

IN THE HIGH COURT OF FIJI  
WESTERN DIVISION AT LAUTOKA  
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 257 OF 2018

BETWEEN : SHAMINA BIBI aka SHAMIMMA BI of Lot 7 Bountiful Estate, Vunisalato Road, Waqadra Namaka, Domestic Duties as Administratrix of the Estate of her late husband SHAMIM SHARIFF aka SHAMIM late of Waqadra, Nadi, in the Republic of Fiji, Waiter, Deceased, Intestate.

PLAINTIFF

AND : FAZILAT BEGUM SHAH RASHEED of Lautoka, Barrister & Solicitor, operating as FAZILAT SHAH LEGAL Barristers & Solicitors of 7 Valetia Street, Lautoka.

1<sup>ST</sup> DEFENDANT

AND : NAAZLI ZARIYA SHARIFF aka NAZLI NARIYA SHARIFF of Lot 15 Kishore Kumar Road, Laucala Beach Estate, Nasinu, Fiji, School Teacher/Beneficiary.

2<sup>ND</sup> DEFENDANT

**Appearances** : Ms M. Sukanaivalu for the plaintiff  
Mr M. Naivalu for the first defendant  
Mr J. Prakashan for the second defendant

**Date of Hearing:** 08 March 2019

**Date of Ruling** : 28 March 2019

## R U L I N G

[on striking-out]

### Introduction

[01] This ruling concerns with the two separate applications (*the applications*) filed by the defendants to strike-out the plaintiff's statement of claim.

[02] By her application filed on 28 November 2018, the first defendant applies to the court to strike out the plaintiff's statement of claim dated 20 November 2018 and the notice of motion for stay of execution and injunction dated 24 November 2018, be dismissed with costs on a higher scale, upon the following grounds:

1. *Order 18 rule 18 (1) (a) to (d).*
2. *Under the inherent jurisdiction of this Court.*
3. *That time for service of this summons be abridged to one day.*

[03] The first defendant filed the affidavit of Setaita Senikuba Ravai, her Litigation Solicitor sworn on the 28 November 2018 in support of her application.

[04] The second defendant also filed a similar application on 10 January 2019. By her application, she seeks to strike out the plaintiff's action and statement of claim on the grounds:

- i. *That it disclosed no reasonable cause of action;*
- ii. *It is frivolous and vexatious;*
- iii. *It may prejudice, embarrass or delay the fair trial of the action*
- iv. *It is an abuse of the process of the Court.*

[05] Both applications are made under Order 18, Rule 18 (1), (a), (b), (c) and (d) of the High Court Rules 1988, as amended ("*HCR*") and the inherent jurisdiction of the court.

[06] The plaintiff has filed the affidavit of Shamima Bibi, the plaintiff in response to the first defendant's affidavit in support.

[07] It is worth noting that the plaintiff did not file any affidavit in response to the second defendant's affidavit in support.

[08] At the hearing, the defendants orally made submissions in support of their respective applications. However, the counsel who appeared for the plaintiff only said she had nothing to add. That means she did not put forward counter argument why the applications for striking-out should not be allowed.

## The background

[09] Shamina Bibi, the administratrix of the Estate of her late husband (Shamim Shariff) and Naazli Zariya Shariff (the beneficiary of the Estate of her late father) are mother and daughter. Shamina Bibi, the plaintiff brought this action (HBC No. 257/18) to set aside the consent order entered and pronounced in open court in Civil Action No. HBC 1 of 2017 (*'the first action'*) initiated by Naazli Zariya Shariff, the second defendant on 27 September 2018 (*'the consent judgment'*). The parties and their respective counsel had signed the terms of settlement. The terms of settlement reads:

### Terms of Settlement

#### WHEREAS:

- a) *The plaintiff has an undivided half share and a beneficiary in the Estate of Shamim Shariff aka Shamim.*
- b) *The defendant is the Administratrix of the estate of her late husband SHAMIM SHARIFF aka SHAMIM late of Waqadra, Nadi in the Republic of Fiji.*

*BY CONSENT both parties have hereby agreed as follows:*

1. *The plaintiff namely NAALI ZARIYA SHARIFF aka NAZLI ZARIYA SHARIFF to purchase the property being Crown Lease No. 13667 being Lot 7 on SO 3505 situated at Lot 7 Bountiful Estate, Vunisalato Road, Waqadra Namaka at the agreed sum of \$310,000 (Three Hundred and Ten Thousand Dollars) in full on 'as it where is' basis.*
2. *From \$310,000.00 (Three Hundred and Ten Thousand Dollars), the said sum will be divided by two wherein the plaintiff' share (as to one undivided half share) is \$155,000.00 (One Hundred and Fifty Five Thousand Dollars) and the Estate of SHAMIM SHARIFF also known as SHAMIM is \$155,000.00 (One Hundred and Fifty Five Thousand Dollars).*
3. *The plaintiff also being a beneficiary of the Estate of Shamim Shariff also known as Shamim is also entitled for her shares from the Estate in the sum of \$19,375.00 (Nineteen Thousand Three Hundred and Seventy Five Dollars).*
4. *From \$155,000.00 (One Hundred and Fifty Five Thousand Dollars) as the half undivided share of the Estate of Shamim Shariff also known as Shamim, \$19,375.00 (Nineteen Thousand Three Hundred and Thirty Five Dollars) will*

*be deducted as the share of the plaintiff, Naazli Zariya Shariff also known as Nazli Zariya Shariff.*

5. *The total sum will be paid to the defendant Shamina Bibi also known as Shamimma Bibi is \$135,625.00 (One Hundred and Thirty Five Thousand Six Hundred and Twenty Five Dollars).*
6. *The transfer process to be completed within six weeks subject to the approval of consent from the Director of Lands.*
7. *The defendant's share in the sum of \$135,625.00 (One Hundred and Thirty Five Thousand Six Hundred and Twenty Five Dollars) will be paid into the Trust Account of her Solicitors, Fazilat Shah Legal.*
8. *The plaintiff will allow the defendant and her disabled sister to reside on the property at the Front Flat for the next 4 months, that is, until 27 January 2019.*
9. *All rental income from the date of settlement is to be deposited into the plaintiff's Bank account.*
10. *Upon vacating the property, the defendant together with her disabled daughter are to only take their personal belongings excluding any fixed fixtures.*
11. *The mortgage payments will be taken over by the plaintiff and will solely be her responsibility upon the signing of this Terms of Settlement.*
12. *The defendant is to take responsibility of vacating the Tenants from the back flat of the property.*
13. *The plaintiff is to be allowed to access the property for renovation purposes upon receipt of the court order.*
14. *The plaintiff to execute the transfer instruments and obtain the consent of the Director of Lands together with stamp duties.*
15. *The defendant is also to execute the transfer documents and apply for Capital Gains Tax.*
16. *All beneficiaries apart from that have renounced their shares are to give their consent to sell the property.*
17. *Peace is to be maintained between the parties and no personal comments or anything or similar nature are to be passed at each other within the 4 months period pending settlement.*
18. *Each party to bear their own solicitor costs.*
19. *All parties consent that the terms of settlement be made an order of this Honourable Court.*
20. *This action be henceforth discontinued.*

- [10] Based on the terms of settlement, the court entered and pronounced the consent judgment that Naazli Zariya Shariff (the plaintiff) will buy out Shamina Bibi (the defendant) for the total sum of \$155,000.00, which the half of the agreed valuation of the property obtained by the defendant.
- [11] The plaintiff (also plaintiff in the first action) has instituted the current proceedings to set aside the consent judgment entered in the first action.

