IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 28 of 2016

BETWEEN : **MEGAN BAILIFF** c/- Joseph Barr & Associates of 9820 Willow Creek Road, Suite 230, San Diego, CA 92131, USA.

PLAINTIFF

AND : **VILIAME TUIVUNA** c/- **AQUARIUS TOURS LIMITED** a limited liability company having its registered office at KPMG, level 10, Suva Central, Renwick Road, Suva trading as **TAVARUA ISLAND RESORT**

FIRST DEFENDANT

AND : **AQUARIUS TOURS LIMITED** a limited liability company having its registered office at KPMG, Level 10, Suva Central, Renwick Road, Suva trading as **TAVARUA ISLAND RESORT**.

SECOND DEFENDANT

Mr. Roopesh Prakash Singh for the Plaintiff
Mr. John Leslie Apted for the Defendants

Date of Hearing : - 24th October 2016
Date of Ruling : - 27th January 2017

RULING

(A) INTRODUCTION

(1) The matter before me stems from the inter party Summons filed by the Defendants, pursuant to Order 18, rule 18 (1) of the High Court Rules, 1988 and under the inherent jurisdiction of the Court, seeking the grant of the following Orders;

1. *The Statement of Claim be wholly struck out and the Action be dismissed.*

2. *All proceedings herein be stayed pending the determination of this application.*

3. *The Plaintiff pays the Defendants the costs of this application and all incidental costs hereto.*

ON THE GROUNDS THAT the Statement of Claim –

(a) discloses no reasonable cause of action; or

(b) is scandalous, frivolous or vexatious; or

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

(d) is otherwise an abuse of the process of the court.

(2) The Defendants relied on the affidavits sworn by 'Viliame Tuivuna' and 'Merissa Hung Fong Yam'.

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

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

(B) THE FACTUAL BACKGROUND

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

(2) **The Claim**

This is an Action for damages for personal injuries arising out of alleged negligence.

On 17 February 2016, the Plaintiff issued a Writ of Summons together with a Statement of Claim in which she alleged that –

(a) in November 2013, the Plaintiff was a paying guest at Tavarua Island Resort ("the Resort"), which is owned and operated by the Second Defendant, Aquarius Tours Ltd ("Aquarius");

(b) *the resort provided swimming and snorkelling activities to guests;*

(c) *on 3 November 2013, the Plaintiff was snorkelling and/or swimming when a panga boat operated by the First Defendant, who was Aquarius's employee at the time, collided with her ("the collision");*

(d) *as a result of the collision, the Plaintiff suffered injuries;*

(e) *the Plaintiff claims (and the Defendants deny) that the collision was caused by the First Defendant's gross negligence and carelessness,*

And that Aquarius is vicariously liable.

In their Defences, the Defendants –

(a) *deny that collision was caused by the First Defendant's gross negligence or carelessness;*

(b) *plead, as a first alternative defence, that –*

(i) *the Plaintiff booked her stay at the Resort through Surf Diva Inc. ("Surf Diva Inc.") which in turn co-ordinated the booking through Tavarua Island Tours Incorporated ("T1T1);*

(ii) *Aquarius requires each of its quest to sign a form titled "Voluntary Agreement to Release Rights and Waive Liability" ("Release and Waiver") before they were allowed to participate in any activities at the Resort;*

(iii) *The requirement that guests sign a Release and Waiver was stated in the Resort's website;*

(iv) *the Plaintiff arrived and checked-in at the Resort on 2 November 2013 and Aquarius received the Plaintiff's completed and signed Release and Waiver dated 1 November 2013 on or shortly after her arrival;*

(v) *therefore, if the Plaintiff suffered the alleged loss and damage through the alleged gross negligence and carelessness of the First Defendant (which is denied), by reason of the Release and Waiver made between the Plaintiff and Aquarius, the Plaintiff released the Defendants from, and/or waived her legal right to, any claim which she might have against them;*

The Plaintiff's Reply

The Plaintiff filed a Reply to Aquarius's Statement of Defence on 15 April 2016, and a Reply to the First Defendant's Amended Statement of Defence on 6 July 2016. In response to the second and third alternative defences, the Plaintiff says that the Release and Waiver is unenforceable and illegal because –

