. 663)".*

58. On the other hand, if the action is filed without serious purpose and having no use, but intended to annoy or harass the other party, it is frivolous and vexatious. Roden J in **Attorney General v Wentworth** (1988) 14 NSWLR 481, said at 491 that:

> *1. Proceedings are vexatious if they instituted with the intention of annoying or embarrassing the person against whom they are brought.*

2. *They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.*

3. *They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.*

59. In Halsbury's Laws of England (4th Ed) Vol. 37 explains the abuse of process in para 434 which reads:

"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 endorsement 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 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 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."

60. Master Azhar, in the case of **Veronika Mereoni v Fiji Roads Authority** (Supra) has stated,

"Fair trial is fundamental to the rule of law and to democracy itself. The right to fair trial applies to both criminal and civil cases, and it is an absolute which cannot be limited. It requires a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Thus, the courts are vested with the power to strike out any such proceeding or claim which is detrimental to or delays the fair trial. Likewise, the rule of law and the natural justice require that, every person has access to the justice and has fundamental right to have their disputes determined by an independent and impartial court or tribunal".

61. In this regard, the Court, having carefully considered all affidavit evidence of the parties, does not find the Statement of Claim or any part thereof to fall within the definitions of scandalous, frivolous, or vexatious.

62. Neither do I find that the claim of the Plaintiff to be an abuse of process, especially on the untested affidavit evidence available before this court. Moreover, there is no facts to establish that the Statement of Claim or any part thereof prejudices, embarrass, or delay the fair trial of the action.

63. I do find that there are triable issues between the Plaintiff and the Defendants. Thus, I conclude that the Defendants have not been able to pass the threshold for allowing an application to strike out the Statement of Claim pursuant to Order 18 Rule 18 (1) of the High Court Rules 1988.

64. Now coming to the application for the joinder of the Director of Lands, it is clear that the claim of the Plaintiff is based on a lease issued by the Director of Lands. The prayers of the Plaintiff as per the Amended Statement of Claim clearly overlap with the rights of the Director of Lands as the Lessor of the subject land.

65. Though the Plaintiff may not have a direct claim against the Director of Lands, the outcome of the case shall, no doubt, affect the rights of the Director of Lands as the lessor of the subject land. As such it is clear that the Director of Lands becomes an interested party in this cause.

66. The application is made under Order 15, Rule 6 of the High Court Rules, as amended, Rule 6 (2) (b) provides, (so far as relevant),

"Misjoinder and nonjoinder of parties

(2) Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application–

(a)...;

(b) order any of the following persons to be added as a party, namely–

(i) ***any person who ought to have joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon****, or*

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter". (Emphasis added)

67. In the case of ***Varo v iTaukei Land Trust Board****; HBJ5.2017 (24 June 2019),* Justice Ajmeer (as he then was) stated thus,

*"**Meaning of interested party***

[08] The intended party wishes to be added in the proceedings as an interested party. As such, it is important to understand the meaning of interested party.

[09] Interested party is defined as any person (other than the claimant and the defendant) who is directly affected by the claim.

[10] The meaning of persons 'directly affected' was considered by the House of Lords in R v Rent Officer Service, ex parte Muldoon [1996] 1 WLR 1103 and suggested (by Lord Keith of Kinkel at p.1105), 'That person is directly affected by something connotes that he is affected without intervention of any intermediate agency."

68. In the above legal context, I find that the Director of Lands is certainly an interested party in this cause and as such should necessarily be named an interested party in the Statement of Claim and all proceedings should be served on the Director of Lands.

69. In considering the application for security for costs, it needs to be stressed that the Plaintiffs position that this application should have been made by way of a separate summons is misconceived in law. Although it would have been desirable to have a separate summons in this regard and to have it considered separately, there is no rule in the High Court Rules 1988 or any other provision of law which prevents such application be made coupled with other interlocutory applications. I therefore reject this contention of the Plaintiff.