### Legal framework

- [12] The HCR, Order 18, Rule 18, provides so far as material:

*'18 (1) The Court may at any stage of the proceedings order to be struck out or amended any pleadings 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;*
- (b) it is scandalous, frivolous or vexatious;*
- (c) it may prejudice or embarrass or delay the fair trial of the action; or*
- (d) it is otherwise an abuse of the process of the court,*

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

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

*(3) ...'*

### The governing principles on striking out

- [13] The general principles applying to the court's jurisdiction to strike out pleadings are well established and are not in dispute. The well-established general rule is that:

*"It is only in 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 QB 86 at 91 (Mayor, etc., of the City Of London v Homer (1914) 111*

LT 512, CA). See also *Kemsley v Foot* [1951] 2 KB 34; [1951] 1 All ER 331, CA, affirmed [1952] AC 345, HL. "(Emphasis provided)

- [14] The Fiji Court of Appeal in *Attorney-General v Shiu Prasad Halka* 18 FLR 210 at page 215 held that:

*"The power to strike out given by Order 18 rule 18 (formerly Order 18 rule 19) is one which is to be sparingly exercised and only in exceptional cases. It should not be exercised where legal questions of importance and difficulty are raised."*

- [15] In *National MBF Finance Limited v Buli* (Civil Appeal No. ABU 57 of 98), Fiji Court of Appeal succinctly summarised the principles as follows:

*"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 (untamed 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."*

### **The Law on setting aside a consent judgment or order**

- [16] The law on setting aside a consent judgment or order also relevant to these proceedings as the plaintiff seeks to set aside a judgment. The following cases illustrate the grounds upon which the court may set aside a consent judgment or compromise in a fresh action brought for that purpose.

- [17] In *de Lasala v. de Lasala* [1980] AC 546, 561, the Privy Council held that:

*"the setting aside of a consent order which is a final order on the grounds of fraud or mistake requires the bringing of a fresh action for this purpose"*.

- [18] In *Sharma v Caldwell* [1975] FJLawRp 12; [1975] 21 FLR 85 (25 July 1975), McMullin J.A. said:

*"A settlement or compromise in an action in which money or damages is or are claimed by or on behalf of an infant is invalid without the sanction of the court—Halsbury's Laws of England, 3rd Edition, Volume 9, Page 234, Para. 536. Nor does it matter that the settlement or compromise has been made the subject of a judgment by consent. Such a judgment would appear to be no better than the source from which it springs, viz; the settlement or compromise made between the parties. A judgment given or an order made by consent may, in a fresh action brought for the purpose, be set aside on any ground which would invalidate a compromise not contained in a judgment or order — Halsbury's Laws of England, 3rd Edition, Volume 22, Page 792, Para. 1672. In Wilding v Sanderson [1897] 2 Ch. 534 at 544 Bryan J. Said*

*"And just as a consent order may be set aside upon any of the grounds upon which an agreement can be set aside, so it appears to me to follow that such an order may be set aside if it can be clearly proved that there is no agreement, and consequently, no true consent to the order made".*

Vaughan Williams J. made the point more forcibly in *Huddersfield Banking Cnnpany[sic] Ltd. v Henry Lister & Son* [1895] 2 Ch. 273 at 276 when he said:—

*"The real truth of the matter is that the Order is a mere creature of the agreement, and to say that the Court can set aside the agreement but that it cannot set aside an order which was the creature of that agreement seems to me to be giving the branch an existence which is independent of the tree".*

Whatever the inadequancies [sic] of the affidavit filed in support of the application to set aside the consent judgment, there can be no dispute that respondent is an infant and, as such, a person under disability. Order 80, Rule 10 of the Rules of the Supreme Court (The White Book 1967), as amended by the Fiji Supreme Court Rules 1968, provides:

*"10. Where in any proceedings money is claimed by or on behalf of a person under disability, no settlement, compromise or payment and no acceptance of money paid into court, whenever entered into or made, shall so far as it relates to that person's claim be valid without the approval of the Court".*

The rule corresponding to Rule 10 and in force at the time the settlement was effected and judgment entered, viz; Order 22 Rule 14(1) was to the same effect. Clearly, subject to the setting aside of the judgment by consent, respondent is not bound by the settlement, the approval of the court not having been obtained.

## The affidavit evidence

[19] The first defendant in her affidavit in support of the striking-out application states that (in summary):

- a) *I am the Litigation Solicitor with the first defendant and did have conduct and carriage of Civil Action No. 1 of 2017 in the High Court of Fiji at Lautoka (hereinafter referred to as the said Action) and I am duly authorised by the first defendant's law firm to make this affidavit in reply to the plaintiff's said affidavit.*
- b) *I say that the plaintiff reads and understands spoken English very well.*
- c) *At all material times the plaintiff conversed with me in the English language and she did not any time express any concerned about her communication with me.*
- d) *The contents in paragraph 5 to 14 inclusive of the said affidavit are strictly between the plaintiff and the second defendant and I make no comments on the same.*
- e) *The first defendant never instituted any proceedings on behalf of the second defendant.*
- f) *The first defendant's law firm agreed to act for the plaintiff upon payment of a retainer in the sum of \$5,000.00 and the plaintiff having agreed to the same than defaulted and paid part retainer of \$3,500.00.*
- g) *The plaintiff had a Pre-trial conference with me in the first defendant's office before attending Court.*
- h) *The plaintiff never had expressed any doubts about communicating in English.*
- i) *The plaintiff is misleading this Honourable Court by saying that she does not understand English. The Court file in question at the material time was brought to us by the plaintiff from her previous solicitors namely Messrs Rams Law, Barristers & Solicitors of Nadi. (I annex herewith a copy of the plaintiff's affidavit sworn by the plaintiff on 16 February, 2017 and prepared by her previous solicitors. The plaintiff has testified in the Jurat to the said affidavit that the content of the said affidavit was explained to her in the English language and mark it as annexure "SSR1").*
- j) *The plaintiff understands the written English language (I annex herewith a copy of an extract of the plaintiff's Oath of Executrix in the estate of her late husband and mark the same as annexure "SSR2").*
- k) *The plaintiff did not at any time request for Ms Shah to be personally present in her case.*
- l) *The plaintiff freely concurred with the Terms of Settlement and my advice to her was in line with her instructions.*



