**IN THE HIGH COURT OF FIJI**
**AT SUVA**
**CIVIL JURISDICTION**

**Civil Action No. HBC 140 of 2019 [LTK]**

**BETWEEN**:

**PAUL PHILIPS**
***PLAINTIFF***

**AND**:

**RENDEZVOUS BEACH RESORT LIMITED**
***1ST DEFENDANT***

**AND**:

**SALTWATER SPORTS COMPANY LIMITED**
***2ND DEFENDANT***

**AND**:

**FIRST DIVERS LIMITED**
***3RD DEFENDANT***

**AND**:

**RATOGO HOLDINGS LIMITED**
***4TH DEFENDANT***

**AND**:
**I-TAUKEI LAND TRUST BOARD**
***5TH DEFENDANT***

**AND**:

**BENJAMIN SEDUADUA**
***6TH DEFENDANT***

**AND**:

**THE DIRECTOR OF LANDS**
***7TH DEFENDANT***

**AND**:

**ATTORNEY GENERAL OF FIJI**
***8TH DEFENDANT***

**AND**:

**SAGACITY INVESTMENT PTE LIMITED**
***9TH DEFENDANT***

**BEFORE**:

Acting Master L. K. Wickramasekara

**COUNSELS**:

Parshotam Lawyers for the Plaintiff
Toganivalu Legal for the 1st, 2nd, 3rd, 4th and 6th Defendants
Legal Department of the I-Taukei Land Trust Board for the 5th Defendant
Office of the Attorney General for the 7th and 8th Defendants
Siwatibau and Sloan for the 9th Defendant
Kumar Legal for the Intended 10th and 11th Defendants
Emmanuel Lawyers for the Intended 12th and 13th Defendants

**Date of Hearing**:

By way of Written Submissions

**Date of Ruling**:

24th March 2025

# RULING

01. There are two pending Summons before this Court as filed by the 1st to 4th and 6th Defendants (The Applicant), seeking various orders. The first summons is filed on 29/02/2024 and the other on 18/04/2024.

02. Summons filed on 29/02/2024 seek the following orders,

> *"1. That this application be returnable instanter;*
>
> *2. An order that leave be granted to the 1st,2nd, 3rd, 4th, and 6th Defendants to join Denyse McPhail, Bluewater Real Estate (Fiji) Limited t/a Harcourts, Vinit Singh, and Parshotam Lawyers, into this proceeding as the 10th, 11th, 12th, and 13th Defendants respectively;*
>
> *3. An order that the costs of this application be costs in the cause; and*
>
> *4. Such further or other orders this Honourable Court deems just and fair in the circumstances."*

03. This summons has been supported with an Affidavit of Benjamin Seduadua, the 6th Defendant, as sworn on 28/02/2024.

04. Summons filed on 18/04/2024 seek the following orders,

> *"1. That this application be returnable instanter;*
>
> *2. An order that leave be granted to the 1st,2nd, 3rd, 4th, and 6th Defendants amend their Statement of Defence and Counter Claim that was filed on the 16th of October 2019;*
>
> *3. An order that the Plaintiff's Statement of Claim filed on the 7th of June 2019 be struck out with indemnity costs ordered against the same;*
>
> *4. Alternatively, to Order 3, An order for Security for Costs against the Plaintiff;*
>
> *5. An order that the costs of this application be paid by the Plaintiff; and*
>
> *6. Such further or other orders this Honourable Court deems just and fair in the circumstances."*

05. This summons too has been supported with an Affidavit of Benjamin Seduadua, the 6th Defendant, as sworn on 17/04/2024.

06. The intended 10th to 13th Defendants opposed the summons for 'Joinder' and with leave of the Court, they have filed Affidavits in Opposition to the same and the Applicant has filed Affidavits in Reply accordingly.

07. The Plaintiff has also objected to the Summons for 'Amendment of the Statement of Defence and Counter Claim' and other orders and has accordingly filed an Affidavit in Opposition to the same and the Applicant has filed an Affidavit in Reply thereupon.

