**IN THE HIGH COURT OF FIJI**
**WESTERN DIVISION**
**AT LAUTOKA**

**CIVIL JURISDICTION**

**Civil Action No. HBC 215 of 2012**

**BETWEEN** : **ANN ELIZABETH HAWORTH** of Lexington, Texas

**Plaintiff**

**A N D** : **STARWOOD PROPERTIES LIMITED**

**First Defendant**

**A N D** : **DUBBO LIMITED trading as WESTIN RESORT & SPA LIMITED**

**Second Defendant**

**A N D** : **SHANE CUNNING OF WESTIN RESORT & SPA** Nadi, Fiji Islands, General Manager

**Third Defendant**

**Appearances** : **Mr. C.B. Young for the plaintiff**
: **No appearance for the first defendant**
: **Mr. John Apted for the second and third defendants**

**Hearing** : **Thursday, 26th September, 2019**

**Ruling** : **Thursday, 31st October, 2019**

# RULING

## (A) INTRODUCTION

(01) The matter before me stems from the plaintiff's Summons filed on 04th April 2019 seeking the grant of the following orders;

*(i) That the date assigned for the trial of the action for 23 to 27 September 2019 be vacated and another date be assigned.*

*(ii) That the orders of Justice Sapuvida dated 30 January 2017 and Justice Ajmeer dated 14 September 2017 (if required) be revoked or varied and the Plaintiff's 2nd and 3rd Supplementary Affidavit List of Documents filed on 12 March 2019 and 21 March 2019 respectively*

*be accepted as properly filed or alternatively that the Plaintiff be at liberty to file and serve a supplementary affidavit of list of documents within 28 days.*

*(iii) That the Plaintiff be at liberty to file and serve particulars of special damages in relation to her medical expenses (including medical fees paid to doctors and hospitals, medication, travelling to and from the same and all incidentals thereto) within sixty (60) days from the date of the order and that such particulars of special damages be treated as part of the Statement of Claim being special damages for the Plaintiff's medical expenses up to the date of the said particulars of special damages.*

*(iv) That the parties be at liberty to file any further supplementary list of documents and serve copies of the documents referred to in the supplementary list of documents no later than thirty (30) days prior to the first day assigned by the court for the trial of this action.*

*(v) That judgment be entered against the 2nd and 3rd Defendants on liability in accordance with the admission made in the Affidavit of Viliame B. Vodonaivalu filed on 20 March 2019 at paragraph 9.*

*(vi) That the cost of this application be costs in the cause.*

(02) The application is made pursuant to Order 24, rule 17 and Order 27, rule 3 of the High Court Rules 1988 and the inherent jurisdiction of the court.

(03) The plaintiff relied on the affidavit of Ann Elizabeth Haworth filed on 01.04.2019 and 04.04.2019.

(04) The Order (i) is dealt with. The defendants vigorously resisted Order (ii), (iii) and (iv).

## (B) BACKGROUND

(01) This action was commenced by a Writ of Summons and Statement of Claim filed on 04th October, 2012. In it, the plaintiff claims against the defendants for alleged personal injury from electrocution while a guest at the second defendant's resort, the Westin Resort and Spa on Denarau Island on 04th October, 2009.

(02) After completion of pre-trial steps on 16th April 2015, the matter was fixed for trial from 17th – 18th November, 2015.

(03) On 06th November, 2015 (viz, 11 days before the trial was due to commence) the plaintiff, via her previous Solicitors, filed a Supplementary List of Documents (the First Affidavit Verifying Supplementary List of Documents) without seeking leave of the Court. The same was served on the defendants on 12th November, 2015 (viz, 5 days before the trial).

(04) On 12th November, 2015 (viz, 05 days before the trial was due to commence) the plaintiff via her previous Solicitors gave the defendants a notice of her intention to

rely on two medical reports at trial as hearsay evidence being Dr Ronald Devere's and Dr Marcy Roy's Medical reports.

(05) When the matter was taken up for trial on 17th November 2015 before J. Sapuvida, the defendants raised objections to the late discovery of additional documents and the hearsay notice and asked for the evidence to be excluded, but the Court decided to vacate the trial to deal with the objection.

(06) The Court delivered its ruling on the defendant's objection on 30th January, 2017. Justice Sapuvida ordered;

> *(*) Plaintiff's Supplementary Affidavit Verifying List of documents dated 06th November, 2015 is struck out and dismissed.*
>
> *(*) The documents listed in the said Affidavit shall not be produced in evidence.*

(07) The basis of these orders of Justice Sapuvida is summarized at paragraph (93) of his Lordships' ruling. The paragraph (93) reads;

> *"[93].- The plaintiff failed to comply properly with the order made on 7th March, 2014 to serve on the defendants a list of documents relating to the matters raised in the pleadings herein and filed an affidavit verifying the same in accordance with the requirements of the rules and practice. When she filed her affidavit verifying list of documents on 17th April, 2014 she deliberately withheld a large number of documents from the defendants until 2 working days before the date of the trial. The reasons that have been advanced for the late discovery of the documents are unconvincing. The affidavit has also been improperly sworn and was filed without leave of the Court by a Law Clerk.*

(08) Subsequently on 13th March, 2017 the plaintiff sought leave to file another Supplementary Affidavit Verifying List of Documents. The application was opposed by the second and third defendants on the following grounds;

- the High Court has already ruled against discovery of the majority of documents.
- the rules that the application relies on does not respond and/or
- the reasons for leave to be granted are inadequate.