*With regards to the settlement:*

- (m) *On the early morning of 27 September 2018, I attended to the plaintiff in my chambers and proofed her potential evidence for Trial. **The exchange was in English and she answered my questions freely in English.***
- (n) *The plaintiff and I along with her adult daughter appeared before His Lordship Mr Justice Mohamed Ajmeer at 9.30 am and advised His Lordship that we were ready to defend the second defendant's claim.*
- (o) *Further I advised His Lordship if the matter could be referred for mediation as per the plaintiff's instructions because she wanted to reconcile the matter without proceeding to Trial, if possible.*
- (p) *Earlier that week as per the plaintiff's instructions, I had communicated this intent to the counsel for the second defendant via email (I annex a copy of the said email and the second defendant's counsel's response and mark the same as annexures "SSR3" and "SSR4" respectively).*
- (q) *His Lordship in response said that he would mediate and proceeded to elicit information from the parties through their counsel as to the relative valuation of the property.*
- (r) *As each party wanted to buy out the shares of the other, His Lordship stated that if the parties did not agree on this single issue, he will make an order that the property be sold to a third party.*
- (s) *His Lordship granted a short recess to enable the parties to resolve this critical issue if possible.*
- (t) ***In the presence of both counsel, the plaintiff and the second defendant reached an amicable settlement through an open and frank discussion and without any undue influence from any side and the same is reflected in the Terms of Settlement as filed in Court.***
- (u) *Further say that there was no suggestion from His Lordship to rush the matter through.*
- (v) *The plaintiff is misleading this Honourable Court as **she at all material times understood all matters that had transpired on the day of the hearing.***
- (w) *In the recess period allowed by His Lordship and after parties and their respected counsel had agreed to Terms of Settlement in a draft form, I took the draft back to my office to be typed out.*
- (x) *Before the Terms of Settlement was typed out **the plaintiff signed an authority to Fazilat Shah Legal to reflect the ceiling of her settlement amount with the second defendant** (I annex a copy of the said authority and mark it as annexure "SSR5").*

- (y) *The plaintiff executed the said authority to us after she and her daughter had read the same and after I had explained to them fully as to the contents of the said authority.*
- (z) *Thereafter, once the court draft was typed out I gave a copy of the same to the plaintiff and her daughter to go through it.*
- (aa) *Both the plaintiff and her daughter read the unsigned Terms of Settlement and signified their acceptance of the same.*
- (bb) *At the Court in the presence of the plaintiff, her daughter, the second defendant and her counsel, I gave the typed out Terms of Settlement; 3 copies in all one by one to the second defendants counsel for execution by them.*
- (cc) *After the second defendant had executed the first copy her counsel returned the copy to me whereupon the plaintiff signed and I witnessed and then I handed the document back to the second defendant's counsel to indorse the same. This pattern was typical of all 3 copies of the Terms of Settlement.*
- (dd) *Once all 3 copies had been fully executed, the clerk of the Court notified His Lordship who then appeared on the Bench and the second defendant's counsel then gave all 3 copies to His Lordship.*
- (ee) *His Lordship then proceeded to read each and every item numbered 1 to 20 of the Terms of Settlement and confirmed with the counsel if the same was correct to which both counsel replied in the affirmative. Then His Lordship proceeded to ask both, the plaintiff and the second defendant to stand up and asked them if they had understood and agreed to the Terms of Settlement and both the plaintiff and the second defendant replied in the affirmative.*
- (ff) *His Lordship then granted Orders in Terms of Settlement (I annex a copy of the Terms of Settlement and mark it as annexure "SSR6").*
- (gg) *Prior to the hearing of the 27 September 2018, the matter had been set down for Hearing on 25 January, 2018 and after preliminary objections by me His Lordship Mr Justice Mackie had adjourned the matter.*
- (hh) *The very same day after the matter had been adjourned the plaintiff and her daughter attended to me in my chambers and asked me to negotiate a settlement with the second defendant as per the direction of His Lordship.*
- (ii) *In the said regard, the plaintiff executed an authority to us to negotiate the settlement as she wanted to buy the second defendant's share (I annex a copy of the said authority and mark it as annexure "SSR7").*
- (jj) *I categorically deny the allegations in paragraph 29 of the said Affidavit and say that the same is mischievous and ought to be struck out.*

- (kk) *As regards to paragraph 30 of the said Affidavit I say that the plaintiff is misleading this court as she had ample opportunity to ventilate her grievance before executing the Terms of Settlement and also after execution when questioned by His Lordship.*
- (ll) *I take serious issue with paragraph 32 of the said Affidavit and say that the Plaintiff is attempting to wriggle out of an open frank and negotiated settlement upon misguided legal advice.*
- (mm) *In response to paragraph 33 of the said Affidavit I say that the issue of consent was well ventilated before His Lordship Mr Justice Mackie and His Lordship directed that consent can be obtained at any stage.*
- (nn) *In response to paragraph 34 of the said Affidavit I say that the said claim is frivolous and vexatious and does not show a cause of action against the first defendant and I ask this Honourable to dismiss the same with Indemnity Costs against both the plaintiff and her counsel.*
- (oo) *We have already written to the plaintiff's counsel to withdraw the said action or face the consequences of a Calderbank v Calderbank penalty (I annex a copy the said letter and mark it as annexure "SSR8").*

*Plaintiff's affidavit in reply*

[20] The plaintiff in her affidavit in reply states:

- (a) I do not understand the English language nor can I read or speak in English as I did not complete my education and left school when I was 11 years of age.
- (b) I did not on any occasion converse or communicate with Miss Ravai in the English language.
- (c) I did not meet Miss Ravai before the commencement of the proceedings as I was expecting the first defendant to appear for my matter as I could communicate easily with her in the Indian language. I was astonished to see an Itaukei Counsel appear for my matter and it was difficult for me to communicate and understand her as I did not speak nor understand the English language or have any interpreter to help me understand what she was saying.
- (d) In response to the contents stated therein paragraph 9 of the said Affidavit, I would like to state that Miss Ravai knew the difficult circumstances I was surrounded by as I could not communicate with her in the English language.