08. As per directions of the Court, all the parties filed written submissions on these applications. This Court, having considered all the facts and submissions of the parties, now proceeds to make its ruling as follows.

09. The Plaintiff's claim is for an order for 'specific performance' of a sales and purchase agreement that was entered between the Applicant (1st to 4th and the 6th Defendants) and the Plaintiff over several properties owned by the Applicant on 19/07/2018. The intended 10th and 11th Defendants were the real estate agents employed by the Applicant to deal with these properties.

10. Whilst dealing with the sale of the said properties, the Plaintiff has come forth as a potential buyer and a sales and purchase agreement (dated 19/07/2018) was drawn up between the parties. As per the available Affidavit evidence before this Court, both the parties had independent legal counsel advising them over the legal matters pertaining to the potential sale and the sales and purchase agreement.

11. Although this sales and purchase agreement was, admittedly, signed between the parties, the Applicant claims that due to an unauthorized amendment to the agreement (clause 32 of the said sales and purchase agreement dated 19/07/2018) and subsequent dealings regarding amendments to terms and conditions of the sale and the associated delays over the potential sale, led the Applicant to eventually cancel the potential sale and the said agreement over the subject properties.

12. Upon the above prospective sale falling out, the Plaintiff, through his then legal counsel, had lodged 'caveats' against the properties that were the subject of the above sales and purchase agreement. The Applicant, through his former legal counsel, at a later stage, had managed to have these caveats removed.

13. The Plaintiff, thereafter, had instituted this proceeding through his current solicitors. Whilst the matter was pending before the Lautoka High Court for pre-trial steps, the Plaintiff had filed Summons for Injunctive Orders regarding the properties subjected to the sales and purchase agreement. It is evident from the Applicants' own

admission, as per the facts averred in the Affidavit in Support, that the Court had allowed time for the Applicant to file any opposition to these orders, but the Applicant had failed to do so, besides being duly represented by legal counsel. Accordingly, on 26/10/2020, the Court had granted the injunctive orders sought by the Plaintiff on an unopposed basis.

14. The Applicant now claims that he had no knowledge of the said injunctive orders as the orders were not sealed till 17/12/2021. However, by this time, the Applicant claims that there was a separate sales and purchase agreement over the subject properties entered into with the 9th Defendant and according to the said agreement, the sale of the subject properties was completed in December 2021, between the Applicant and the 9th Defendant.

15. The Applicant, whilst making the current summonses, holds the position that the intended 10th to 13th Defendants have made fraudulent misrepresentations, acted with intent to defraud, acted without having made any considerations and further, that the intended 10th and 11th Defendants have conspired to defraud/injure the Applicant by unlawful means (breach of fiduciary duty, secret profits, and dishonest assistance).

16. It is to be noted at this point that the intended 12th and 13th Defendants are the current solicitors for the Plaintiff, and that the basis on which the above allegations are being leveled against the 12th and 13th Defendants appears to be that they, whilst allegedly being aware of the initial sales and purchase agreement between the Plaintiff and the Applicant being fraudulent, had nevertheless pursued the current legal action against the Applicant.

17. It is also to be noted that the orders sought to amend the Statement of Defence, and the Counter Claim relates to the above allegations brought against the intended 10th to 13th Defendants.

18. The basis on the application to strike out the Plaintiff's claim is being made on the grounds that the Plaintiff failed to pay any consideration over the sales and purchase agreement dated 19/07/2018 and has made unauthorized amendments that were disapproved by the Applicant rendering the said agreement an anomaly which in turn makes the claim of the Plaintiff an abuse of the process of the Court.

19. In view of the alternate application for Security for Costs, the ground advanced by the Applicant is that the Plaintiff is ordinarily resident outside the jurisdiction of Fiji. It is further submitted that since the Plaintiff resides outside the jurisdiction of Fiji, it shall be difficult for the Applicant to have any costs orders enforced against the Plaintiff.