(09) The application was heard by Justice Ajmeer and his Lordship refused leave on 14th September, 2017. His Lordship J. Ajmeer ordered;

- *Leave refused.*
- *Plaintiff application dismissed with costs of $800.00 payable by the plaintiff to the 2nd and 3rd defendants in three weeks from today.*

- *Matter is adjourned for Mention to fix hearing at 9.30a.m on 12th October, 2017.*

(10) The basis of these orders of Justice Ajmeer is summarized at paragraphs (20), (21) and (22) of his Lordships' ruling. The paragraphs 20, 21, and 22 read;

> *"[20] It appears that the plaintiff is attempting to re-litigate a matter which the court has already decided upon merits.*
>
> *[21] Functus means the court had expended its jurisdiction in respect of the same cause between the same parties (see Merchant Finance & Investment Co. Ltd v Lata [2016] FJCA 151; ABU0034.2013 (29 November 2013).*
>
> *[22] Admittedly, the previous application was also made against the same defendants as in this application. On that application, both parties filed their respective written submission. Sapuvida J, after considering the submissions made by both parties, ruled and ordered that the plaintiff's supplementary affidavit verifying list of documents is to be struck out and dismissed. The plaintiff did not appeal that ruling. There is a binding judgment between the parties in relation to the supplementary affidavit verifying the list of documents. In the current application, the plaintiff is attempting to re-litigate the matter that had already been decided by the court. Unfortunately, the current application filed by the plaintiff is unnecessary and unwarranted. I am not convinced by the submissions and the reasons adduced by the plaintiff for filing the supplementary affidavit verifying the list of documents. The inherent jurisdiction of the court cannot be exercised to curing a mistake which a party had made in complying with the rules of the Court. The documents the plaintiff is attempting were in the control and custody of the plaintiff well ahead of the application. Some of the documents date from April 2012 to November 2015. These documents are not new documents. I would, therefore, refuse to grant leave to file the supplementary affidavit verifying the list of documents and dismiss the application with costs of $800.00 payable by the plaintiff to the 2nd and 3rd defendants within 3 weeks. I now adjourn the matter for mention to fix hearing at 9.30am on 12th October, 2017."*

(11) On 24th August, 2018 the Court re-fixed the matter for trial between 8th – 11th April, 2019. On 15th October, 2018 Young & Associates filed Notice of Change of Solicitors.

(12) On 12th March, 2019 without leave, the plaintiff filed an Affidavit Verifying Plaintiff's 2nd Supplementary List of Documents which listed more than 280 documents dating back to 2009 (including documents Court expressly prohibited her from producing into evidence in its rulings by J. Sapuvida and J. Ajmeer).

(13) On 15th March, 2019 the plaintiff again gave Notice of her intention to adduce hearsay evidence at the trial from 5 documents (including Dr Devere's 16th April, 2014

medical report which the Court expressly prohibited in its 30-01.2017 ruling). [Defendants annexure marked "VV-3C"]

(14) On 21st March, 2019 again without leave, the plaintiff filed an Affidavit Verifying Third Supplementary List of Documents which listed 11 additional documents dating back to 1990.

(15) All the documents listed in the plaintiff's 2nd and 3rd Supplementary Affidavit of List of Documents filed on 12th and 21st March, 2019 have been given to the defendants Solicitors on 06-03-2019 and 15-03-2019 respectively. (defendant's annexure marked VV-3A and VV-3B)

(16) On the 25th March 2019, the second and third defendants filed Summons seeking the grant of the following orders;

(*) *The Affidavit Verifying Plaintiff's 2nd Supplementary List of Documents filed on 12th March, 2019 be struck out and removed from the Court file and the Plaintiff may not produce and rely on any document listed therein;*

(*) *The Affidavit Verifying Plaintiff's 3rd Supplementary List of Documents filed on 21st March, 2019 be struck out and removed from the Court file and the Plaintiff may not produce and rely on any document listed therein;*

(*) *The plaintiff's notice of proposal to adduce hearsay evidence under Section 4 of the Civil Evidence Act 2002 given on 15th March, 2019 does not give the defendants reasonable and practicable notice in the circumstances for the purposes of enabling the defendants to deal with matters arising from it being hearsay, and no hearsay evidence may be adduced by the plaintiff or alternatively any hearsay evidence allowed should be treated as having no weight pursuant to Section 4 and 6 of the Civil Evidence Act 2002;*

(*) *Pursuant to Section 15 of the Civil Evidence Act 2002 and O.25, r.8 of the High Court Rules 1988, no expert oral evidence may be adduced by the plaintiff;*

(*) *The costs of this application be costs in the cause; and*

(*) *Such further Orders as this Honourable Court deems just and fair.*

(17) The application is made pursuant to Order 24, rule 16 & Order 25, rule 8 of the High Court Rules 1988, Section 4, 6 and 15 of the Civil Evidence Act 2002 and under the inherent jurisdiction of the High Court.

(18) The Summons is supported by an Affidavit sworn by 'Viliame B. Vodonaivalu', the Chief Investment Officer of the Fiji National Provident Fund, the current owner of the shares in the second defendant and a Director on the Board of the second defendant.

(19) The application is vigorously resisted by the plaintiff. The hearing was held on 02nd April, 2019. Submissions and authorities were filed.