- (e) In response to paragraphs 10 and 11 of the said Affidavit, I would like to state that the contents were read to me in the English language, however, the contents were never explained to me in a language that I could understand.
- (f) The annexure marked "SSR1" was executed by me in front of the Commissioner for Oaths after my son explained its contents in Hindustani language and thereafter the said Commissioner for Oaths asked me if I understood the contents and thereafter I signed the said annexure.
- (g) In response to paragraph 12 of the said Affidavit I did personally ask the first defendant to be present as I was comfortable while communicating with her as she could speak in Hindi.
- (h) In response to paragraphs 15 and 16 of the said Affidavit, I would like to state that I did not give any instructions to Miss Ravai in regards to the Terms of Settlement. I was advised by Miss Ravai that I should execute the Terms of Settlement as this was favourable to me, however, the contents and **Terms of Settlement were never explained to me in the Hindustani language.** I further say as follows:
- (i) I deny the allegations contained in paragraph 16 sub (i) of the said Affidavit.
  - (ii) I admit the allegations contained in paragraph 16 sub (ii);
  - (iii) That I am not aware of the allegations contained in paragraph 16 sub (iii);
  - (iv) That I deny the allegations contained in paragraph 16 sub (iv);
  - (v) That I am not aware of the allegations contained in paragraph 16 sub (v), (vi) and (vii) as the Miss Ravai was talking to the Judge in the English language which I did not understand;
  - (vi) That **the alleged settlement was explained to me by the first defendant.**
- (i) In response to paragraph 17 of the said Affidavit, I would like to state that Miss Ravai was communicating with the Lordship in the English language and I did not understand a single word stated by Miss Ravai as it was beyond my understanding. Things were being rushed and Miss Ravai directed me to sign a particular document as the Lordship wanted to finish the matter on the said day.
- (j) In response to paragraph 18 of the said Affidavit, I did not have any interpreter to translate the transactions of the day to me, I did not understand anything which was said in Court, however, I signed the documents as my counsel namely Miss Ravai had stated that the documents were favourable to me.

- (k) In response to paragraph 19 of the said Affidavit, the contents stated therein are false. Miss Ravai advised me that the Terms of Settlement were in my favour and that I should sign the Terms of Settlement. The contents of the document were never explained to me in a language that I understood.
- (l) I further say that at no stage the contents of the Terms of Settlement were explained to me in the Hindustani language and at no stage my daughter read through the documents or explained to me in Hindustani language.
- (m) In response to paragraph 20 of the said Affidavit, I am not aware of such adjournment as all the communications were in English language and I was not in a position to understand.
- (n) In response to paragraphs 21 and 22 of the said Affidavit, Miss Ravai had called me and advised me that I should sign the documents given by her. I did not know the contents of the Terms of Settlement as it was in English language and as the contents were not explained to me. I was told by Miss Ravai to sign the documents because the terms of settlement were in my favour.
- (o) I further say that the said Authority was never explained to me in the Hindustani language but was only requested by Ms Ravai which I did.
- (p) As to paragraph 23 I repeat my allegations contained in paragraph 29 of my Affidavit.
- (q) In response to paragraph 24 of the said Affidavit, I did not know the contents of the Terms of Settlement as I was directed by my counsel Miss Ravai to sign the documents. Once the Consent Orders had been made on 27 September 2018, I took the Consent Orders to another Indian speaking solicitor who then explained the contents of the documents to me and at that stage I realized that the Terms of the Settlement were not in my favour.
- (r) In response to paragraph 25 of the said Affidavit, Miss Ravai did not fulfil her duties as obligations to me as her client. She could not provide an interpreter to explain the contents of the Terms of Settlement as I can only understand and converse in Hindustani.
- (s) In response to paragraph 26 of the said Affidavit, I am informed by my counsel that after they did a search it was mandatory that consent from the Director of Lands be obtained before instituting proceedings or before the proceedings have finished in Court. That I am informed by my counsel that the first

defendant had failed to obtain such consent and such proceedings were null and void.

- (t) In response to paragraph 28 of the said Affidavit, I initiated these proceedings as I am seeking Staying of Orders made in Civil Action No. HBC 1 of 2017 by Justice M. H. Ajmeer granted on 27 September, 2018 and an order to set aside the same orders on the basis that the plaintiff in that action had not obtained consent from the Director of Lands and instituted and finalized the action without such consent.
- (u) As to paragraph 29 of the said Affidavit, I say that in view of the facts that the first defendant directing me to sign the Terms of Settlement without explaining to me in the Hindustani language has breached her professional obligation and as such the Consent Orders she obtained is subject to my instituting High Court Proceedings.

*Second defendant's affidavit in response*

[21] The second defendant in her affidavit in response to the stay application made by the plaintiff states, in summary, that:

- (a) The High Court Action Number HBC 1 of 2017 has been settled, where plaintiff and myself entered into a Terms of Settlement in the Court which then became an order of the Court.
- (b) The Terms of Settlement was entered into after thorough discussions, negotiations and agreements reached between myself, the plaintiff and my sister namely Ashi Nafiza Shariff, who was present in Court on that particular day (I annex hereto and mark as Annexure 1 is the terms of settlement executed between the parties on 27 September, 2018 and filed in Court of 27 September, 2018 and the Court order).
- (c) All parties agreed to each and every clauses of the agreement and understood what the terms of settlement states since, the terms of settlement was drafted and made before my presence, plaintiff and my sister's presence. I could even further remember that after the draft copy was drafted in court, my sister went with her lawyer to the first defendant's office for typing where it clearly reveals that plaintiff was well

aware of the Terms of Settlement, as such, I feel that it is now too late for the plaintiff to unnecessarily complain that she did not understand the Terms of Settlement.

- (d) In the presence of myself and my lawyer, I saw and heard the plaintiff's lawyer and my sister advising and explaining everything to the plaintiff who confirmed that she has understood what was happening in the matter.
- (e) She had agreed that she will vacate the property by January 2019 and will look for another flat within 4 months from the date of the order.
- (f) **The plaintiff also understood and said in the Court that she does not want any problems and just wants to have this matter resolved.**
- (g) Now it is surprising to see plaintiff is bringing unnecessary and unreasonable excuses that she never understood what happened in Court and she was never explained or advised. This is simply gross dishonest practice by the plaintiff.
- (h) I simply say that the plaintiff is dishonest to this Court by saying that she did not understand what transpired in Court on that day. I feel that the plaintiff is now intentionally trying to create mess and makeup things so that the transfer of the property and comply of the Orders for the Case Number HBC 1 of 2017 is avoided and delayed.
- (i) The plaintiff is intentionally using this current case as her tactic to delay the process of Transfer and cause frustration, stress and tension to me, since plaintiff is well aware that the more delay caused, it is beneficial to her and on the other hand it will prejudice me that would be a detrimental for me.
- (j) I believe and have been verily advised that the plaintiff had been wrongly advised by some few members and also by some of her legal

representative which has in fact made the plaintiff to change her mind and to take this unreasonable step.

