IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 173 of 2018

BETWEEN: NAVEEN BHAI P. PATEL & COMPANY LIMITED a limited liability company having its registered office at 60 Appabhai Patel Road, Varadoli, Ba, Fiji.

PLAINTIFF

A N D: ABDUL JALIL trading as **POLOS RENTAL** a business having its place of business in Main Street, Nadi Town and residential address at Nabila, Nadi.

1st DEFENDANT

A N D: NAIBUKA RATU the address and occupation is unknown to the plaintiff

2nd DEFENDANT

Before: Master U.L. Mohamed Azhar

Counsels: Ms. M. Naidu with Mr. M. Arun for the Plaintiff
Mr. K. Siwan for the 1st Defendant
The 2nd Defendant excused

Date of Ruling: 23.02.2021

RULING

01. The plaintiff sued the defendants for the damages allegedly caused to its vehicle due to the negligent driving of the second defendant. At all material times, the plaintiff was the owner of motor vehicle bearing registration number IZ 906. The first defendant by virtue of a car rental agreement permitted the second defendant to drive motor vehicle bearing number LR 2477. The plaintiff claimed that, the second defendant on 15.04.2018 negligently drove the vehicle LR 2477 and collided with the vehicle IZ 906 belonged to the plaintiff. As a result, the plaintiff suffered loss as his vehicle sustained extensive damages and was beyond safe and viable repair. The plaintiff therefore prayed for judgment against both defendants in sum of $ 159,687.90 together with costs on solicitor-client indemnity basis and the interest at the rate of 8%.

02. The first defendant acknowledged the writ and filed the statement of defence. The first defendant specifically pleaded that the second defendant hired the motor vehicle bearing registration LR 2477 as per the Rental Agreement Number 0133. He denied liability to

the plaintiff and moved to dismiss plaintiff action together the costs on solicitor-client indemnity basis and interest on the said costs. The second defendant neither acknowledged the writ, nor she did file the statement of defence. The plaintiff then sealed the default judgment against the second defendant which was later set aside with consent and subject to agreed costs. The parties completed the pleadings and the matter was at discovery stage when the first defendant filed the current summons pursuant to Order 18 rule 18 (1) (a) of the High Court Rules and inherent jurisdiction of the court, on the basis that the plaintiff's pleadings do not disclose reasonable cause of action against the first defendant, who rented out the vehicle LR 2477 to the second defendant.

03. The counsels for the plaintiff and the first defendant made oral submission at hearing and tendered their written submissions too. The second defendant did not take part in this hearing, as it was not related to her. The law on striking out of pleadings is well settled. The Order 18 rule 18 of the High Court Rule gives the discretionary power to strike out the proceedings for the reasons mentioned therein. The said rule reads:

> 18 (1) The Court **may** at any stage of the proceedings **order to be struck out or amend** any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-
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> (a) It discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) It is scandalous, frivolous or vexatious; or
>
> (c) It may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) It is otherwise an abuse of the process of the court;
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(a).
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> (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading (emphasis added)

04. The unambiguous wording of the above rule makes its effect very clear that, the power to strike out the pleadings is permissive and not mandatory. Even though the court is satisfied on any of those grounds mentioned in the above rule, the pleadings should not

necessarily be struck out as the court can, still, order for amendment. The underlying rational is that, the access to justice should not, merely, be denied by glib use of summery procedure of pre-emptory striking out.

05. Lord Pearson in **Drummond-Jackson v British Medical Association** [1970] 1 All ER 1094 held at page 1101 that;

> "Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases. The authorities are collected in The Supreme Court Practice 1970 Vol ı, p 284, para 18/19/3, under the heading 'Exercise of Powers under this Rule' in the notes under Ord 18, r 19. One which might be added is Nagle v Feilden [1966] ı All ER 689 at 695, 697; [1966] 2 QB 633 at 648, 651. Reference has been made to four Recent cases: Rondel v Worsley [1967] 3 All ER 993, [1969] ı AC 191, Wiseman v Borneman [1969] 3 All ER 275, [1969] 3 WLR 706, Roy v Prior [1969] 3 All ER 1153, [1969] 3 WLR 635, and Schmidt vSecretary of State for Home Affairs [1969] ı All ER 904, [1969] 2 Ch 149. ……There was no departure from the principle that the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed, but the procedural method was unusual in that there was a relatively long and elaborate instead of a short and summary hearing. It must be within the discretion of the courts to adopt this unusual procedural method in special cases where it is seen to be advantageous. But I do not think that there has been or should be any general change in the practice with regard to applications under the rule".