After hearing the Summons, the Court made the following orders on 16th August, 2019;

(a) *I dismiss the defendants' application for an Order for striking out the affidavit verifying plaintiff's 2nd and 3rd supplementary list of documents.*

(b) *The plaintiff may produce in evidence and rely on any document listed in the Affidavit Verifying Plaintiff's 2nd Supplementary List of Documents filed on 12th March, 2019 and the Affidavit Verifying Plaintiff's 3rd Supplementary List of Documents filed on 21-03-2019* ***except for****;*

(i) *the documents the court excluded from being produced in evidence including Dr Devere's Report dated 16-04-2014.*

(ii) *special damages documents.*

(iii) *documents relating to litigation costs.*

(c) *There can be no reliance at the trial on expert reports not disclosed within 10 weeks after the close of the pleadings. Dr. Devere, Dr. Flume, Dr. Rose and Dr. Roy may be called to testify about their care and treatment of the plaintiff and may attest to the plaintiff's medical conditions and treatments. They cannot or should not offer a medical opinion outside the scope of their personal observations and treatment of the Plaintiff. They may not veer into expert testimony territory without adherence to all applicable disclosure rules. Not only will Courts exclude physicians who are trying to "disguise" themselves as fact witnesses in order to circumvent the protocol for experts, the move may also affect the Doctor's credibility in the eyes of a fact finder.*

(d) *The plaintiff may adduce hearsay evidence from the following documents ;*

(*) *David L. Flume's Notice to Mr. Maopa dated 06-06-2017.*

(*) *David L Flume's letter of 01/01/2019.*

(*) *Email from David Flume to Ann Haworth dated 06/02/2019.*

(*) *Handwritten Statement given by Shashi Shankar dated 05/11/2009.*

(e) *The case to be mentioned on 23-08-2019 to fix a hearing date for plaintiff's summons filed on 04/04/2019 for :*

(1) *revocation or variation of order dated 30/01/2017 and 14/09/2017.*

(2) *to file and serve particulars of special damages in relation to plaintiff's medical expenses.*

(3) *to enter judgment against 2nd and 3rd defendants on liability in accordance with the admission made in the affidavit of Viliame B. Vodonaivalu filed on 20/03/2019 at paragraph (9).*

(f) *Costs reserved.*

## (C) DISCUSSION

(01) The prayer (i) of the Summons filed on 04th April, 2019 is dealt with.

(02) In prayer (ii) of the Summons, the plaintiff seeks the following order;

> *(ii) That the orders of Justice Sapuvida dated 30 January 2017 and Justice Ajmeer dated 14 September 2017 (if required) be revoked or varied and the Plaintiff's 2nd and 3rd Supplementary Affidavit List of Documents filed on 12 March 2019 and 21 March 2019 respectively be accepted as properly filed or alternatively that the Plaintiff be at liberty to file and serve a supplementary affidavit of list of documents within 28 days.*

(03) The defendants submit that the order should be refused. The defendants submission is that;

- The plaintiff has not shown 'sufficient cause' or 'any cause' to vary the earlier order. The case of **John Walker & Sons Ltd v Henry Ost & Co. Ltd [1970] RPC 151** is cited to support this proposition.

- It would be inconsistent with the principle of judicial comity for a judge to vary the order of another judge of coordinate jurisdiction without good cause. The cases of **Chetty v Fiji Public Service Association (2004) FJHC 359 and Hicks v Minister for Immigration & Multicultural & Indigenous Affairs, 2003, FCA 757** were cited to support the proposition.

- In principle, Order 24, r.17 does not provide an opportunity for a litigant merely to relitigate the same issues that have previously been argued and decided by the court.

(04) The submission of Counsel for the defendant is conveniently summarised in the following passages taken from his written submissions filed on 10.06.2019.

> *(32) Order 24 r.17 gives the Court discretion to vary any previous order given in respect of discovery if the applicant convinces the Court that it has shown **"sufficient cause"** to do so.*
>
> *(33) The equivalent former English rule was considered by the English Court of Appeal in **John Walker & Sons Ltd v Henry Ost & Co. Ltd [1970] 1 WLR 917; [1970] 2 All ER 106**, where Harman LJ said-*
>
> > *"So that right up to the very trial itself and order, particularly an order of the court striking out in defence, may be revoked if cause be shown and the question in this case, and I think the only question really, is; Has cause been shown?"*
>
> ***Not Opportunity For Relitigation***
>
> *(34) It is respectfully submitted that in principle 0.24 r17 does not provide an opportunity for a litigant merely to relitigate the same issues that have previously been argued and decided by the Court*

*particularly where, as was the case here, a considered ruling has been given following extensive submissions.*

*(35) This would be entirely inconsistent with the fundamental principle of "res judicata" and also against the equally well-established principle that leave to appeal against an interlocutory decision will only be granted in exceptional circumstances.*

***Judicial Comity***

*(36) Where the order which is sought to be varied is that of another judge of coordinate jurisdiction, it would also be inconsistent with the principle of judicial comity for another judge to vary the order without good cause.*

*(37) In **Chetty v Fiji Public Service Association [2004] FJHC 359; HBC0400.2003 (6 May 2004),** Winter J who was considering an application to reconsider a brother Justice's decision on an interlocutory injunction stated-*

> ***"Reddy Construction Company Limited v Pacific Gas Company Limited 26 FLR 121** (Mr Justice Dyke) a decision of our Fiji High Court while not directly sighting comity nonetheless in principle equally applies. The learned justice refused an application to amend an injunction as he considered himself bound by the previous ruling of a brother justice and held that successive application should not be made unless circumstances had altered. The defendant applicant argues that I should re-look at this matter as my brother Justice Connors has now shifted to Lautoka and is unavailable to re-consider his original decision. This Court has a wide jurisdiction and large discretion to vary orders made on interlocutory application. However, as a matter of practice it would be extremely unsound for any judge in the absence of changed circumstances or exceptional policy consideration to vary or discharge an injunction."*

