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

**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 214 of 2012**

**BETWEEN** : **COSTERFIELD LIMITED** as trustee for Costerfield Unit Trust

**PLAINTIFF**

**And the other Plaintiffs as set out in the schedule of Statement of Claim**

**A N D** : **DENARAU INTERNATIONAL LTD**

**FIRST DEFENDANT**

**A N D** : **DENARAU INVESTMENTS LTD**

**SECOND DEFENDANT**

**Mr. Roneel Kumar for the Plaintiff**
**Mr Robert Keith Newton and (Ms) Lusia Lagilevu for the Defendants**

**Date of Hearing: - Friday 01st April 2016**
**Date of Ruling : - Friday 08th July 2016**

# RULING

## (A) INTRODUCTION

(1) The matter before me stems from the Defendants Summons dated 12th October 2015, made pursuant to Order 2, r.1, Order 15, rr.6 & 14. Order 18, rr. 6, 11 &18, Order 23, r.1, Order 24, r.16 and Order 25, r.1 of the High Court Rules, 1988 and pursuant to the

inherent jurisdiction of the Court, seeking the grant of the following interlocutory reliefs ;

(a) *the statement of claim be struck out [pursuant to O.18 r.18];*

(b) *the first Plaintiff not be permitted to continue the proceedings as representative proceedings [O.15 r.14 (1)];*

(c) *that any person on whose behalf relief is sought be joined as a plaintiff in their personnel names or be at liberty to commence separate proceedings against the defendants;*

(d) *that the first plaintiff and any other plaintiff suing in their personal capacity have liberty to file and serve an amended writ and statement of claim;*

(e) *that any plaintiff desirous of commencing separate proceedings against the defendants have liberty to file and serve a separate writ and statement of claim;*

(f) *that the defendants file a defence to any amended statement of claim;*

(g) *the present first plaintiff and those it represents provide security for costs;*

(h) *the present first plaintiff and those it represents give further verified discovery;*

(i) *the present first plaintiff and those it represents serve expert reports; and;*

(j) *the first plaintiff pay the defendants costs of the present application and any costs thrown away in consequence of the orders made.*

(2) The application is supported by an Affidavit sworn by 'Subhas Parashotam', the Principal in the firm 'Parashotam Lawyers', Solicitors for the Defendants.

(3) The application is vigorously contested by the Plaintiff. The Plaintiff filed an 'Affidavit in Opposition' sworn by 'Graeme Knott', the representative Plaintiff in the matter, followed by an 'Affidavit in Reply' thereto.

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

## (B) THE FACTUAL BACKGROUND

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

(2) The Statement of Claim on its face purports to be a claim by multiple Plaintiffs. The Statement of Claim contains 42 paragraphs and 9 prayers.

(3) The First Plaintiff is incorporated pursuant to the 'Companies Act' and the trustees for the 'Costerfield Unit Trust'.

(4) The First Defendant is incorporated pursuant to the 'Companies Act' and the Manager of the 'Fiji Hilton Beach Resort and Spa'.

(5) The Second Defendant is incorporated pursuant to the 'Companies Act' and the developer of the 'Fiji Hilton Beach Resort and Spa'.

(6) The First Plaintiff in its Statement of Claim pleads *inter alia*; (as far as relevant)

*Para 5.* *During 2006, the First Plaintiff executed a number of agreements titled:*

*(a)* *AGREEMENT FOR GRANT OF A TITILE LEASE;*
*(b)* *AGREEMENT FOR CONSTRUCTION OF A VILLA;*
*(c)* *AGREEMENT FOR SALE OR FITTINGS, FURNISHINGS AND EQUIPMENT (together 'Agreement') in relation to a villa described as Villa number 22B (the "Villa").*

*6.* *The First and Further Plaintiffs executed agreements identical to those referred to in the previous paragraph on the dates set out in the schedule of particulars annexed hereto.*

*7.* *Pursuant to the Agreement, the First Plaintiff:*

*(a)* *purchased the Villa for NZ$946,000;*
*(b)* *appointed the First Defendant as the Manager of the Villa and all furniture, furnishings and equipment comprised in the Villa;*
*(c)* *granted to the First Defendant of the non-exclusive rights to use the common property in the course of the First Defendant perform its obligations and exercising its rights under the Agreement; and*
*(d)* *the First Defendant accepted the appointment as Manager of the villa*

*8.* *The Further Plaintiffs, purchased villas for the respective sums set out in the schedule of particulars annexed hereto and also:*

*(a)* *appointed the First Defendant as Manager of their respective villas;*

*(b)* *granted the First Defendant non-exclusive rights in the manner set out in 7 (c) herein; and*

(c) *the First Defendant accepted the respective appointments as manager for the respective villas.*

9. *Pursuant to the agreements, the First Defendant is to use and manage the villa as part of the fully integrated hotel facilities situated on Denarau Island, Nadi, Fiji on a site comprised in the native lease number 434874 dated 30 December 1997, issued by the Native Land Trust Board in respect of that land which is part of Denarau Island, Tikina of Nadi, Province of Ba, Fiji, identified as Lot 4, S.O. 3706 and comprising an area of 12.7902 hectares.*