(a) *there was no consideration for the Release and Waiver*

(b) *the meaning and effect of the Release and Waiver was not explained to her and nor was she advised that she could seek legal advice before she signed it;*

(c) *she signed the Release an Waiver without understanding or being aware of its nature, meaning and effect;*

(d) *the Release and Waiver does not release Aquarius or is inequitable and unconscionable because –*

(i) *it seeks to release the Aquarius from any negligent, careless and reckless act of its agents and servants;*

(ii) *it is not fair and just;*

(iii) *it was prepared by Aquarius without the Plaintiff's input;*

(e) *the requirement that the Plaintiff sign the Release and Waiver amounts to unconscionable conduct by Aquarius.*

(C) THE LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

It has been said that the Court will not permit a plaintiff to be "driven from the judgment seat" except where the cause of action is

*obviously bad and almost incontestably bad (per Fletcher Moulton L.J. in **Dyson v Att. – Gen [1911] 1 KB 410 p. 419).**"*

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

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

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

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

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

*"The jurisdiction to strike out proceedings under Order 18 Rule 18 is guardedly exercised in exceptional cases only where, on the pleaded facts, the plaintiff could not succeed as a matter of law. It is not exercised where legal questions of importance are raised and where the cause of action must be so clearly untenable that they cannot possibly succeed (see **Attorney General –v- Shiu Prasad Halka 18 FLR 210 at 215**, as per Justice Gould VP; see also **New Zealand Court of Appeal decision in Attorney –v- Prince Gardner [1998] 1 NZLR 262 at 267.**"*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(D) ANALYSIS

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

(2) Before I pass to consideration of submissions, let me record that counsel for the Plaintiff and the Defendants in their written submissions have done a fairly exhaustive

study of judicial decisions and other authorities which they considered to be applicable.

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

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

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

(4) The Defendants contended that upon a proper construction of the Release and Waiver, which the Plaintiff signed before checking into the Resort and before engaging in any activities, the Statement of Claim should be struck out as the Release and Waiver is a complete Defence to the Action.

(5) **<u>In response, the Plaintiff says;</u>**

(a) she booked her stay at the Resort through Surf Diva Inc.

(b) she was not provided with or made aware of the requirement that she sign a Release and Waiver when she booked her stay; (Ibid);

(c) the first time she was presented with the Release and Waiver was on her arrival at the Resort;

(d) she was not aware of any Release and Waiver provided on the Resort's website;

(e) she signed the Release and Waiver when she was obtaining her room assignment;

(f) *she did not understand the full impact of the Release and Waiver;*

(g) *she did not imagine that it would apply to exclude Aquarius and the First Defendant from liability if a boat operator from the Resort were to strike her with a boat;*

(h) *she did not have a chance to obtain independent legal advice;*

(j) *she does not have any legal training, experience or education.*

(6) **In reply, the Defendants say;**

(a) *that the Plaintiff booked her stay through Surf Diva which in turn made a group booking through Tavarua Island Tours Incorporated ("TITI") (a separate entity)*

(b) *disagree that the Release and Waiver was presented to her and other members of the Surf Diva group for the first time or that she completed and signed the Release and Waiver when she arrived at the Resort and was in the process of checking-in. They say that –*

(i) *on 4 October 2013, TITI emailed a package of booking information to the Plaintiff and the Surf Diva group. Included in the package was the Release and Waiver form,*

(ii) *the Plaintiff and the Surf Diva group arrived in Fiji on 1 November 2013. She and the others of the group stayed overnight in Nadi and did not arrive at the island until 2 November 2013.*

(iii) *on her arrival on 2 November 2013, a completed Release and Waiver signed by the Plaintiff and dated 1 November 2013 was handed in, a colour photocopy is annexed as "MY7" to Ms Yam's Reply Affidavit of 1 August 2016.*

(iv) *the Plaintiff completed and signed an Accommodation Sheet, and also signed a credit card imprint upon check-in, a colour photocopy of which is annexed as "MY9" and "MY10" to Ms Yam's Reply Affidavit of 1 August 2016.*