*(38) In **Hicks v Minister for Immigration & Multicultural & Indigenous Affairs 2003 FCA 757,** French J (once a member of the Fiji Supreme Court) explained the importance of judicial comity at paragraph 76 as follows-*

> *"The injunction to judicial comity does not merely advance mutual politeness as between judges of the same or co-ordinate jurisdictions. It tends also to uphold the authority of the courts and confidence in the law by the value it places upon consistency in judicial decision-making and mutual respect between judges."*

***The Test***

*(39) It is submitted that the foregoing makes clear that what must be required to justify an order under O.24 r.17 is some change in circumstances which could not have been raised earlier and that would make it just to vary the earlier order. In that regard, the*

*Defendants submit that the Plaintiff has not shown "sufficient cause" or any cause to vary the earlier orders at all.*

(05) I now turn to the Plaintiff's Submissions. In their written submissions filed on 10.06.2019, the plaintiff said;

(2.2) *It is to be noted that the 2nd and 3rd Defendants' principal complaint before Justice Sapuvida and Justice Ajmeer was that the filing and serving of the supplementary affidavit list of documents on the eve of the trial date previously set for 8 to 11 April 2018 was prejudicial to the 2nd and 3rd Defendants in that they were not able to review the documents and it was a trial by ambush.*

(2.3) *Since the trial date has now been adjourned from 9 to 13 December 2019 that complaint no longer exists.*

(2.4) *Before Justice Ajmeer, the 2nd and 3rd Defendants submitted that the Court was functus because of the existing order of Justice Sapuvida. Even if one was to interpret Justice Sapuvida's order as an order forever forbidding the Plaintiff from filing any further supplementary affidavit list of documents, Justice Ajmeer did not have the benefit of considering Order 24 Rule 17 so his Lordship was not functus.*

(2.5) *It is submitted that sufficient "cause" has been shown by the Plaintiff in the fact that the 2nd and 3rd Defendants cannot now complain that it is a trial by ambush or that they do not have enough time to investigate the documents because these documents were already given to them on 6 March and 15 March 2019. The Affidavit of Ann Elizabeth Haworth filed on 4th April, 2019 at paragraph 7 reads:*

> *"All the documents listed in the Plaintiff's 2nd and 3rd Supplementary Affidavit of List of Documents filed on 12th March and 21st March, 2019 respectively have been given to Munro Leys and hence, the 2nd and 3rd Defendants cannot complain about not having sufficient time to consider the documents.*
>
> *Annexed hereto and marked with the letters "AEH-1" and "AEH-2" are copies of letters dated 6th March, 2019 and 15th March, 2019 respectively are the said letters confirming this."*

*This is not denied by the 2nd and 3rd Defendants.*

(2.6) *The English Civil Procedure Rules ("CPR") Part 3.1(7) provides that:*

> *"A power of the Court under these rules to make an order includes a power to vary or revoke the order."*

(2.6.1) *The scope of that English Civil Procedure Rule was considered in* ***Thevarajah v Riordan and another****[2014] EWCA Civ 14, when reference was made to the earlier Court of Appeal decision in* ***Tibbles v SIG plc*** *[2012] EWCA Civ 518 regarding orders under*

*Rule 3.1(7) of the CPR. At para. 39 of* ***Thevarajah v Riordan*** *(supra) Lord Justice Rix said:*

> *"39. In my judgment, thus jurisprudence permits the following conclusions to be drawn:*
>
> *(i) .....*
> *(ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated."*

*(2.6.2) Whilst the wording in the CPR Par 3.1(7) does not have the words "sufficient cases" nevertheless the English cases provide helpful guide on how to apply Order 24 Rule 17.*

*(2.6.3) The Plaintiff submits the change of circumstances here is that the trial date now fixed is in a future date and there can be no complaint about a trial by ambush.*

*(2.6.4) Furthermore, the automatic directions under Order 25 Rule 8(h) providing "reliance at the trial on expert evidence, he shall, within 10 weeks disclose the substance of the evidence to the other parties in the form of a written report...." is no longer an issue because the medical reports of Dr DeVere and Dr Flume (even if they are considered experts) have already been disclosed to the 2nd and 3rd Defendants more than 10 weeks before the trial dates of 9th to 13th December, 2019 (see 2.5 above).*

(06) The matter depends on two rules. Order 24, rule 16 and Order 24, rule 17. Order 24, rule 16 says;

> **Failure to comply with requirement for discovery, etc.**
>
> **(O.24, r.16) 16.-**
>
> *(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose, fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1), (a) that party shall not be entitled subsequently to produce a document in respect of which default was made without the leave of the Court, and (b) the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.*

2) *If any party against whom an order for discovery or production of documents is made fails to comply with it, then, without prejudice to paragraph (1), he shall be liable to committal.*

(3) *Service on a party's barrister and solicitor of and order for discovery or production of documents made against that party shall be sufficient service to found an application for committal of the party disobeying the order, but the party may show in answer to the application that he had no notice or knowledge of the order.*

(4) *A barrister and solicitor on whom such an order made against his client is served and who fails without reasonable excuse to give notice thereof to his client shall be liable to committal.*

(07) Order 24, rule 17 reads as follows;

**Revocation and variation of orders**

**(O.24, r.17)**

17. *Any order made under this Order (including an order made on appeal) may, on sufficient cause being shown, be revoked or varied by a subsequent order or direction of the Court made or given at or before the trial of the cause or matter in connection with which the original order was made.*

(08) So that the order of the Hon. J. Sapuvida striking out the plaintiff's supplementary affidavit verifying list of documents dated 06.11.2015, and the order of Hon. Justice Ajmeer dated 14/09/2017 refusing to grant leave to file the supplementary affidavit verifying the list of documents (found the application to be "*res judicata*" and that the court was "*functus officio*") may be revoked if sufficient cause be shown and the question in this case, and I think the **only question** really is; **Has sufficient cause been shown?**

(09) The defendants say that no sufficient cause has been shown. The plaintiff says that sufficient cause has been shown. The plaintiff says that there is a change of circumstances since the order was made. I will return to this later.