12. *It was an express term of the Agreement that the First Defendant would pay:*

(a) *the Plaintiffs; and*

(b) *all Villa owners;*

*Fifty percent (50%) of all money received by the Defendants from the letting of the Villa (Villa Revenue") without any variations to the Villa Revenue until 8 June 2009, save as where a variation is made in accordance with sub clause 5.3 of the Agreement.*

13. *In breach of the Agreement, the First Defendant has failed and has refused to pay to:*

(a) *the Plaintiffs; and*

(b) *all Villa owners*

*The correct sums of Villa Revenue due and owing to them pursuant to the Agreements between the third quarter of calendar year 2008 to the present date.*

29. *Prior to execution of the Agreement, the First Defendant represented to:*

(a) *the Plaintiffs; and*

(b) *the Villa Owners*

*That the First Defendant had an arrangement with the Fiji Revenue and Customs Authority ("FRCA") regarding the payment of value added tax ("VAT") whereby VAT would not be payable on the purchase of the villa.*

*Particulars*

*The representation was in a letter from the first Defendant to Villa Owners.*

30. *It is a further term of the Agreement that the First Defendant shall pay to any Villa Owner the amount of all VAT chargeable on any taxable supply by the Owner under their agreement.*

*Particulars*

*Clause 14 of the Purchase Agreement*

31. *In breach of the Agreement and the clause referred to in the preceding paragraph, the First Defendant has not repaid VAT expenses incurred by the Plaintiffs and Villa Owners pursuat to the Agreement.*

*Particulars*

*The amounts not repaid will be particularised as soon as practicable.*

32. *By reason of the breach referred to in the preceding paragraph, FRCA has pursued a number of the Plaintiffs for the VAT payable on the purchase of the Plaintiff's villa.*

*Misrepresentation*

33. *Further, prior to the purchase of the villa referred to in paragraph 7 herein, the First Defendant provided profit projections to:*

*(a) the Plaintiffs;*

*(b) Villa Owners*

34. *Further, by way of the Agreement, the Plaintiffs and Villa Owners were provided with information about the drawing of revenue from the Resort as payment for management services namely:*

*(a) the Third Defendant; and*

*(b) The Second Defendant*

35. *Promotional materials provided to the Plaintiffs and to Villa Owners:*

*(a) refer to Lausanne Project Management Limited ("LPML") as "architects from Sydney, Australia"; and*

*(b) inferred that any fees payable to LPML are associated with the construction stage of the Resort.*

36. *In reliance on the Agreement and promotional materials, the:*

*(a) Plaintiffs; and*

*(b) Villa Owners*

*made financial assessments of their investment returns on the basis that the only drawers of management fees would be the First Defendant and the Third Defendant.*

37. *Further, on 1 May 2009, the First Defendant write to Villa Owners stating:*

> *Lausanne Project Management Ltd, based in Auckland, is a project management company which provides management, accounting and administrative services to Denarau Investments and Denarau International. Lausanne Project Manager does not receive any fees for these services provided to Denarau International.*

38. *Subsequent to Villa purchases by the Plaintiffs and Villa Owners, LPML had drawn management fees*

    (a) *up until 1 January 2010, in excess of FJ$800.00*

    (b) *further sums on a monthly basis.*

*Particulars*

*As to (a) the Plaintiff refers to Statements by the receivers of the First Defendant, Korda Mentha. As to (b) the Plaintiff cannot provide further particulars until it has been provided with proper accounts.*

39. *The payment referred to in the previous paragraph were in breach of the Agreement*

40. *Further, and in alternative, the statements referred to in paragraphs 35 and 37 were:*

    (a) *False; and/or*

    (b) *Misleading*

*in that they failed to disclose that an additional company associated with the First Defendant and Second Defendant would be paid significant sums of money from the pool of revenue from which Villa Revenue was drawn and thereby reduce future available Villa Revenue.*

41. *By reason of the matters set out in paragraphs 39 and 40 the:*

    (a) *Plaintiffs; and*

    (b) *Villa Owners*

*Have suffered losses of Villa Revenue to the extent of the fees paid to LPML.*

42. *The Villa Owners that would seek to follow the Plaintiff in its representative action are set out in Schedule A to this claim.*

(7) Therefore, the First Plaintiff prays for the following Orders against the First and Second Defendant;

A. *A declaration that the Force Majeure Notice dated 26 March 2009, is void.*

B. *That taking of accounts of the First Defendant and Second Defendant by an auditor appointed by the Court.*

C. *Specific Performance of the Management Agreement for the benefit of the:*

i. *Plaintiff; and*

ii. *Schedule A Villa Owners*

D. *Damages to the extent of unpaid Villa Revenue in the sum of*

i. *FJ$95,000 to the Plaintiff*

ii. *FJ$3,800,000 to the Schedule A Villa Owners.*

E. *Damages to the extent of misappropriation of revenue by LPML.*

F. *Damages to the extent of the Plaintiffs' indebtedness to FRCA in the sums owing to the Schedule A Villa Owners.*

G. *Interest.*

H. *Costs on a solicitor client basis.*

## (C) THE LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

*It has been said that the Court will not permit a plaintiff to be "driven from the judgment seat" except where the cause of action is obviously bad and almost incontestably bad (per Fletcher Moulton L.J. in **Dyson v Att. – Gen [1911] 1 KB 410 p. 419).**"*