06. Marsack J.A. in his concurring judgment in **Attorney General v Halka** [1972] 18 FLR 210, explained how the discretionary power to strike out should be exercised by the courts and held that:

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

07. Every person has access to justice and has fundamental right to have his or her disputes determined by an independent and impartial court or tribunal. This fundamental right, guaranteed by the supreme law of the country, should not lightly be taken away unless the case is unarguable. Salmon LJ said in **Nagle v Feilden** [1966] ı All ER 689 at 697:

> 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable'.

08. Accordingly, the general principle is that the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed. The courts cannot strike out an action for the reason that, it is weak or the plaintiff or the defendant is unlikely to succeed in his or her claim or defence.

09. The instant summons was filed by the first defendant pursuant to paragraph (1) (a) of the Order 18 rule 18. No evidence shall be admissible in an application filed under that paragraph. The court has to examine the allegations in the pleadings to come to a conclusion on reasonable cause of action. His Lordship the former Chief Justice A.H.C.T. Gates (as His Lordship then was) in **Razak v. Fiji Sugar Corporation Ltd** [2005] FJHC 720; HBC208.1998L (23 February 2005) held that:

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

10. The counsel for the plaintiff submitted at the hearing that, the plaintiff pleaded its cause of action against the first defendant in paragraphs 4 and 12 of statement of claim. Those paragraphs are as follows:

> 4. The first defendant by virtue of a car rental contract permitted the second defendant to drive motor vehicle LR 2477 at the material time.
>
> 12. The first defendant is liable to the plaintiff on the basis of his ownership of LR 2477 and permitting the second defendant to drive LR 2477 which caused the accident resulting in the damages to IZ 906.

11. The plaintiff in both paragraphs alleges that, the first defendant is liable for the negligence driving of the second defendant on the basis of first defendant's ownership of motor vehicle LR 2477. Undoubtedly, the plaintiff tries to attribute the alleged liability of the second defendant to the first defendant on the doctrine of vicarious liability, as the first defendant was the owner of the vehicle LR 2477 at the time of collision between two vehicles. The doctrine of vicarious liability represents not a tort, but a rule of responsibility which renders one person liable for the torts committed by another. Most common application of vicarious liability is in employer and employee relationship. The employers are held liable for what their employees did for their (employers') purposes and benefit. The law either considers that the employees' actions are those of the employers, or the law says that the employers are liable for the actions of their

employees. In order to establish vicarious liability, firstly the wrongdoer must be the employee as opposed to an independent contractor, secondly, the employee must have committed the tort, and finally the tort must have been committed in the course of the employment.

12. The owners of the vehicle are held liable for negligent driving of their servant or drivers on the above premise. However, the ownership alone cannot impose liability on any person unless the other requirements are fulfilled. DU Parcq L.J in **Hewitt v. Bonvin** [1940] 1 K.B. 188 held at page 194 that:

> It is plain that the appellant's ownership of the car cannot of itself impose any liability upon him. It has long been settled law that where the owner of a carriage or other chattel confides it to another person who is not his servant or agent, he is not responsible merely by reason of his ownership for any damage which it may do in that other's hands.

13. Accordingly, the negligent driver must be either the servant or agent of the owner to impute the liability on him. Hammett CJ in **Ram Pal v. Ise Lun** trading **as Wing Fat Bakery** [1971] 17 FLR 8 held at page 13 that:

> The authorities are quite clear that in order to impute to the owner of a car the negligence of its driver, it must be proved that the driver was the servant or agent of the owner.