(10) I now turn to the oral submissions made to me.

(11) Counsel for the defendant, Mr. Apted's oral submissions is that; (reference is made to page (10) to (15) of the Transcript of hearing)

*Mr Apted:* *Order 24 Rule 16 has an additional part. This is what I was coming to. It's not just about that. If you go to Order 24 Rule 16; under (a) the parties shall not be entitled subsequently to produce the document but the (b) the Court may make such Order as it thinks just including in particular an Order that the action be dismissed or as the case maybe an Order that the Defence be struck out and the Judgment be entered accordingly. So, in addition to the document being excluded, the Court has a wide discretion. And what we have to do which has not been acknowledged*

*by my friends' Submission. Our reliance on Order 24 Rule 16 was not about the, just about the document being excluded. We were seeking an Order from the Court that specifically be excluded and these Supplementary Affidavit be struck out and the Bundles be removed from the Court file. So, those were the Orders we were seeking from the Court. And as your Lordship has noted, it took Justice Sapuvida 18 months to issue the Order. He adjourned the matter. And it's very, very important to note that when he made the Order excluding the documents and striking out the Affidavits, the Trial had already been vacated. And I'll come back to that but that's the fact. So, as at the date of the Order which my friend seeks to vary the Trial, there was no prejudice as of that date. So, we take your Lordship now, to the fact and what we want to emphasize is that the reason we sought that Order or those Orders from Justice Sapuvida was because it was clearly Trial by ambush. And your Lordship in your Ruling of a couple of months ago, has emphasized how discovery and trials are about openness. And it was precisely this principle that the Plaintiff's then Solicitors breached. They withheld all of those very crucial documents until the 11th hour and then, I mean it's not a small point that they filed the Affidavit late and then withheld the documents and didn't give them to us until 3 days before the Trial. And that's quite a serious attempt to prejudice the Defendants. And these documents, also you will appreciate my Lord, from the list are all to do with things that happened in America which we could not even find out about ourselves. So, it was after considering all of those Submissions that Justice Sapuvida made his Orders. And we respectfully submit that it was all to do with punishing them, penalizing them for what they have done. We in response to the particular Summons, my Lord, say that, for the first Order about reviewing or varying Justice Sapuvida's Order, we are relying on the case of John Walker and Henry Ost which my friend does refer to. We don't have the case with us here today, I forgot it in the car, my Lord. But we will accept that we've named the Judge wrongly, we apologise to the Court for the typo but in any event, my friend does not dispute the principal which is that; under this rule it is for him as the Applicant to demonstrate cause to vary the Order. Maybe revoked as cost is shown. And the question in this case and I think the only question really is; has cause been shown? And that we submit, means that the plaintiff has the burden of showing cause to the Court. And that is the question; has the Plaintiff shown cause? We say, in interpreting this rule and the breadth of the Court's discretion, it is we would submit clear it has to be that this power can't be used to re-litigate. The Court's power to vary cannot be used to re-decided something just because a party disagrees. That's what appeals are for. And it would be entirely inconsistent, it's a fundamental principle of res judicata if a Court could vary an Order without good cause. Because then parties would become, would keep coming back over and over and over again to*

*see if they can get a different Order. There has to be some principle which restricts the discretion and it has to be good cause. A further reason why it has to be good causes the principle of judicial comity whereas, a file goes to a different Judge you can't have the second Judge just overruling the first one because they disagree. That would undermine the whole concept of neutral justice and objective justice. If the public got the idea that you go to a different Judge you get a different outcome especially where Judges are of the same standing of the same Court. So, for justice to work, Judges have got to respect each other's decisions. And this is the principles for example in the area of Injunctions where a similar principle applies. For example, if you apply for an Interlocutory Injunction and it is either granted or denied you can go back if circumstances change to either discharge the Injunction or try again for an Injunction. But in that jurisdiction which is basically the same as this one in terms of the principles, judicial comity is an important considerations and the Courts' always insist that there may be a material change in circumstances before they can make a decision that differs from the previous Judge. And we fight two cases;* ***Chetty v Fiji Public Service Association*** *where Justice Winter was considering an application to reconsider an Interlocutory Injunction that's at para 37 of our Submissions and he said;*

> *"Reddy Construction Company Limited v Pacific Gas Company Limited 26 FLR 121 (Mr Justice Dyke) a decision of our Fiji High Court while not directly sighting comity nonetheless in principle equally applies. The learned Justice refused an application to amend an injunction as he considered himself bound by the previous ruling of a brother justice and held that successive applications should not be made unless circumstances has changed."*

*And that's pretty basic. And in I've recited an Australian*

*Judge:* *You may continue, please.*

*Mr Apted:* *Pardon my Lord?*

*Judge:* *You may continue, please. You may*

*Mr Apted:* *Okay. An Australian decision, Hicks* ***v The Minister for Immigration*** *(Justice French) who was once on our Supreme Court, emphasized the importance of judicial comity and he said;*

*"The injunction to judicial comity does not merely advance mutual politeness as between judges of the same or co-ordinate jurisdictions. It tends also to uphold the authority of the courts and confidence in the law by the value its*