- (k) If the plaintiff did not understand the Court process on that particular day, she could have asked my sister who was present with her in Court, where my sister could have easily advised the lawyers and the Court that she does not understand what is transpiring in Court. My sister became my mother's spokesperson, where I could see that up to some extent, my sister was taking lead and was dealing with her lawyers and was explaining things to the plaintiff.
- (l) Even when the Court asked her whether she understood what is transpiring in Court, where she stood up and gave an affirmed answer.**
- (m) I further saw that there was a Fijian lawyer of Indian descendant being the first defendant's associate who also explained it to her. There was a Fijian of Indian descendant Court Clerk present in Court with whom she could have asked as well.
- (n) There shall not be any stay granted to the execution of orders for Civil Action Number HBC 1 OF 2017 since, that matter has been dealt [with] by consent where both parties agreed to the terms and orders has been granted.
- (o) There will be a serious prejudice to me since, currently I am paying towards current mortgage. Also my loan has been approved by my Bank in relation the HBC 1 of 2017 orders where now I am ready to pay the plaintiff the sale sum (*I enclose herein and mark as Annexure 2 is the copy of offer letter from the bank*).
- (p) My solicitors have also drafted the transfer and sent the same to the plaintiff's solicitor's for plaintiff's execution. (*I enclose herein and mark as Annexure 3 the copies of Transfer documents sent to plaintiff's solicitors*).



- (q) I am complying with the said order of the court where I want the transfer process to conclude at the earliest so that I could proceed with the renovation and other developments.

*In response to the plaintiff's affidavit*

- (r) In response to paragraph 3 of the affidavit in support (affidavit), I admit the same.
- (s) In response to paragraph 4 of the Affidavit, I deny the said paragraph and say that the plaintiff is misleading the court herein. I say that **the plaintiff fully understand and speaks English well. She is communicating with other races of people in English which I personally have witnessed.**
- (t) In response to paragraphs 5, 6, and 7 of the affidavit, I admit the same.
- (u) In response to paragraph 8 of the affidavit, I admit up to the extent that I and deceased purchased the said property together and both of our names appear on the title. The deceased was not qualifying for the loan and neither of my siblings tried to assist the deceased until I agreed to purchase the said property together with the deceased.
- (v) In response to paragraph 9 of the affidavit, I totally deny the said paragraph and say that the deceased had very low income where he could not afford to make repayments, hence, I being the school teacher I started paying for the mortgage from the date the said property was purchased under our names.
- (w) In response to paragraph 10 of the affidavit, I say that the reason I resided on the said property for short while was since, I was transferred to Suva for work purposes and then I got married where I then started residing in Suva with my husband.
- (x) In response to paragraph 11 of the affidavit, I deny up to the extent "*that it was agreed that the deceased will make payments to the mortgage debt despite my name appeared on the Title.*" I repeat myself and say that there was never such agreement placed between myself and the deceased. I am the biological daughter of the deceased, where I promised my father that I will assist him in making the mortgage repayments as the mortgage

repayment was high where the deceased's entire monthly income was not even enough to meet the monthly repayment towards the debt.

- (y) In response to paragraph 12 of the affidavit, I totally deny the said paragraph and say that I have my bank statements that show monies being deducted from my salary account towards the mortgage repayments. The mortgage repayment which the plaintiff is stating is from the rental income that has been generated from the said property and from which the plaintiff is claiming started to be paid is when I raised an issue about rental monies and the mortgage repayments in the High Court case Number HBC 1 of 2017, then the plaintiff just to show to the court that she is also paying the mortgage, she used rental income to pay the mortgage. There have been double payments made towards the mortgage repayments. Further, the plaintiff has used the rental income to pay the mortgage without my consent and knowledge as the said rental income also belonged to me as I hold more than 50% shares in the said property (*I annex hereto and mark as Annexure 4 is the copy of the bank statement revealing the mortgage repayments being made from my bank account*).
- (z) The response to paragraph 13 of the affidavit, I deny the said paragraph.
- (aa) In response to paragraph 14 of the affidavit, I admit the same and further say that out of 8 beneficiaries, 4 of them have renounced their shares to the benefit of the plaintiff.
- (bb) In response to paragraph 15 of the affidavit, I admit the same.
- (cc) In response to paragraph 16 of the affidavit, I am totally unaware of the same. I further say that HBC 1 of 2017 was initiated through the originating summons which was then converted to Writ of Summons where then Writ of Summons was filed.
- (dd) In response to paragraph 17, 18, 19, 21 and 22 of the affidavit, I am unaware of the same as I cannot comment what transpired between the plaintiff and the first defendant.
- (ee) In response to paragraph 23 of the response, I deny the same and say that necessary letter were sent to the Director for Lands to grant consent where the subject property had massive ground rental arrears which was holding the grant of consent. I was making necessary arrangement to clear the ground rental so that my solicitor is able to obtain the consent. That I

have been further advised that the Director of Lands consent can be obtained before the court passed out its judgment. The consent does not require to be obtained when the matter is initiated in court. Since this matter was settlement by both parties then there was no requirement to obtain the consent.

- (ff) In response to paragraph 24 of the affidavit, I totally deny that the Civil Action number HBC 1 of 2017 was set for 3 days hearing. That particular matter was only set for 1 day hearing. The plaintiff is totally misleading the court herein with her false statement. The matter was settled since the plaintiff understood that I am holding the majority shares and I am purchasing the deceased's share. The plaintiff was well aware of the same.
- (gg) In response to paragraph 25 of the affidavit, I deny the said paragraph and say that I do not agree with the plaintiffs' statement herein, as I was personally present in Court on that day when the terms of settlement was drafted and executed. I totally deny any allegations that Ms Setaita Ravai did not carried out her duties properly. It is only plaintiff who is trying to place unreasonable allegations on her lawyers just to cause unreasonable delay.
- (hh) In response to paragraph 26 of the affidavit, I deny the said paragraph and say that the plaintiff is now somehow trying to put false allegations on Ms Setaita Ravai so that she gets into trouble and the plaintiff could somehow be in a winning point that due to her lawyers mistake the terms of settlement shall be declared null and void. I further say that the plaintiff is misleading the court herein.
- (ii) In response to paragraph 27 of the affidavit, I deny the said paragraph and say that **the plaintiff also had previous lawyers and have executed the documents where she was explained in English as well.**
- (jj) In response to paragraph 28 of the affidavit, I deny the said paragraph and again say that the plaintiff is making up unreasonable grounds just to drag the matter of property settlement. The plaintiff is well aware that she understood the terms of settlement as on every step she was also explained by her daughter as well.
- (kk) In response to paragraph 29 of the affidavit, I am unaware what transpired between the plaintiff and her lawyers.