20. In opposing these summonses, the intended Defendants have raised a preliminary objection against the 6th Defendant deposing the Affidavit in Support on behalf of the 1st to 4th Defendants without proper authorization from them to do so.

21. However, the Court notes that these summonses have been filed on behalf of the 1st to 4th and the 6th Defendants as the Applicant. Thus, the 6th Defendant, in the given circumstances, being part and parcel of the Applicant, clearly has the colour of right to depose an Affidavit supporting the said summonses. Furthermore, it is evident from the available affidavit evidence that the 6th Defendant is, in fact, the sole director and shareholder for the 1st to 4th Defendant companies. In the light of the above facts, I find no merit in the preliminary objection raised by the Plaintiff and the intended Defendants and accordingly dismiss the same.

22. The intended 10th and 11th Defendants in opposing the 'Summons for Joinder' have submitted that they only acted for the 6th Defendant pursuant to a 'Harcourts Listing Authority' signed by the 6th Defendant on 11/01/2018. It is also submitted that the Plaintiff was introduced to them through an agent at their Nadi office. The initial sales and purchase agreement (dated 19/07/2018) was sent to them by the Plaintiff and they had referred the same to the 6th Defendant and his then solicitors as per the 6th Defendants instructions.

23. It is the submission of the intended 10th and 11th Defendants that the said sales and purchase agreement was reviewed by the legal counsel for both the Plaintiff and the 6th Defendant and that they had no part in drafting or reviewing the said agreement.

24. In respect of the amended clause 32 of the said agreement, it is submitted that the said clause was included in the presence of the 6th Defendant at their Suva office and the 6th Defendant signed and initialed the same in the presence of the intended 10th Defendant. It is submitted that the 6th Defendant had signed the said sales and purchase agreement having received legal advice from his then legal counsel.

25. Moreover, the intended 10th and 11th Defendants have submitted that after the initial sales and purchase agreement was signed between the Plaintiff and the 6th Defendant, there were further amendments proposed and discussed between the Plaintiff and the 6th Defendant and their legal counsel at the time, regarding the terms and conditions of the potential sale.

26. The intended 10th and 11th Defendants have clearly denied being the authors or reviewers of any of such proposed amended terms and conditions. As per the opposition on the summons, the intended 10th and 11th Defendants' position is that they were merely assisting the parties to a potential sale and purchase of properties,

upon the authority provided by the 6th Defendant to that effect, as real estate agents and had no other dealings, whatsoever, with the Plaintiff or the 6th Defendant.

27. It is therefore submitted by the intended 10th and 11th Defendants that the Applicant has no reasonable cause of action against them and that the Applicant has failed to submit any genuine grounds pursuant to Order 15 Rule 4 and 6 of the High Court Rules1988 for them to be added as parties to this suit. It is also pointed out that the Applicant has failed to submit any facts or particulars, in its affidavit evidence, to substantiate the allegations made against the intended 10th and 11th Defendants.

28. The intended 12th and 13th Defendants oppose the said 'Summons for Joinder' on similar grounds. It is submitted that the intended 12th and 13th Defendants were only instructed by the Plaintiff to initiate and proceed with the current suit.

29. The intended 12th and 13th Defendants have denied having any previous dealings with the Plaintiff or the 6th Defendant regarding the sale and purchase agreement (dated 19/07/2018) or any related matters prior to initiating this case.

30. Accordingly, the intended 12th and 13th Defendants have categorically denied any allegations of fraudulent misrepresentations, acting with intent to defraud, acting without having made any considerations and/or having conspired to defraud/injure the Applicant by any unlawful means.

31. Thus, the intended 12th and 13th Defendants also submit that the Applicant has failed to show a reasonable cause of action against them and has failed to submit any genuine grounds pursuant to Order 15 Rule 4 and 6 of the High Court Rules1988 for them to be added as parties to this suit. It is also pointed out for the intended 12th and 13th Defendants that the Applicant has failed to provide any facts or particulars to substantiate any such allegation against them.