(v) *the Plaintiff's Release and Waiver was completed with black ink whereas the Accommodation Sheet and credit card imprint were completed and signed with blue ink – suggesting that they were not filled out and signed at the same time and that she did not complete and sign the Release and Waiver at check-in.*

(c) *do not agree that the Plaintiff did not understand the full impact of the Release and Waiver, as it was written in plain English and is self-explanatory and clearly states what is being waived.*

(d) *do not agree that with the Plaintiff's statement that she did not believe that the Release and Waiver would apply to exclude liability for the collision as it clearly states in clause 1 that it applies to any and all activities pursued while on or in the ocean waters surrounding Tavarua Island.*

(e) *do not agree that the Plaintiff had no opportunity to read, and had no alternative but to sign, the Release and Waiver for the reasons set out in paragraph (b) above and because she could have declined to produce a completed and signed Release and Waiver at any time right up until she checked-in at the Resort, in which case, accommodation services and activities would not have been provided to her.*

(f) *do not agree that the Plaintiff did not have the opportunity to obtain independent legal or other advice –*

(i) *by clause 18 of the Release and Waiver, the Plaintiff expressly acknowledged that she had been advised that she was free to seek independent legal advice or legal counsel before signing the Release and Waiver;*

(ii) *the Plaintiff expressly acknowledged that she fully understood the terms of the Release and Waiver;*

(iii) *it appears that the Plaintiff (and others of the Surf Diva group) had signed the Release and Waiver forms in Nadi before coming to the Resort;*

(iv) *however, even if she had asked Aquarius to provide her with the opportunity to take legal advice before her Release and Waiver was handed in, Aquarius would have facilitated this request as a binding Release and Waiver is an essential pre-condition to any guest staying at the Resort and participating in any of the activities offered by the Resort. The Plaintiff did not ask for such opportunity;*

(g) *say that, according to the Plaintiff's LinkedIn profile, she holds a Master's degree, and that she has experience working as a legislative aide.*

(7) **Determination**

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

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

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

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

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

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

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

One word more, as I indicated earlier, the Defendant's application is made under Order 18, Rule 18 of the High Court Rules, 1988 **and under the inherent jurisdiction of the Court.** Therefore, it is permissible to refer to Affidavit evidence. In **Khan v Begum (2004) FJHC 430**, Hon. Justice John Connors said;

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

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

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

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

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

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

What is a "Cause of Action"?

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

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

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

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

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

(8) With all that in my mind let me now move to consider the Defendants application for striking out.

(9) The Defendants seek to strike out the Statement of Claim and dismiss the Action, *inter alia*, the Plaintiff, by signing the Agreement to Release Rights and Waive liability has released the Defendants from, and has waived her legal right to institute any claim against them and covenanted not to sue the Defendants.

During the course of the arguments, Counsel for the Defendants referred me to the decision of Fiji High Court decision, **Gerogry Clark v Zip, HBC 05 of 2008.** Counsel for the Defendants relied heavily on this decision which, he said, applies to the present case. I closely read the decision. That does not, in my Judgment, help in the present case. **Gerogry v Zip** is distinguishable. The issue here is quite different from that which was before **Gerogry v Zip.**

In **Gerogry Clark v Zip, Fiji High Court of Fiji Civil Action Number HBC 05 of 2008** the Court dealt with a similar application and struck out the Plaintiff's claim. In my opinion, that case is distinguishable by the facts as the Plaintiff in that case did not

raise the issue that he did not understand what he had executed i.e. the release. At paragraph 10 the Court stated;

> *"10. The interpretation of the waiver signed by the Plaintiff is strictly legal issue that does not involve any factual issues. Parties admit the waiver document and signing it without any duress or coercion. The Plaintiff who is a pilot in USA should have understood the contents of the document without any difficulty and the said waiver was signed before he participated in the activity, these facts are not disputed by the parties."*

The Plaintiff in Clark's case did not raise the issue that has been raised by the Plaintiff in this case before the Court, that she did not understand the document/waiver. The Plaintiff in Clark's case centred his argument raising the point that the release was unconscionable. However, the Plaintiff in the instant case pleads that she did not understand the document or the legal implications thereof. This is entirely distinguishable.