70. Order 23 of the High Court Rules, which contains 4 rules therein, provides for the discretion of the court to order to provide security for cost and deals with other connected matters. Whilst rule 1 deals with the discretion of the court, the other rules 2 and 3 deal with the manner in which the court may order security for cost and supplementary power of the court. The rule 4 prohibits any such order being made against the state. The rule 1 reads as follows:

Security for costs of action, etc (O.23, r.1)

1.-(1) Where, on the application of a defendant to an action or other proceedings in the High Court, it appears to the Court –

(a) that the plaintiff is ordinarily resident out of the jurisdiction, or

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a normal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or

(c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or

(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,

> *Then, if having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.*
>
> *(2) The court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the Court that the failure to state his address or the misstatement thereof was made innocently and without intention to deceive.*
>
> *(3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.*

71. This rule clearly indicates that, the power given to the court is a real discretion, which is simply understood from the word *'may',* used in the said rule. Lord Denning M.R. when interpreting the same word used in the Companies Act 1948 held in **Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd** [1973] 2 All ER 273 at 285 that;

> *Turning now to the words of the statute, the important word is "may". That gives a judge a discretion whether to order security or not. There is no burden one way or other. It is a discretion to be exercised in all the circumstances of the case.*

72. The next important phrase in that rule is '*if having regard to all the circumstances of the case, the Court thinks it just to do so',* which requires the court to consider all the circumstances of the case before it, in exercising the said discretion and to come to a conclusion that '*it is just to do so*', before making any order and determine, whether and to what extent or for what amount a plaintiff (or the defendant as the case may be) may be ordered to provide security for costs. Sir Nicolas Browne Wilkinson V.C in **Porzelack K G v. Porzelack (UK) Ltd**, (1987) 1 All ER 1074 at page 1077 as follows:

> *"Under Order 23, r1(1) (a) it seems to me that I have an entirely general discretion either to award or refuse security, having regard to all the circumstances of the case. However, it is clear on the authorities that, if other matters are equal, it is normally just to exercise that discretion by ordering security against a non-resident plaintiff. The question is what, in all the circumstances of the case, is the just answer".*

73. Accordingly, it is no longer an inflexible or rigid rule that a Plaintiff/Defendant resident abroad should provide security for costs. **The Supreme Court Practice 1999** (White Book), in Volume 1 at pages 429 and 430, and in paragraph 23/3/3, states clearly and explains the nature of the discretion given to the court. it reads that;

> *The main and most important change effected by this Order concerns the nature of the discretion of the Court on whether to order security*

for costs to be given. Rule 1 (1) provides that the Court may order security for costs, "if having regard to all the circumstances of the case, the Court thinks it just to do so". These words, have the effect of conferring upon the Court a real discretion, and indeed the Court is bound, by virtue thereof, to consider the circumstances of each case, and in the light thereof to determine whether and to what extent or for what amount a plaintiff (or the defendant as the case may be) may be ordered to provide security for costs. It is no longer, for example, an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. In particular, the former O.65, r.6s, which had provided that the power to require a plaintiff resident abroad, suing on a judgment or order or on a bill of exchange or other negotiable instrument, to give security for costs was to be in the discretion of the Court, has been preserved and extended to all cases by r.1 (1).

In exercising its discretion under r.1 (1) the Court will have regard to all the circumstances of the case. Security cannot now be ordered as of course from a foreign plaintiff but only if the Court thinks it just to order such security in the circumstances of the case.

74. Master Azhar, in the case of **MEGAN BAILIFF v VILIMAINA TUIVUNA and Another; Lautoka HC Case HBC 28/2016 (Ruling; 25 September 2018)** has succinctly identified the principles in considering an application for security for costs having extensively considered the rules of the court and the authorities in this regard.

"*However, given the discretionary power expected to be exercised by courts with judicial mind considering all the circumstances of a particular case, these principles should not be considered to be exhaustive.*

a. *Granting security for cost is a real discretion and the court should have regard to all the circumstances of the case and grant security only if it thinks it just to do so (**Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd** [1973] 2 All ER 273; **Porzelack K G v. Porzelack (UK) Ltd** (1987) 1 All ER 1074.*

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

c. *Application for security may be made at any stage (**Re Smith** (1896) 75 L.T. 46, CA; and see **Arkwright v. Newbold** [1880] W.N. 59; **Martano v Mann** (1880) 14 Ch.D. 419, CA; **Lydney, etc. Iron Ore CO. v. Bird** (1883) 23 Ch.D. 358); **Brown v. Haig** [1905] 2 Ch. 379. Preferably, the application for security should be made promptly (**Ravi Nominees Pty Ltd v Phillips Fox** ((1992) 10 ACLC 1314 at page 1315).*

d. *The delay in making application may be relevant to the exercise of discretion; however, it is not the decisive factor. The prejudice that may be caused to the plaintiff due to delay will influence the court in exercising its discretion (**Jenred Properties Ltd v. Ente Nazionale Italiano per il Tuismo** (1985) Financial Times, October 29, CA; **Ross Ambrose Group Pty Ltd v Renkon Pty Ltd** [2007] TASSC 75; **Litmus Australia Pty Ltd (in liq) v Paul Brian Canty and Ors** [2007] NSWSC 670 (8 June 2007).*