*places upon consistency in judicial decision-making and mutual respect between judges."*

*Which is the point I was making earlier, that if Judges of the same level of jurisdiction change their mind, public respect and the courts will be undermine. So, my friend, in his Submission relying on the CCPR we accept that that is the principle. That the same principle applies as under the English CCPR which is that he has to show a material change in circumstances. And our Submission is; he has not shown that. We say, he was wrong in saying that Order 24 Rule 16 is relied on by us only; for the exclusion of the documents at Trial. We applied under this rule for Orders specifically to exclude these documents. And at para 41 onwards, we refer to various cases, including a decision of your Lordship yourself, in Whittaker where more severe consequences, more severe Orders have been made where discovery obligations have not been complied with. So, there was that case Whittaker, there's Safari Lodge where Master Azhar dismissed an action also because discovery was not timely. Justice Mackie refused leave to appeal that Judgment. Other recent decisions in which an action has been dismissed or Statement of Defence has been struck out for delays and discovery and disobedience to discovery orders include Fisheries Limited which is at 2018, High Court Decision, and that was because the plaintiff delayed filing an Affidavit Verifying List for a year. Narayan v Ali, defence struck out for similar reason; Attorney General v Pacific Construction Works 2017, defence struck out for failure to file Affidavit Verifying List, the point of all of these is, all of these cases have been, they have been much more severe orders made under Order 24 Rule 16 for breaches of discovery obligations. So, our Submission is Justice Sapuvida's Order was made under the same jurisdiction, under the same rule. And compared to these Orders, this Order was quite moderate. It only excluded those documents whereas he had the discretion to go as far as to dismiss the action. So, this was clearly a decision and Order made an exercise of a power that was not extreme by any means. And it took him 18 months to decide, he heard us, there were written submissions so it was a very considered decision. It wasn't one made summarily. So, we submit that this context has got to be looked at. My friend says; that the material change in circumstances is the change in the Trial. But as your Lordship has pointed out that is not the change from the date that the Order was made. As at the date of Justice Sapuvida's Order, the Trial had already been vacated. So, it was clearly an Order made in the discretion under Order 24 Rule 16 to penalize the Plaintiff for her Counsels' conduct.*

*And if you look at the history of this matter, subsequent to that, the Plaintiff did not seek leave to appeal that Order. She could have, she didn't. She has tried other things, she withheld various Trial dates again vacated and then she*

*does almost the same thing again just before our last Trial which is, your Lordship allow the documents in but a lot of those documents date way back and yes, there is a continuing duty to discover but that is as the documents are found. Not a continuing duty to discover things you had five (5) years ago, that you've been withholding. And there's a pattern in this matter. Each time there is a Trial date, a whole lot of documents that have existed for many years get discovered. And that is, your Lordship is correct to say this system is about transparency and playing with open cards. But it's not the defendant who is not playing with open cards. It's the plaintiff's whose been hiding her cards all the time to the last minute because she's got the joker there somewhere. And she won't throw it until we can't deal with it. That has been the pattern. So, going back to the Submission, my Lord, we would respectfully submit,*

*(a) Justice Sapuvida's Order was not unfair;*

*(b) With the greatest of respect, this Court's jurisdiction to vary it must be exercised on principle. It can't reconsider just because your Lordship disagrees. There has to be some material change. It is for the plaintiff as the Applicant to show that cause to the Court. If you go to the plaintiff's Affidavit, if you go to the plaintiff's Submission, the only cause shown by the plaintiff is the adjournment of the Trial date. But as your Lordship yourself has pointed out, that was not a change. It had already been adjourned for 18 months on the date that the Order was made. There was also no future Trial date, so when Justice Sapuvida made those Orders, he knew that the Defendants had time to respond to the documents. So, that is not a material change and that is the only cause that the Plaintiff had shown. So, with all due respect to the Plaintiff, the Plaintiff who is the one who has the burden, has not met the burden. And it would be with the greatest of respect unjust, it would also be in breach of the rules of judicial comity and res judicata if the Court were to vary those orders only because your Lordship disagrees. Justice debugs that Orders of every Judge be respected by a Judge of the same co-ordinate jurisdiction. The only way you can vary a Judges' Order because you disagree is by way of appeal. And that is the way our system works. That is all we have on that. Does your Lordship want to hear some special damages or we will just rely on our Submissions.*

(12) In reply, Counsel for the plaintiff, Mr Young says; (reference is made to page (15) to (17) of the transcript of hearing).