What is meant by the word **'waiver'**?

Both in ordinary and in legal usage **'waive'** originally meant 'abandon' generally. Nowadays, in ordinary usage 'waive' signifies the relinquishment of anything which one has the right to expect, as in 'waive the formalities'; in legal usage 'waive' and 'waiver' signify the relinquishment of a legal right (which, of course, implies a correlative legal obligation). Such expression as 'waive the tort', 'waive the forfeiture' or 'waive the term' are legal shorthand: they mean, respectively, 'relinquish the rights accruing to the injured party in respect of a civil wrong committed against him by the tortfeasor', 'relinquish the right accruing to the landlord to re-enter the demised premises by reason of a breach of covenant of the lease' and 'relinquish the rights accruing to the promise by reason of the relevant term of the contract.' In the last instance the rights may be either the primary ones conferred by the contract (i.e. to performance of its promises) or the secondary ones conferred by law for breach of the contractual promises (i.e. to withhold performance of reciprocal promises – called compendiously, in the case of a lease, 'forfeiture'.)

'Waive the term' is also apt to include relinquishment of the right to performance of a condition precedent (See, **Addison on Contracts**). *See; (11th Edn, 1941) pp 55, 145, 146.*

The word 'waiver' is a vague term. See; **Gloag on Contracts** (2nd Edition) 281.P.

In '**Banning v Wright' (1972) (1) WLR 972**, **Lord Hailsham** of St. Marylebone at Page 979 said this;

> *"In my view, the primary meaning of the word 'waiver' in legal parlance is the abandonment of a right in such a way that the other*

party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted".

In the same case, **Lord Reid** at 981 P. said;

"It (waiver) always, I think, involves the idea of giving up or abandoning some right or rule".

The Plaintiff in the case before me pleads that she did not understand the document or the legal implications thereof. I cannot brush aside this argument without prolong and serious legal argument. I refuse to embark on that argument on the bare facts pleaded and leave the point of law to be solved at the trial in light of the actual facts of the case. The Defendants cannot, in my judgment, expect the court to assess the requirements of justice with their eyes in blinkers; they must look at all the circumstances.

In my opinion, however, contrary to the submissions of Counsel for the Defendants, the question whether there has been an abandonment of a right in such a way that the other party is entitled to plead the abandonment is a question of fact which is to be determined objectively upon a consideration of all the relevant evidence. This approach accords with the following judicial decisions.

- **Amria Limited v DaeJan Development Limited (1979) House of Lords, UKHL 8**
- **Davies v City of Glasgow Friendly Society 1935 S.C. 224 P.**
- **Domison v Employers Accident & Livestock Insurance Co Ltd 2L. R. 681 P.**

I can see no reason why the rule of law enunciated in the aforementioned judicial decisions should not be applied in the case before me.

Dealing with the questions thus far, I would hold that in spite of the force with which Counsel for the Defendants put his submission, it is wrong for the Defendants to rely on Agreement to Release rights and Waive liability in support of an application to strike – out the claim. **The plea of Waiver is clearly one of fact, which is to be determined objectively upon a consideration of all the relevant evidence. An interpretation of the 'Agreement to release rights and waive liability' comes into play. This is strictly a complicated legal issue.** I refuse to embark on that on the bare facts pleaded and it is, in my opinion, safer in the interests of justice to leave the point of law to be solved at the trial in light of the actual facts of the case.

(10) That brings me to the next submission. The second submission on behalf of the Defendants is that, the Plaintiff's case is unsustainable by virtue of her 'voluntary assumption of the risk'.

Counsel for the Plaintiff has submitted that the Defendant will need to establish knowledge of the risk the Plaintiff assumed and it becomes a matter of fact which will need to be established.

In my Judgment, in the first place, it is not open to the defendants to rely upon the maxim "*Volenti non fit injuria*" in support of an application to strike-out the claim, for the question whether the plaintiff voluntarily undertook the risk with full knowledge of its nature and extent is one of fact. This is clearly shown by the judgment of Lord Esher, M.R., in **Yarmouth v France, (19) Q.B.D.** at p. 657.