14. Obviously, the second defendant is not the servant of the first defendant. The second defendant only hired the vehicle from the first defendant who is in car rental business. It appeared from the submission of the counsel for the plaintiff at hearing that, the plaintiff tries to rely on 'agency' to impute the liability to the first defendant. Agency is a representative relation. It is founded upon the express or implied contract of the parties, or created by law. The agent is employed and authorized to represent and act for the other, the principal, in business dealings with third persons. The agent derives the authority from the principle, represents him and acts on his behalf. There must be an authority, either express or implied, to act on behalf of the principle to make him liable. The liability of the principle for the acts his agent is based on the maxim that, ***Qui facit per alium facit per se*** and it means, "He who acts through another does the act himself." In **Hewitt v. Bonvin (supra)** DU Parcq L.J further stated at pages 194 and 195 that:

> The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownerships, but on the delegation of a task or duty. Thus, in *Wheatley* v. *Patrick* (I) the defendant, who had

> borrowed a horse and gig for an excursion to the country, permitted a friend to drive on the way home. The friend's negligent driving cause damage to the plaintiff. The declaration alleged that the defendant had himself driven negligently, and the Court of Exchequer held that this allegation was supported by the evidence. The reason is plain. The defendant had delegated to his friend the duty of driving and was personally responsible for his acts as the acts, not of a servant, but of an agent. There could hardly be a better illustration of the maxim qui facit per alium facit per se. The decision of the Privy Council in *Samson* v. *Aitchison [1912] A.C. 844* was founded on the same principle.

15. In the above case (**Hewitt v. Bonvin**) the son obtained permission from his mother, who had authority to grant it, to drive his father's motor car. The son drove the car with his friends accompanying him for a party to Wisbech. On their way back, due to the negligent driving of the son the car was upset and one of his friend was killed in that accident. The father of the deceased as the administrator sued the son and his father, as he was the owner of the car. The trial judge (Lewis J) awarded damages against the father on the basis that, the son was driving the car with the consent of the owner, and therefore, he (son) was the servant and agent of the father on that journey. The father appealed to the Court of Appeal. The Court of Appeal unanimously allowed the appeal and held that, the son was not driving the car as his father's servant or agent or for his father's purposes, and that therefore the father was not liable for his son's tortious act.

16. It follows that, mere ownership does not impute the liability under doctrine of vicarious liability unless the driver of the vehicle acts as the servant of the owner, nor it makes the owner liable under the principle of agency unless it is shown that, he has delegated his duty of driving to the driver. Similar approach was followed in Fiji in **Michael Ban v Jan's Rental Car's (Fiji) Limited** (1992) 38 FLR 158. In that case the plaintiff sued the rental car company in respect to injuries he sustained as a result of accident involving motor vehicle rented out by the rental company to a third party. The third party was driving the vehicle at the time of the accident. The court differentiated between driving a vehicle for the own pleasure of the driver and for the business of the owner. His Lordship Justice Scott (as he then was) stated at page 160 as follows:-

> "As I see it, the basic question is whether the mere fact that Groot hired the car from the Defendant can give rise to the Defendant's liability. In my view it cannot. In his discussion of liability for torts committed by an agent the learned author of Bowstead on Agency makes no mention of any rule that a hiring company is liable in the way being suggested. On the contrary, under the heading "Casual Delegation" (15 edition page 393) a large number of cases are cited which tend to establish just the opposite and it is said "there is no question of liability where A is merely driving

> with B's permission for a purpose of his own in which B has no interest." In the present case the Defendant's business was to rent cars but in my view that does not mean that each hirer is going about the Defendant's business. If the Defendant has asked Groot to perform some small service for him on his way to Sigatoka such as dropping off a packet to a friend of the defendant and had an accident occurred while the packet was being dropped off then perhaps it could be argued that at that time Groot was driving on the Defendant's business. In my view the first submission made by Mr. Maharaj and already quoted is fallacious. Either a person is driving on the rental car hirer's business or he is driving for a pleasure purpose not both. That the defendant may have had an interest in seeing his hire car safely returned to him but the hirer did not, in my view, mean that he had an interest in legal terms in the hirer's driving. I agree with Mr. Singh that the evidence also quite clearly shows that the reason that Groot was driving the car was that he had rented it for pleasure purpose of his own. He had paid rent for the car."