- (ll) In response to paragraph 30 of the affidavit, I deny the said paragraph and again repeat myself that **the plaintiff is raising unreasonable grounds herein and that she did not understand what transpired in Court on that day.** I further feel that the plaintiff has been misled by her legal representatives which had in fact made the plaintiff to fork out monies unnecessarily from her pocket to institute new legal action.
- (mm) In response to paragraph 31 of the affidavit, I deny the said paragraph and say that the court has already dealt with the High Court proceedings being Civil Action No. HBC 1 of 2017 hence, the plaintiff should now comply with the orders to avoid any contempt of court action against her.
- (nn) In response to paragraph 34 of the affidavit, I deny the said paragraph and say that the plaintiff's writ of summons does not carry any reasonable cause of action that has merits in it, to show course that there is a highly likely chance of the plaintiff to success in this matter. Further I have perused the said claim and have obtained the legal advice. It purely seems the plaintiff and its solicitors have some personal grudge against the first defendant where they are trying to let down the first defendant in some way or the other. (Emphasis provided)

*Second defendant's evidence*

[22] The second defendant in her affidavit in support of her application to strike out the claim states:

- i. The plaintiff has no reasonable cause of action against me;*
- ii. The plaintiff has failed to understand that the High Court Civil action number HBC 1 of 2017 has already been dealt with where final decision has been made by consent.*
- iii. That the plaintiff already had change two solicitors where both solicitors have provided her the professional advice in lieu to the said matter being HBC 1 of 2017 which the plaintiff has fully understood the same;*
- iv. That the plaintiff has also executed affidavits with her former solicitors being Rams Law and Fazilat Shah legal which means that she was fully aware of the matter.*
- v. That the plaintiff had fully understood the court proceedings as she has her lawyers present in court to protect her interest which in fact her lawyers have done.*
- vi. The plaintiff has raised unreasonable ground that does not suffices her claim.*

- vii. *The plaintiffs claim is scandalous, frivolous and vexatious;*
- viii. *The plaintiffs claim is also an abuse of the process of the court;*
- ix. *The said writ filed by the plaintiff is only causing prejudice to me where it delays the compliance of the orders granted by this Honourable Court being the High Court Civil action number HBC 1 of 2017.*
- x. *The transfer process is now delayed as well.*
- xi. *My loan has been approved where now I am ready to pay the plaintiff for the monies as agreed in court based on Civil action number HBC 1 of 2017.*

## **Discussion**

- [23] The defendants have made applications to strike out the claim brought by the plaintiff to set aside the consent judgment made in the first action (HBC No. 1 of 2017) on 27 September 2018. The first action was between the current plaintiff (the defendant in the first action) and the current second defendant (the plaintiff in the first action). The plaintiff was represented by Messrs Fazilat Shah Legal, Barristers & Solicitors of which the first defendant is the principal partner. Ms Ravai, solicitor and barrister appeared for the plaintiff on the instructions of the first defendant on the day when the consent judgment was entered.
- [24] The defendants rely on all four grounds enunciated in the HCR, Rule 18 (1) (a)-(d), for striking out the claim or the statement of claim.
- [25] The court has power and jurisdiction to summarily strike out a claim or defence as the case may be on any of the grounds set out under the HCR, R 18.
- [26] When considering an application to set aside on the ground that the statement of claim discloses no reasonable cause of action (R 18 (1) (a)), the court will only look at the pleadings. Evidence will be inadmissible on an application under paragraph (1) (a) (see R 18 (2)). However, evidence will be admissible on an application under any other grounds (paragraph (1) (b), (c) and (d)).
- [27] It will be noted the defendants have also invoked the inherent jurisdiction of the court to strike out the claim. Where inherent jurisdiction of the court is invoked, affidavit evidence may be and ordinarily used (para 18/19/5 of White Book).

[28] I need to determine the application in the absence of any argument advanced by the plaintiff at the hearing. Counsel who appeared for the plaintiff only submitted that she had nothing to add.

*No reasonable cause of action*

[29] Firstly, I would deal with the first ground that the statement of claim discloses no reasonable cause of action against the defendants.

[30] A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (see *Drummond-Jackson v British Medical Association* [1970] WLR 688).

[31] I will examine the statement of claim in order to determine whether it discloses reasonable cause of action. I will also consider the affidavit evidence adduced by the parties for this purpose. I will consider the affidavit evidence because the defendants have invoked the inherent jurisdiction of the court as well.

[32] As I said, the plaintiff brings this action to set aside the consent judgment made in open court in the presence of the parties and their counsel in case No. HBC 1 of 2017. The plaintiff seeks relief among other things that:

(a) *An order that the orders granted on 27 September 2018 in Civil Action No. HBC 1 of 2017 be stayed pending determination of this action.*

(b) *An order that the orders granted on 27 September 2018 in Civil Action No. HBC 1 of 2017 be wholly set aside on the basis that the plaintiff in the said action instituted and finalised the said action without obtaining consent from the Director of Lands to institute such proceedings.*

[33] A consent order is a final order. It may be set aside on the grounds of **fraud or mistake** in a fresh action (see *de Lasala v. de Lasala*, above). Furthermore, just as a consent order may be set aside upon any of the grounds upon which an agreement can be set aside, so it appears to me to follow that **such an order may be set aside if it can be clearly proved that there is no agreement, and consequently, no true consent to the order made** (see *Sharma v Caldwell*, above).

[34] The plaintiff seeks to set aside the consent judgment upon two grounds namely:

1. *The terms of settlement was not explained to the plaintiff in Hindustani language.*
2. *The action (HBC 1 of 2017) was instituted and finalised without consent from the Director of Lands to institute such proceedings.*

[35] Surprisingly, the plaintiff does not rely on the grounds of fraud or mistake to set aside the consent judgment. The plaintiff is simply relying on the two grounds as mentioned above.

[36] The principal issue for decision in the matter is whether the plaintiff's claim of ignorance of language could succeed without her being able to prove that the terms of settlement were to her manifest disadvantage.

[37] I cannot see any pleading in the statement of claim that the terms of settlement were to the plaintiff's manifest disadvantage, and that the relationship between the plaintiff and the first defendant (solicitor-client relationship) has been exploited and abused to gain an unfair advantage.

[38] Manifest disadvantage had been held to be a necessary ingredient of presumed undue influence by the House of Lords in *National Westminster Bank Ltd v Morgan* [1985] AC 686.

[39] It will be seen that there is no complaint in the statement of claim that the first defendant as her solicitor unduly influenced the plaintiff into signing the terms of settlement.