32. In opposing the summons for 'Leave to Amend the Statement of Defence and Counter Claim, Striking Out the Statement of Claim and/or Security for Costs', the Plaintiff has submitted that the Applicant has failed to disclose any new material that was freshly discovered (including any newly discovered documents), after filing the initial Statement of Defence and the Counter Claim in October 2019, that warrants an amendment almost after 06 years from filing of the same. The Plaintiff also submits that the Applicant has no justifiable ground to amend its Statement of Defence and Counter Clain and thus is employing delaying tactics to deny swift justice to the Plaintiff.

33. The Plaintiff has further submitted that his claim is based on the initial sales and purchase agreement (dated 17/07/2018) between the Plaintiff and the 1st to 4th and the 6th Defendants. Since any proposed amendments were not approved by the parties, the

Plaintiff submits that the initial agreement is still valid, and its claim is based on the same. As such Plaintiff submits that the claim must necessarily be determined through a proper trial and that it is not an abuse of the process of the Court.

34. With regard to the alternate application for 'Security for Costs', the Plaintiff submits that although the Plaintiff is currently residing out of the jurisdiction of Fiji, it has substantive business interests in Fiji. The Plaintiff has accordingly submitted proof of its business interests, namely a company for bottling and export of Fiji water, the IJIF Water Fiji Limited. The Plaintiff has submitted the proof of this business interest by submitting copies of the company registration and the particulars of Directors and Secretaries of the company along with a copy of the Memorandum of Association of the said company.

35. I shall now consider the relevant legal provisions and the case authorities governing the applications made by the Applicant by its two summonses.

36. The application for 'Joinder' has been made pursuant to Order 15 Rule 4 and 6 of the High Court Rules 1988. The said Rules reads as follows,

> *"**Order 15 Rule 4***
>
> *4.-(1) Subject to rule 5(1), two or more persons may be joined together in one action as plaintiffs or as defendants with the leave of the Court or where–*
>
> *(a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions, and*
>
> *(b) all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions.*
>
> *(2) Where the plaintiff in any action claims any relief to which any other person is entitled jointly with him, all persons so entitled must, subject to the provisions of any Act and unless the Court gives leave to the contrary, be parties to the action and any of them who does not consent to being joined as a plaintiff must, subject to any order made by the Court on an application for leave under this paragraph, be made a defendant.*
>
> *This paragraph shall not apply to a probate action.*
>
> ***Order 15 Rule 6***
>
> *6.-(1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.*

*(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) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;*

*(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.*

*(3) An application by any person for an order under paragraph (2) adding him as a party must, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.*

*(4) No person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.*

*(5) No person shall be added or substituted as a party after the expiry of any relevant period of limitation unless either–*

*(a) the relevant period was current at the date when proceedings were commenced and it is necessary for the determination of the action that the new party should be added, or substituted, or*

*(b) the relevant period arises under the provisions of subparagraph (i) of the proviso to paragraph 4(1)(d) of the Limitation Act Cap 13A High Court Rules 173 and the Court directs that those provisions should not apply to the action by or against the new party. (Cap 35 v2 p870,021)*

*In this paragraph "any relevant period of limitation" means a time limit under the Limitation Act. (Cap 35 v2 p870,021)*

*(6) The addition or substitution of a new party shall be treated as necessary for the purposes of paragraph (5)(a) if, and only if, the Court is satisfied that-*

*(a) the new party is a necessary party to the action in that property is vested in him at law or in equity and the plaintiff's claim in respect of an equitable interest in that property is liable to be defeated unless the new party is joined, or*

*(b) the relevant cause of action is vested in the new party and the plaintiff jointly but not severally, or*

*(c) the new party is the Attorney-General and the proceedings should have been brought by relator proceedings in his name, or*

*(d) the new party is a company in which the plaintiff is a shareholder and on whose behalf the plaintiff is suing to enforce a right vested in the company, or*

*(e) the new party is sued jointly with the defendant and is not also liable severally with him and failure to join the new party might render the claim unenforceable.*