Secondly, the affidavit evidence does not show that the Plaintiff had full knowledge of the nature and extent of the risk. It is not correct to suggest that the Plaintiff had the knowledge that a boat would go over her when she was swimming in an area where she was told to swim by the First Defendant. The necessity for such knowledge is apparent from the judgment of Bowen, L.J., in **Thomas v Quartermaine, (18) Q.B.D. at p. 696** where his Lordship said;

> *"It is no doubt true that the knowledge on the part of the injured person which will prevent him from alleging negligence against the occupier must be a knowledge under such circumstances as leads necessarily to the conclusion that the whole risk was voluntarily incurred. The maxim, be it observed, is not 'scienti non fit injuria' but 'volenti'. It is plain that mere knowledge may not be a conclusive defence. There may be a perception of the existence of the danger without comprehensive of the risk: as where the workman is of imperfect intelligence, or, though he knows the danger, remains imperfectly informed as to its nature and extent."*

With due respect to the forceful and tenacious argument of Counsel for the Defendants, in my opinion, if the Defendants desire to succeed on the ground that the maxim *'volenti non fit injuria'* is applicable, they must obtain a finding of fact ' *that the Plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk she ran, agreed to incur it*'. **Whether the Plaintiff was *volens* or *nolens* is a question of fact and not of law.** The mere knowledge of the danger will not do; there must be an assent on the part of the Plaintiff to accept the risk, with full appreciation of its extent to bring the Defendants within the maxim *volenti non fit injuria.*

The question must be, not simply whether the Plaintiff knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the Plaintiff.

This is a question of fact, and, this being so, it follows that the Defendants cannot succeed unless and until they have a finding of fact in their favour. It is a matter for trial

(11) As I apprehend the pleadings, the Statement of Claim raises debatable question of facts against the Defendants. The factual issues in this case are complicated and the facts, in some respect at least, obscure; difficult questions of conflict of laws are

almost certain to arise out of the circumstances. These are to be determined. Therefore, it is not competent for this Court to dismiss the action on the ground that it discloses no reasonable cause of action against the Defendants.

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

I venture to say beyond per-adventure that this is not case for the exercise of any summary power.

Fundamentally, courts are required to determine cases on merits rather than dismissing them summarily on procedural grounds.

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

In the context of the present case, I have no hesitation in leaning in favour of the more liberal judicial thinking reflected in the dictum of O'Conner J in **Burton v Shire of Bairnsdale** (1908) 7 C.L.R. 76. Hon Judge said;

> *"Prima facie every litigant has a right to have matters of law as well as of fact decided according to the ordinary rules of procedure, which give him full time and opportunity for the presentation of this case to the ordinary tribunals and the inherent jurisdiction of the court to protect its process from abuse by depriving a litigant of these rights and summarily disposing of an action as frivolous and vexations will never be exercised unless the plaintiff's claim is so obviously untenable that it cannot possibly succeed."*

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

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

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

> *"A case must be very clear indeed to justify the summary intervention of the court ... once it appears that there is areal question to be determined whether of fact or of law and that the rights of the parties depend upon it, then it is not competent for*

the court to dismiss the action as frivolous and vexatious and an abuse of process."

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

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

(E) CONCLUSION

Having had the benefit of written submissions for which I am most grateful and after having perused the pleadings, doing the best that I can on the material that is available to me, I venture to say beyond a per-adventure that the Statement of Claim discloses a reasonable cause of action and constitutes triable issues against the Defendants

Therefore, this is not a case for the exercise of any summary power.

Accordingly, there is no alternate but to dismiss the Summons.

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

(F) ORDERS

- The Defendants Summons to strike out the Statement of Claim is dismissed.
- The Defendants are to pay costs of $1000.00 (summarily assessed) to the Plaintiff within 14 days from the date hereof.

I do so order!!!

27/01/2017.

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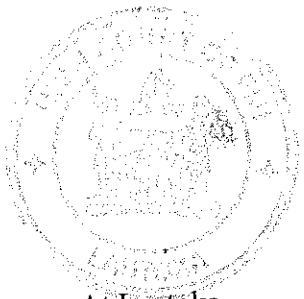
Jude Nanayakkara
Master of the High Court



At Lautoka

27th January 2017