*Mr Young:* *My Lord, may I just address the issue about the 18 months issue. Lord,* ***when a Judge has a case, whether he has it today and then writes his judgment in 5 years' time, he has to decide on the facts as it existed on the date of the hearing. So, for my learned friend to try and suggest that his ruling 18 months later, was in relation to the situation existed 18 months thereafter has no merit. It has to be so at that particular time when the time he said; I will now adjourn the matter for Ruling, and I am going to vacate it, he had to deal with the issue and the fact at that particular time. And he found that at that particular time it was wrong for the Plaintiff to try and put documents in when the Trial date was in two days' time, or few days' time. That's what he was .....with. Not 18 months later.*** *That's the first point. Now, in the issue of judicial comity, my Lord, the over arking principle is this. If there's a .[0.35.36.6..] followed by a Judge, he say; this is I poll that say for example, this is the law then as a Judge you should unless for good reasons, you should follow, and said the previous judge had said that Injunction should not be granted under this particular circumstances. And so, I think the circumstance are exact to the same so therefore I should follow it. But this is not, nothing to do with judicial comity. It's a nice word, my Lord. But it doesn't apply to this situation because we are not talking about same issue. The reason being is this; we have come and you have rightly done so, come on a separate application under Order 24, Rule 17. It says; it empowers the Court without the need of appealing to ask the Court to reveal Orders made under discovery. It doesn't exist anywhere else, actually. We were to look at other High Court Rules. It doesn't exist anywhere. It's a specific power to discover it. And if I could just read the paragraph my Lord, it says this; "Any order made under this Order including an Order made on appeal, that's important. So, if the Court of Appeal made an Order, my Lord, before to say no, we are asking you to give discovery over all your Bank Statements, right? And the Court of Appeal make that Order. Then if it comes back to your Lordship and he says further, then the rest of the matters is referred back to the High Court Judge as they normally do, then these rules actually permits your Lordship, you don't have to say, No, I'm sorry, I'm bound by the Court of Appeal. The Plaintiff can come back to you and say; On evoking Order 24 Rule 17, even though they appeal, Orders says that I have to do this, I'm asking you to vary that appeal Order. Appeal my Lord, the wording is much stronger so your Lordship doesn't have to go and say; I'm bound by the Court of Appeal rules, but this is only for discovery. Nothing else. Order 24 Rule 17.* ***Now, the change of circumstances, my Lord. He said we haven't shown any facts. We have, my Lord. The changes of circumstances is this; everything that the Defendant had been pushing and submitting to Justice Sapuvida was his Trial by ambush. And if you look at the Affidavits, and I invite your Lordship to look at the Affidavits and the***

***Submissions, he said; we don't have enough time to consider all these documents more particular one of their own; Dr De Vere's document. And in fact, one of his submission said; we don't even know that you are going to use it now. That's irrelevant, whether we use or we don't use it. But, it's just a human error by accepting that as a reason. He knows now, when the time he's filing, we are going to use it.*** *If subject to the rules of enemies. So, he can't say that the same issue before Justice Sapuvida is the same issue now.* ***There's no Trial by ambush.*** *We have been trying to comply with the rules of discovery. Now, your Lordship would know and Counsel would also know that not only the [0.39.02.6].is bound by lose of discovery. It's also the Solicitors to ensure that their client complies with the rules of discovery. And that's what happened. When he comes towards us, when you see it, we had to put all those documents in. And the Vernom case is very, very clear on the point. How did you use it? You don't deal with it by saying, I refused you to file any more Supplementary Affidavit List of Documents, you don't have that power. But you deal with it with costs. Because it means adjourning the case and it means; okay you put the Defendant to all his expenses, you pay $20,000.00, $30,000.00 and what it is. But doesn't apply over here, my Lord. Because we are already giving it to them and they have a right to raise an issue to say, it's coming too late. It is not too late. So, it's a very simple particular issue. We have changed the circumstances. And that's a blurry change of circumstances because the Trial date is not at end of December, then all these time. Unless they come back, unless they come back to ask now and say; Listen, because they come so late Dr De Vere is refusing to deal with us anymore or we can't deal with it (Dr De Vere) or his Dad or whatever it is then your Lordship can say; okay, under those circumstances, I would not revoke the Order. But there is no evidence. They didn't show any prejudice. And we have shown, my Lord.* ***We have shown change of circumstances, Trial Dates in December is strongly given way back in August.*** *And when you look at all the correspondences, so they come now, they are the 4th of the doorsteps of the actual Plaintiff. Now my Lord, that's all I have to say and I wanted .....my learned, read the John Walker case and I'll hand over to this Court and he will, I think agree with me, and in fact my Lord, I invite your Lordship, it's quite a lengthy Judgment. I'm not sure where they called the.. [0.40.52.6].....in that case but I couldn't find it on a quick reading what I did yesterday. I couldn't find the proposition of law that he say was in the case. But I accept the proposition of law because I'm saying in my case that I have to go and show cause. And I'm submitting that I have done that. But I'm not holding against it because I know we are all living on a lot of pressure and that will be some proper errors, .....and then he can hand them to your Lordship.*

(Emphasis added)

(13) As I understand the submissions, in a nutshell, what the plaintiff says about the change of circumstances since the order was made is that;

- ❖ Since the trial date has now been adjourned to 9th to 13th December, 2019 the complaint of 'trial by ambush' no longer exists.

- ❖ Since the documents were already given to the defendants on 06.03.2019 and 15.03.2019 the defendants cannot complain that it is a trial by ambush or that they do not have enough time to investigate the documents.

(14) True is that the trial has now been adjourned to 9th to 13th December, 2019. True is that the defendants admitted the service of the documents on 06th and 15th March, 2019.

**Has sufficient cause been shown?**

(15) Justice Sapuvida delivered the ruling on 30.01.2017. His Lordship ordered:-

> *"Plaintiff's supplementary affidavit verifying list of documents dated 06th November 2015 is struck out and dismissed.*
>
> *The documents listed in the said affidavit shall not be produced in evidence."*