37. The law relating to joinder applications has been expounded in many local case authorities. The Judgments and/or Rulings in ***Fiji Development Bank v New India Assurance Company Ltd****; HBC299.2003 (10 August 2011),* ***Kososaya v Director of Lands****; HBC124.2009 (17 April 2013),* ***Prasad v State*** *(no.6) [2001] FJLawRp 6; [2001] FLR 39,* ***Prasad v Saheed****; HBC50.2003 (29 August 2008),* ***State v Director of Town and Country Planning****; HBJ7J2006S (24 September 2008),* ***Lakshman v Estate Management Services Ltd****; ABU14.2012 (27 February 2015)* and ***The State v Tauz Khan, Director of Town and Country Planning & Others****; HBJ14.1996* are some of the useful references in this regard.

38. Having carefully considered the application for 'Joinder', the Court finds that the Applicant has, in fact, failed to satisfy this Court that any of the intended 10th to 13th Defendants fits in the categories of a party listed under Order 15 Rule 4 and 6.

39. The intended 10th and 11th Defendants are only the real estate agents employed by the 6th Defendant pursuant to the authority provided by him for the sale of the subject properties. The Applicant fails to submit any facts relating to the terms and conditions of the authority provided to the intended 10th and 11th Defendants regarding the sale of the subject properties.

40. It is evident from the affidavit evidence before this Court that this authority provided by the 6th Defendant is in writing. To determine and/or assess whether the intended 10th and 11th Defendants made fraudulent misrepresentations, acted with intent to defraud, acted without having made any considerations and/or whether the intended 10th and 11th Defendants have conspired to defraud/injure the Applicant by unlawful means (breach of fiduciary duty, secret profits, and dishonest assistance) it is pivotal to consider the terms of engagement of the intended 10th and 11th Defendants. The Applicant seems to intentionally ignore submitting any facts relating to the above terms of authority and/or engagement of the intended 10th and 11th Defendants.

41. Furthermore, the Applicant has also failed to mention any facts or particulars to show that the intended 10th and 11th Defendants were, in fact, involved in drafting, reviewing and/or compelling or misleading the Applicant into signing the disputed initial sales and purchase agreement (dated 17th or 19th July 2018) against his will.

42. To the contrary, the Applicant has admitted in its Affidavit in Support that at all material times, the Applicant received independent legal advice through his former solicitors in all matters relating to the said initial sales and purchase agreement and at no time consulted the intended 10th and 11th Defendants for any such legal advice.

43. In view of the above facts and considerations, this Court finds that the Applicant has failed to satisfy the Court under Order 15 Rule 4 and 6 to allow the application for joinder of the intended 10th and 11th Defendants in these proceedings.

44. On the same token, it could be noted that the Applicant fails to show any relevant basis under Order 15 Rule 4 and 6 of the High Court Rules to justify the application for joinder of the intended 12th and 13th Defendants to this action.

45. The intended 12th and 13th Defendants are the current solicitors for the Plaintiff. Affidavit evidence before this Court is to the effect that they act on the instructions of the Plaintiff regarding the current suit before the Court and that they had no prior dealings regarding the initial sales and purchase agreement between the Plaintiff and the 6th Defendant.

46. The current suit is a live proceeding before the Court. The applications made in Court, by the solicitors to a party to this suit, shall not in any way become a common question of law or fact and/or any right that could be claimed in the action as would arise out of the same transaction or series of transactions, to render the solicitors for a party liable for a claim in the same cause.

47. The Applicant was always represented by legal counsel before the Court in this cause. Therefore the 1st to 4th Defendants and the 6th Defendant in this proceeding legally had the right and the mandate to consent/oppose to any interlocutory applications made by the Plaintiff in this action. In failure to do so, the Applicant cannot have another bite at the apple in these proceedings by way of adding the solicitors for the Plaintiff as a party to this action. In Court's considered view, this is clearly a frivolous and vexatious attempt by the Applicant to render these proceedings into illegality and drive this action into procedural chaos.