*e. The purpose of granting security for cost is to protect the defendant and not to put the plaintiff in difficulty. It should not be used oppressively so as to try and stifle a genuine claim (**Corfu Navigation Co. V. Mobil Shipping Co. Ltd** [1991] 2 Lloyd's Rep. 52; **Porzelack K G v. Porzelack (UK) Ltd** (1987) 1 All ER 1074. Denial of the right to access to justice too, should be considered (**Olakunle Olatawura v Abiloye** [2002] 4 All ER 903 (CA)).*

*f. It may be a denial of justice to order a plaintiff to give security for the costs of a defendant who has no defence to the claim (**Hogan v. Hogan** (No 2) [1924] 2 Ir. R 14). Likewise, order for security is not made against the foreign plaintiffs who have properties within the jurisdiction (**Redondo v. Chaytor** (1879) 40 L.T. 797; **Ebbrard v. Gassier** (1884) 28 Ch.D. 232).*

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

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

*h. The prospect of success, admission by the defendants, payment to the court, open offer must be taken into account when exercising the discretion. However, the attempt to reach settlement and "without prejudice" negotiations should not be considered (**Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd** (supra); **Simaan Contracting Co. v. Pilkingoton Glass Ltd** [1987] 1 W.L.R. 516; [1987] 1 All E.R. 345).*

*i. In case of a minor the security for cost will be awarded against the parent only in most exceptional cases (**Re B. (Infants)** [1965] 2 All E.R. 651)".*

75. It is not denied by the Plaintiff that he is ordinarily residing out of the jurisdiction, specifically in Australia. It is also noted that the Plaintiff has not opposed the application for security for costs. As such, the Court finds that security for costs must be ordered having regard to all the circumstances of this case.

76. In the outcome, this Court makes the following orders.

1. The Summons by the Plaintiff, filed on the 09/11/2022 for amendment of the Amended Writ of Summons and the Statement of Claim, is hereby allowed.

2. The Summons filed by the 1st named Defendant on the 07/03/2023 is partially allowed subject to the following orders,

    I. The application for Strike Out as prayed for by the 1st named Defendant in his summons filed on the 07/03/2023 is refused and hereby struck out and dismissed.

II. The application for joinder of the Director of Lands is hereby allowed and the Plaintiff is directed to add the Director of Lands as an 'Interested Party' to this cause and all pleadings shall forthwith be served on the Interested Party.

III. The application for security for costs is hereby allowed and the Plaintiff shall pay into Court a sum of $ 15000.00 as security for costs within 14 days from the date of this Ruling (That is by 24/06/2024).

IV. In failure to deposit the security for costs as ordered above, all proceedings in this cause shall be stayed forthwith.

3. Plaintiff shall serve a copy of this Ruling on the Interested Party with the sealed copy of the orders within 07 days of the date of this Ruling (That is by 19/06/2024).

4. Subject to the above orders the Plaintiff shall file and serve on all parties an Amended Writ of Summons and Statement of Claim within 21 days from today (That is by 01/07/2024) on the Defendants and as well as on the Interested Party.

5. The 1st named Defendant, upon being served with the Amended Writ of Summons and Statement of Claim, shall thereupon file and serve an Amended Statement of Defence 14 days after (That is by 15/07/2024).

6. The Interested Party shall be at liberty to file a Statement of Defence within 14 days from the date of service of the Amended Writ of Summons and the Statement of Claim on the Interested Party.

7. This cause shall be mentioned before the Court on the 02/09/2024.

8. 14 days prior to the next call date of this case, the Plaintiff shall file and serve Summons for Directions (That is by 19/08/2024).

9. Costs of the proceedings into both the summons shall be costs in the cause.

HIGH COURT OF FIJI SUVA

L. K. Wickramasekara,
Acting Master of the High Court.

At Suva,
10/06/2024.