[40] The plaintiff says in her statement of claim, at para 23 that:

*"23. That the 1<sup>st</sup> defendant has been negligent in discharge of her professional duties and obligation to her paid client, namely the plaintiff herein.*

**"PARTICULARS OF NEGLIGENCE**

*(a) Failing to bring to the Courts attention that the Civil Action No. HBC 1 of 2017 that was instituted by the present defendants were null void due to not obtaining consent from the Director of Lands to institute such proceedings.*

*(b) Acting without instructions to the detriment of the Plaintiff's interest in Civil Action No. HBC 1 of 2017 at the High Court at Lautoka.*

(c) *Failing to adequately advice and/or inform the plaintiff of the contents of the terms of settlement in a language which the plaintiff understood before the Plaintiff executed upon the instructions of the 1<sup>st</sup> Defendant on the 27<sup>th</sup> day of September, 2018.*

(d) *Failing to adequately advice and/or inform/explain the plaintiff of the contents in the Hindustani language of the Consent Orders on the 27 day of September, 2018.”*

[41] I should say that negligence of the solicitor in advising and explaining the plaintiff of the contents of the terms of settlement and of the consent orders is not a ground for setting aside the consent judgment.

[42] The first defendant in her supporting affidavit, sworn by Ms Ravai, the litigation solicitor with the first defendant and counsel appeared for the plaintiff on the day when the matter (HBC 1 of 2017) was settled in open court, states the following in regards to the terms of settlement and the consent judgment:

(a) *The plaintiff also understood and said in the Court that she does not want any problems and just wants to have this matter resolved.*

(b) *The plaintiff reads and understands spoken English very well. The plaintiff conversed with me in the English language and she did not any time express any concerned about her communication with me.*

(c) *The plaintiff has testified in the Jurat of her affidavit filed in support of appointment of administratrix in the estate of her husband that the content of the said affidavit was explained to her in the English language (“SSR1”).*

(d) *The plaintiff understands the written English language. She has taken oath of executrix in the estate of her late husband in English (“SSR2”).*

(e) *For proof of her (plaintiff) potential evidence for trial, the exchange was in English and she answered my questions freely in English.*

(f) *I advised His Lordship if the matter could be referred for mediation as per the plaintiff's instructions because she wanted to reconcile the matter without proceeding to Trial.*

(g) *In the presence of both counsel, the plaintiff and the second defendant reached an amicable settlement through an open and frank discussion and without any undue*



*influence from any side and the same is reflected in the Terms of Settlement as filed in Court.*

*(h) She (plaintiff) at all material times understood all matters that had transpired on the day of the hearing.*

*(i) Before the Terms of Settlement was typed out the plaintiff signed an authority to Fazilat Shah Legal to reflect the ceiling of her settlement amount with the second defendant ("SSR5"). The plaintiff executed the said authority to us after she and her daughter had read the same and after I had explained to them fully as to the contents of the said authority.*

*(j) The plaintiff signed and I witnessed and then I handed the document back to the second defendant's counsel to indorse the same. This pattern was typical of all 3 copies of the Terms of Settlement.*

*(k) His Lordship then proceeded to read each and every item numbered 1 to 20 of the Terms of Settlement and confirmed with the counsel if the same was correct to which both counsel replied in the affirmative. Then His Lordship proceeded to ask both, the plaintiff and the second defendant to stand up and asked them if they had understood and agreed to the Terms of Settlement and both the plaintiff and the second defendant replied in the affirmative.*

*(l) Even when the Court asked her whether she understood what is transpiring in Court, where she stood up and gave an affirmed answer.*

[43] The court can take judicial notice as to the facts stated in (k) and (l), above that the court read the terms of settlement and asked both counsel whether they confirm it, and then the court asked the parties (the plaintiff and the second defendant) and that the parties and their counsel confirmed it. Further, the court can also take judicial notice that even when the court asked the plaintiff whether she understood what was transpiring in court, she stood up and gave an assenting answer.

[44] The second defendant, the plaintiff's daughter in her affidavit states:

- (a) *The Terms of Settlement was entered into after thorough discussions, negotiations and agreements reached between myself, the plaintiff and my sister namely Ashi Nafiza Shariff, who was present in Court on that particular day.*
- (b) *The plaintiff also understood and said in the Court that she does not want any problems and just wants to have this matter resolved.*
- (c) *Even when the Court asked her whether she understood what is transpiring in Court, where she stood up and gave an affirmed answer.*
- (d) *The plaintiff fully understand and speaks English well. She is communicating with other races of people in English which I personally have witnessed.*
- (e) *The plaintiff also had previous lawyers and have executed the documents where she was explained in English as well.*

[45] It is worth noting that the plaintiff did not file any affidavit in response to the second defendant's affidavit in support filed in support of her striking out application. As a result, the second defendant's evidence on her affidavit in support remains unchallenged. This translates that the plaintiff could not deny when her daughter says on affidavit that her mother (plaintiff) speaks and understands English very well.

[46] The plaintiff's evidence, in essence, was that she does not understand the English language nor can she read or speak in English as she did not complete her education and left school when she was 11 years of age and that the contents and Terms of Settlement were never explained to me in the Hindustani language.

*Ignorant of language*

[47] Interestingly, the plaintiff seeks to set aside the consent judgment relying on the claim of ignorance of language.

[48] The question then arises whether the plaintiff would be successful in her claim of ignorant of language to set aside the consent judgment.

[49] Ignorance of the language is not a ground for setting aside a consent judgment made in court in accordance with the terms of settlement.

[50] The plaintiff had never raised an issue in court that she does not understand English and she needed to be explained in Hindustani language when the court read over the terms of settlement to the parties and asked their confirmation. The plaintiff assented to the terms of settlement as she fully understood the terms of settlement. She did not raise any concern over the terms of settlement, albeit she was accompanied by her other daughter.

*Duty to read*

[51] The Supreme Judicial Court of Massachusetts adopted the duty to read standard early in the 1928 case *Paulink v American Express Co*, 163 N-E 740, 741 (Mass, 1928). Paulink, who did not speak or understand English, purchased traveler's checks from an American Express Agent. The checks written in English contained language outlining the conditions for their redemption. When the check turned out to be something other than what Paulink had intended to purchase, he sued to recover the money he paid for the unused traveler's checks. The court refused to invalidate the transactions applying the duty to read standard, the court held that Paulink **"was bound by [the contract's] terms, in the absence of deceit on the part of the defendant, even though not understanding their purport and ignorant of the English language. Regardless of his ability to understand the language of contract, Paulink's purchase of the checks was a reasonable manifestation of assent."** (Emphasis supplied)

[52] The plaintiff signed all three (3) copies of the terms of settlement when her other daughter was present. Moreover, the plaintiff assented to the terms of settlement in open court without raising any issue of her inability to understand the English language. Significantly, I can find no allegation on the statement of claim of deceit on the part of the defendants. In the circumstances, the plaintiff is bound by the terms of settlement in the absence of deceit on the part of the defendants, even though not understanding their purport and ignorant of the English language. Regardless of her inability to understand the language of the terms of settlement (English), her signature on all three copies of the terms of settlement was a reasonable manifestation of assent. There are serious questions as to the reliability and credibility of the plaintiff's evidence that she did not understand the terms of settlement, which was in plain English.