48. As per the findings made in the foregoing paragraphs, this Court is of the considered view that the Applicant has failed to satisfy this court to exercise its judicial discretion to allow the application to join the intended 10th to 13th Defendants in these proceedings.

49. This Court therefore finds that this application for 'Joinder' offends the principals as expounded in the case of ***Fiji Development Bank v New India Assurance Company Ltd (Supra)***, in joining a necessary party to the proceedings pursuant to Order 15 Rule 4 and 6 (5) and (6) of the High Court Rules.

50. Furthermore, as per the legal principles referred to and articulated in the case of ***Prasad v Shaheed*** *(Supra),* I conclude that the Plaintiff has failed to satisfy this Court on the grounds of 'Prejudice' and 'Necessity' for consideration of an application for joinder pursuant to Order 15 Rule 6 (5) and (6) of the High Court Rules, to join the intended 10th to 13th Defendants to these proceedings.

51. As mentioned in the foregoing paragraphs of this ruling, the application to 'Amend the Statement of Defence and the Counter Claim' is incidental to the success of the application to join the intended 10th to 13th Defendants in these proceedings. As noted from the proposed Amended Statement of Defence and the Counter Claim, annexed to the Applicant's Affidavit in Support, the proposed amendments solely relate to the intended 10th to 13th Defendants. In the event the 'Joinder' application failing to succeed, this application for 'Leave to Amend the Statement of Defence and the Counter Claim' shall necessarily fail.

52. In view of the above technicality, I do not find it warranted to consider any further the application for 'Leave to Amend the Statement of Defence and the Counter Claim', as it has no chance of success and/or any justification to be considered independently when devoid of the intended 10th to 13th Defendants being joined in these proceedings.

53. Now, I shall consider the application to 'Strike Out the Plaintiff's Statement of Claim'. The sole ground adduced in this regard is that the Stamen of Claim allegedly being an abuse of the process of the Court.

54. 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.*

55. Master 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".*

56. Following the discretionary power the court possesses to strike out under this rule, it is clear that it cannot strike out an action for the simple reasons that 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**."*

57. 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***).

58. 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)".*

59. 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.*

60. The **Halsbury's Laws of England (4th Ed) Vol. 37** succinctly explains the abuse of process in para 434 which reads to the effect,

*"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."*

61. As reiterated by the superior Courts in Fiji, a fair trial requires a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Courts are therefore 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 justice and has a fundamental right to have their disputes determined by an independent and impartial court or tribunal.

62. The Applicant, although simply states that the claim of the Plaintiff is an abuse of the process of the Court, has categorically failed to submit any facts to show how the claim of the Plaintiff becomes an abuse of the process. The fact that alleged unauthorized amendments been made to the initial sales and purchase agreement is a question of fact which needs to be evaluated through proper evidence in that regard. Similarly, the allegation that the Plaintiff provided no valuable consideration towards the said sales and purchase agreement is also a question of fact. Both these allegations need a comprehensive review of the agreement itself with all evidence relating to the proposed amendments and the conduct of the parties in signing the alleged sales and purchase agreement to be proven as a fact.

63. Having carefully considered all affidavit evidence before this Court, it is the Court's considered view, that the Applicant has failed to exhibit any facts that would reflect upon the allegation that the Plaintiff by instituting this cause intended that the Court's *'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'.*

64. It is therefore the finding of the Court that the Applicant has not been able to pass the threshold for allowing an application to strike out the Plaintiff's Statement of Claim pursuant to Order 18 Rule 18 (1) (d) of the High Court Rules and that this application should therefore necessarily fail.

65. Finally, I come to the application for 'Security for Costs'. It is interesting to note that the Applicant made this application alternatively to the application to 'Strike Out the Claim'. Technically, it implies that the Applicant is not genuinely interested and/or

necessarily concerned in the ability of the Plaintiff to pay and/or of the manner in compelling the Plaintiff in paying any costs awarded against it. This application simply appears to be an attempt to influence the Plaintiff to forego the claim against the Applicant, in failure of its application to 'Strike Out the Claim'.