17. The court clearly established that, the owner of a rented car is not vicariously liable for the negligent driving of the driver unless it is shown that, the driver was driving for the business of the owner. The rational is that, the driver of a rental car does not drive the car qua servant or agent of the rental company. His Lordship the Acting Chief Justice Kamal Kumar (as His Lordship then was) followed the above principle in **Jan's Rental Cars (Fiji) Ltd v Nand** [2016] FJHC 73; HBM147.2014 (27 January 2016). Thereafter, Justice Deepthi Amaratunga followed both decisions in **Ali v Cakabou** [2020] FJHC 83; HBC1.2019 (14 February 2020).

18. The plaintiff in paragraph 2 of statement of claim specifically pleaded that, the first defendant at all material times operated a car rental business and was the owner of motor vehicle LR 2477. The plaintiff further pleaded in paragraph 4 that, the first defendant by virtue of car rental contract permitted the second defendant to drive said motor vehicle LR 2477. The plaintiff in its own pleading has clearly identified the relationship between the first and second defendant, which is based on 'car rental contract' as plaintiff itself pleaded. Having clearly identified the above relationship, the plaintiff sued the first defendant purely on the basis that, the first defendant was the owner of the vehicle LR 2477 involved in the accident. There is nothing in the statement of claim to show that, the second defendant was driving the said vehicle as the servant or agent of the first defendant. Obviously, a person who drives a motor vehicle of a car rental company on a 'car rental agreement' cannot be said to be driving as the agent or servant of that company. If he is the servant or agent of the company, he does not need to enter into a 'car rental agreement'. It is the purpose and the relationship that determines the liability of the rental company in this circumstance. The question is whether he or she was driving a rented car for the business of the rental company or for his pleasure purpose. The first

defendant company pleaded that, the second defendant took the motor vehicle LR 2477 pursuant to the 'Rental Agreement Number 0133' and the plaintiff too admitted the same as mentioned above. It is clear from pleadings that, the second defendant was driving the motor vehicle LR 2477 for her pleasure purpose at the time of accident, and not for the business of the first defendant. As a result, the plaintiff has no chance of success against the first defendant, when all the allegations in the statement of claim are considered.

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

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

20. The plaintiff's action against the first defendant is obviously unsustainable on above analysis. It was held in **Ratumaiyale v Native Land Trust Board** [2000] FJLawRp 66; [2000] 1 FLR 284 (17 November 2000) that:

> "It is clear from the authorities that the Court's jurisdiction to strike out on the grounds of no reasonable cause of action is to be used sparingly and only where a cause of action is obviously unsustainable. It was not enough to argue that a case is weak and unlikely to succeed, it must be shown that no cause of action exists (**A-G v Shiu Prasad Halka** [1972] 18 FLR 210; **Bavadra v Attorney-General** [1987] 3 PLR 95.

21. His Lordship the former Chief Justice A.H.C.T. Gates in **Razak v. Fiji Sugar Corporation Ltd** (supra) held that:

> "The power to strike out is a summary power "which should be exercised only in plain and obvious cases", where the cause of action was "plainly unsustainable"; Drummond-Jackson at p.1101b; A-G of the Duchy of Lancaster v London and NW Railway Company [1892] 3 Ch. 274 at p.277."

22. For the reasons mentioned above, I am firm on my view that, this is a plain and obvious case where the cause of action is plainly unsustainable. It follows that this court should summarily intervene in this matter and strike out the plaintiff's action against the first

defendant with the reasonable amount of costs for the first defendant for defending this matter to date.

23. In result, I make the following orders,

a. The plaintiff's action against the first defendant is struck out, and

b. The plaintiff should pay a summarily assessed cost of $ 1,500 to the first defendant within a month from today.

U.L Mohamed Azhar
Master of the High Court
At Lautoka
23.02.2021