(16) The orders were given well after the 2015 hearing had been adjourned. To my mind, it is axiomatic that the orders were clearly for the exclusion of the relevant documents from the subsequent hearing of the action. It is true, as Counsel for the defendants pointed out, that if Justice Sapuvida intended only to exclude the documents from the prior aborted 2015 trial, it would not have been necessary for His Lordship to make the orders at all in 2017. There is much force in the defendants submission that His Lordship's order was intended to make it clear that the plaintiff, by **attempting trial by ambush**, had lost the opportunity to rely on those documents at the trial to come. With respect, it is wrong to characterise Justice Sapuvida's order as applying only to exclusion of the evidence from the trial that had been scheduled for November 2015. Of course, I do not deny for a moment that *when a judge hears a case today and writes his judgment some time back he has to decide the facts as it existed on the date of the hearing.* **When the defendants raised a preliminary objection to the late discovery on 17th November 2015, Justice Sapuvida vacated the trial. So there can be no complaint about a trial by ambush since the trial is vacated and the defendants have time to investigate into the documents.** A trial by ambush is what happens when one side or another in a trial is caught by surprise by some unexpected or unknown factor. It must be borne in mind that there was no future date fixed for trial when justice Sapuvida made the discovery orders 18 months after the vacation of trial. **The order was made 18 months after the date of hearing and His Lordship very well knew when the order was made that the defendants had sufficient time to investigate into the documents and there can be no complaint about trial by ambush.** As stated, because the 2015 trial was vacated there can be no complaint of trial by ambush. It was just an attempt for trial by ambush. After the discovery order was made there can be no complaint of trial by ambush. So what is the material change of circumstances before and after the order was made?. I find it difficult to

understand Mr. Young's argument addressed to court "*the change of circumstances here is that the trial date is now fixed in a future date and there can be no complaint about a trial by ambush*". I must confess, as best as I tried to understand this submission, Mr. Young has failed to convince me. If Justice Sapuvida intended only to exclude the documents from the prior aborted 2015 trial, it would not have been necessary for His Lordship to make the orders at all in 2017.

(17) As I see, what is required to justify an order under Order 24, r.17 is some change in circumstances which could not have been raised earlier and that would make it just to vary or revoke the earlier order.

If I may say without impertinence, I do not agree with the decision of J. Sapuvida dated 30/01/2017 and Justice Ajmeer dated 14/09/2017 on discovery and I do not propose to follow them at all. It is unfortunate that the plaintiff's supplementary affidavit verifying list of documents have been struck out. The proceedings have taken on a marathon character for the last seven years. The plaintiff and the defendants have been put to considerable expense in the meantime. All of those circumstances, however unfortunate, do not relieve me of the duty of determining the correct meaning of Order 24, rule 17 of the High Court Rules and its proper application in the circumstances.

Order 24, rule 17 says;

> *17. Any order made under this Order (including an order made on appeal) may, **on sufficient cause being shown**, be revoked or varied by a subsequent order or direction of the Court made or given at or before the trial of the cause or matter in connection with which the original order was made.*
>
> (Emphasis added)

**So that right up to the very trial itself any order on discovery may be revoked if cause be shown. No sufficient cause has been shown by the plaintiff to revoke or vary the discovery order made under Order 24, rule 16. The plaintiff has failed to surmount the threshold requirement.**

I read "John Waker" (supra) and did find it helpful.

In view of the approach I have adopted, it would be at best a matter of academic interest only or at worst an exercise in futility to express my conclusion on the merits of the defendants' argument in relation to 'judicial comity' and 'res judicata'.

(18) The prayer (ii) in the plaintiff's summons is refused.

(19) In prayer (iii) of the Summons, the plaintiff seeks the following order;

> *(iii) That the Plaintiff be at liberty to file and serve particulars of special damages in relation to her medical expenses (including medical fees paid to doctors and hospitals, medication, travelling to*

*and from the same and all incidentals thereto) within sixty (60) days from the date of the order and that such particulars of special damages be treated as part of the Statement of Claim being special damages for the Plaintiff's medical expenses up to the date of the said particulars of special damages.*

(20) The defendants submit that, this order is unnecessary and unfair in view of the fact that there have been three previous aborted trial dates without particularisation of special damages.

(21) However, in the interest of justice, the court is minded to make an order without shutting them out. **The plaintiff is allowed to deliver particulars of special damages within (30) days from the date of this ruling. However, this does not relieve the plaintiff from having to plead special damages in the statement of claim.** Therefore, the prayer (iii) in the plaintiff's summons is granted subject to condition.

(22) In prayer (iv) of the Summons the plaintiff seeks the following orders;

> *(iv) That the parties be at liberty to file any further supplementary list of documents and serve copies of the documents referred to in the supplementary list of documents **no later than thirty (30) days prior to the first day assigned by the court for the trial of this action**.*
>
> [Emphasis added]

(23) The defendants oppose this order which seeks to allow the plaintiff to withhold documents until one month before trial.

(24) The plaintiff should discover documentary evidence in a timely manner. Subject to that the order is granted.

(25) In prayer (v) of the summons, the plaintiff seeks the following order;

> (v) *That judgment be entered against the 2nd and 3rd Defendants on liability in accordance with the admission made in the Affidavit of Viliame B. Vodonaivalu filed on 20 March 2019 at paragraph 9.*

(26) The defendants do not oppose the order. The order is granted.

## (D) ORDERS

(i) The prayer (ii) of the plaintiff's summons filed on 04th April 2019 is refused.

(ii) The prayer (iii) of the plaintiff's summons is granted but this will not relieve the plaintiff from making any necessary amendments to the statement of claim.

(iii) The prayer (iv) of the plaintiff's summons is granted.

(iv) The prayer (v) of the plaintiff's summons is granted. Judgment on liability is entered by consent in favour of the plaintiff against the defendants and the proceedings are adjourned to 9th to 13th December for assessment of quantum of damages.

(v) Costs in the cause.

HIGH COURT OF FIJI
LAUTOKA

31/10/2019.

**Jude Nanayakkara**
**[Judge]**

**At Lautoka,**
**Thursday, 31st October 2019**