66. Despite the above technical observations, I shall consider the relevant law and legal authorities with regard to this application for 'Security for Costs'. 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 the other connected matters.

67. 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. Rule 1 reads as follows,

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

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

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

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

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

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

*Then, if having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.*

*(2) The court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.*

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

68. 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.*

69. 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".*

70. 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.*

71. 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 difficult. 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)".*

72. In view of all the affidavit evidence before this Court, I find that the Plaintiff appears to have a strong claim and that his claim is *bona fide* and not sham. The claim arises out of a sales and purchase agreement between the Plaintiff and the 1st to 4th and 6th Defendants. Thus, it is fortified on a written agreement and witnessed and reviewed by legal counsel from both sides.

73. Moreover, the Plaintiff has satisfactorily shown to the Court that it has reliable business and monetary interests in Fiji. The evidence annexed with the Plaintiffs opposing Affidavit supports this fact.

74. In the case of ***Sharma v Registrar of Titles*** ***[2007] FJHC 118; HBC 351.2001 (13 July 2007) Master Udit*** has held as follows.

> *"The aforementioned rule vests the court with an unfettered discretion to order security for costs. All this rule entails to protect is the risks to which an applicant may be exposed to for recovering of costs in a foreign jurisdiction. The quantum of costs comparatively in Fiji is not relatively high although fairly substantive within the jurisdiction which is worth recovering. Execution of costs abroad where the litigation costs are much higher will render the exercise as wholly uneconomical. Be that as it may, ultimately the issue is not that the respondent will not have the assets or money to pay the costs or that the law of the foreign party's country not recognizing an order of our court, and/or enforcement of costs order even be it under any legislation similar to our Reciprocal Enforcement of Judgments Act, (Cap 39), but it is also the extra steps which will be needed to enforce any such judgment outside the jurisdiction. Indeed, it will not be an irrefutable presumption to infer that an extra burden in terms of costs and delay, compared with the equivalent steps that could be taken in Fiji, will be an inevitable corollary. The obvious expenditure which comes to my mind is the engagement of an attorney and the conundrum of registering an order in the foreign jurisdiction before it can be enforced".*

75. Pursuant to the above analysis and considerations of the Court, I find that there is no real necessity and/or any justified reasons to exercise the unfettered discretion conferred on this court by virtue of Order 23 Rule 1 and to order security for costs against the Plaintiff. Accordingly, I hold that this is a fit and proper case not to exercise the Court's discretion in favour of the Applicant and to order the Plaintiff to pay any security for cost.

76. In consequence, the Court makes the following final orders.

1. The Summons filed by the Applicant, 1st to 4th and the 6th Defendants, on 29/02/2024 for Joinder of the intended 10th to 13th Defendants is hereby refused and accordingly struck out subject to the following orders of the Court,

2. The Applicant, 1st to 4th and the 6th Defendants, shall pay a cost of $ 2000.00 to each of the intended 10th to 13th Defendants in this proceeding (Total costs to be paid $ 8000.00), as summarily assessed by the Court, as costs of this application, within 21 days from this ruling. (That is by 14/04/2025).

3. The Summons filed by the Applicant, 1st to 4th and the 6th Defendants, on 18/04/2024 for Leave to Amend the Statement of Defence and the Counter Claim and other orders, is hereby refused and accordingly struck out subject to the following orders of the Court,

4. The Applicant, 1st to 4th and the 6th Defendants, shall pay a cost of $ 2000.00 to the Plaintiff in this proceeding as summarily assessed by the Court, as costs of this application, within 21 days from this ruling. (That is by 14/04/2025)

5. In failure by the Applicant, 1st to 4th and the 6th Defendants, to comply with all above cost orders, the pleadings of the 1st to 4th and the 6th Defendants shall stand struck out forthwith and the Plaintiff shall be at liberty to enter default judgment against the 1st to 4th and the 6th Defendants.


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

**At Suva,**
**24/03/2025.**