[53] For the reasons I have set out above, I find that it is highly unlikely that the plaintiff would succeed in her claim that the consent judgment should be set aside on the ground that she was not explained the terms of settlement in Hindustani language.

*Consent issue*

[54] The statement of claim states that the Civil Action No. HBC 1 of 2017 (*'the first action'*) was brought by the second defendant in respect of the state land with the consent of the Director of Lands and as such, the proceedings in that action should be declared *null and void*.

[55] The plaintiff and the second defendants are tenants in common of the property. The actual dispute in the first action was *'who buys who and what rate'*. It was a dispute between two co-owners of the property. The terms of settlement were agreement between the two owners of the property. Precisely, according to the terms of settlement, the second defendant will buy out the plaintiff for the consideration sum of \$155,000.00. Notably, cl. 14 of the terms of settlement states that: *The plaintiff to execute the transfer instruments and obtain the consent of the Director of Lands together with stamp duties.*

[56] The consent of the Director of Lands will be required when dealing with the state land. The actual dealing will take place when property is transferred to the second defendant. It is then dealing with the property arises. It would be sufficient compliance with the law if the consent of the Director of Lands is obtained any time before the performance of the agreement or arrangement between the parties. Therefore, the consent of the Director of Lands was not required to institute the first action to adjudicate the dispute between the two tenants in common of the property. As the consent of the Director of Lands was not required to institute the first action, the issue that the proceedings in the first action were *null and void* due to not obtaining consent from the Director of Lands to institute such proceedings does not arise.

[57] I find that the claim that the first action was brought without the consent of the Director of Lands to deal with the state land and the whole proceedings therein should be declared *null and void* is misconceived and untenable. The plaintiff's case is unwinnable on this claim.

*Abuse of process*

- [58] The HCR, R 18 (1) (d) gives the court power to strike out the statement of claim which is an abuse of the court's process.
- [59] It was held in *Barrett v Universal-Island Records Ltd* [2003] EWHC 625 (Ch), that the court needed to have a high degree of confidence that the claim or defence would not succeed before striking it out as an abuse of process.
- [60] In *McDonald's Corporation v Steel* [1995] 3 All ER 615 it was held that it is an abuse of process where statement of case (statement of claim) is incurably incapable of proof. In that case, it was said that on this basis it will be fairly unusual as there are few cases which are sufficiently clear and obviously hopeless that they deserve the draconian step of being struck out.
- [61] The plaintiff's statement of claim fails on its face to disclose a sustainable cause of action. The case is weak even on evidence and bad in law. I would regard the statement of claim that the plaintiff did not understand what was happening in court as having no prospect of success because there was no complaints at the time when the court settled the matter and pronounced the consent judgment.
- [62] On the documents it was clear that throughout the parties had negotiated on a settlement. As the terms of settlement had been signed, a valid contract had been entered into.
- [63] The statement of claim does not disclose any grounds for setting aside the consent judgment. It follows that the action has been brought without probable cause of action.
- [64] I find that the statement of claim is sufficiently clear and obviously hopeless, and that it raises an unwinnable case where continuing proceedings is without any possible benefit to the plaintiff and would waste resources on both side (*Harris v Bolt Burdon* [2000] CPLR 9, cited by Potter LJ in *Portco Group Ltd v Wragg* [2002] EWCA Civ 594, at [46]).
- [65] For the reasons I have set out above, the plaintiff has brought a hopeless and unwinnable case, and I have high degree of confidence that the plaintiff would

not succeed in her claim. I would, therefore, strike the plaintiff's action out as an abuse of the court's process.

*Frivolous or Vexatious*

[66] On the ground of '*frivolous or vexatious*', it has been held that by these words are meant cases which are obviously frivolous or vexatious, or obviously unsustainable (see *Law v Deamly* [1950] 1 All ER 124, CA).

[67] As I said, the plaintiff's claim is obviously unsustainable. I would, therefore, strike the claim out on this ground as well.

*Prejudice, embarrass or delay the fair trial of the action (R 18 (1) (d))*

[68] This ground did not arise. Therefore, I do not intend to discuss this ground.

**Conclusion**

[69] For all the reasons I have set out above, I find that the statement of claim filed by the plaintiff discloses no reasonable cause of action against the defendants. On its face it fails to disclose a sustainable claim against the defendants. It is, in my opinion, a plain and obvious case where there is no point in having a trial and that the examination and cross-examination will not change the case of the plaintiff. The plaintiff's claim is frivolous, vexatious and an abuse of process of the court. It is a claim which is incurably incapable of proof. I would, therefore, acting under the High Court Rules, O 18, R 18 and under the inherent jurisdiction of the court, strike the plaintiff's claim out.

[70] Since I have decided to strike the claim out, the application filed by the plaintiff seeking a stay on the consent order delivered on 27 September 2018 in Civil Action No. HBC 1 of 2017 pending hearing or determination of this matter has become redundant.

**Costs**

[71] As successful party, both defendants are entitled to costs of these proceedings.

[72] The defendants are seeking costs on indemnity basis. The plaintiff has brought this action to set aside the consent judgment without any probable ground. I have found her claim to be unsustainable, frivolous and vexatious and an abuse

of process of the court. The facts and circumstances of the case warrant making a cost order on indemnity basis. Therefore, I make an order that the defendants are entitled to costs on indemnity basis.

[73] I am unable to determine the amount of the indemnity costs as there is no material before me. I would, therefore, make an order that the amount of costs should be determined before the Master upon application made by the defendants for that purpose.

**The result**

1. Plaintiff's action struck out.
2. Plaintiff shall pay indemnity costs to the defendants.
3. Amount of indemnity costs to be determined by the Master upon application made by the defendants for that purpose.

*Hajhu ajmeer* 28/3/19  
.....

**M. H. Mohamed Ajmeer**

**JUDGE**



**At Lautoka  
28 March 2019**

Solicitors:

For the plaintiff: M/s Iqbal Khan & Associates, Barristers & Solicitors

For the first defendant: M/s Law Naivalu, Barristers & Solicitors

For the second defendant: M/s Reddy Nandan Lawyers, Barristers & Solicitors