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

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

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

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

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

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

*Court of Appeal decision in <u>Attorney –v- Prince Gardner [1998] 1 NZLR 262</u> at 267."*

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

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

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

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

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

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

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

*burden of further wasted time which could be devoted to the determination of claims which have legal merit.*

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

*"The principles applicable to applications of this type have been considered by the Court on many occasions. Those principles include:*

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

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

*c) It is only in plain and obvious cases that recourse would be had to the summary process under this rule – Lindley MR in* ***Hubbuck v Wilkinson*** *[1899] Q.B 86.*

*d) The purpose of the Courts jurisdiction to strike out pleading is twofold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice; defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.*

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

*f) A dismissal of proceedings "often be required by the very essence of justice to be done"..... – Lord Blackburn in* ***Metropolitan – Pooley*** *[1885] 10 OPP Case 210 at 221- so as to prevent parties being harassed and put to expense by frivolous, vexations or hopeless*

*allegation – Lorton LJ in* ***Riches v Director of Public Prosecutions (1973) 1 WLR 1019 at 1027"***

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

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

i) *It is only in plain and obvious cases that recourse would be had to the summary process under this rule – Lindley MR in* ***Hubbuck v Wilkinson*** *[1899] Q.B 86.*

j) *The purpose of the Courts jurisdiction to strike out pleading is twofold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice; defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.*

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

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

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

> *"An abuse of process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the*

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

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

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

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

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

## (D) ANALYSIS

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

(2) Before dealing with the merits of the application, let me record that counsel for the Plaintiff and the Defendants in their written submissions has done a fairly exhaustive study of judicial decisions and other authorities which they considered to be applicable.

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

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

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

The Striking out application by the defendants is made on the grounds that the Plaintiffs action against the second Defendant;

**(a) discloses no reasonable cause of action**
**(b) is scandalous, frivolous or vexatious: and**
**(c) is an abuse of the process of the court.**

In the same breathe Counsel contended that the Writ as it stands is hopelessly bad and a representative action does not lie under Order 15, rule 14 (1) of the High Court Rules.

(4) In the written submissions the Defendants stated and outlined seven serious issues. They are;

*(a) Relevant facts and circumstances not pleaded [see O.18 rr.6 and 12], internal inconsistencies and irrelevancies;*

*(b) Some of the "other Plaintiffs" listed in the schedule to the statement of claim are not legal persons capable of being a party or even a represented person, simply because they are solely described as trust eg "ME Freeman Family Trust";*

*(c) Non-compliance with O.6 r.3 (a), which stipulates that the description of a representative party in a Writ should carry an indorsement to that effect. Other parties should not be forced to somehow glean or guess that capacity from vague references buried elsewhere in the pleading such as paragraph 42 of the Statement of Claim: see* ***In re Tottenham [1896] 1 Ch 628 at 629 (North J);***

(d) *It is impermissible for parties to be named as parties doubly in a personal capacity and in a representative capacity: see* ***Hardie and Lane Ltd v Chiltern*** *[1928] 1 KB 663 at 699 (Sargant LJ) and 700 – 701 (Lawrence LJ);*

(e) *In some cases the allegations in the statement of claim do not give rise to damages; and*

(f) *It will usually be impermissible to maintain a representative claim for damages; and*

(g) *There is a lack of commonality of interest in matters concerning multiple representations and acts of reliance.*

(5) As against this, the Plaintiff says; (Reference is made to paragraph 15, 20, 27, 28, 30, 32, 33 and 34 of the Plaintiff's written submissions)

*Para 15.* *We respectfully submit that the Plaintiffs in their statement of claim clearly particularised the material facts. The facts pleaded clearly shows that the claim arose from the breaches of contracts, namely the Villa Owners Management Agreement, between the Plaintiffs and the Defendants.*

*20.* *We submit that the Plaintiffs have a meritorious claim against the Defendants. The Plaintiffs have expressly and clearly stated material facts on which they rely on. Therefore, at present a striking out simply has no basis or merit.*

*27.* *We submit that the Court must look to the pleadings to decide whether the Plaintiffs simply have no sustainable case. The claim stemmed from breaches of contracts by the Defendants. The Plaintiffs has a good case for trial on the pleadings and we submit that the present application is frivolous.*

*28.* *The Defendants have tried to create confusion as to what type of actions have the Plaintiff's instituted. It is apparent from the statement of claim that this is a representative action also referred as class action. It is clearly states in the Writ of Summons that this action is filed by the First Plaintiff and the other Plaintiffs as set out in the schedule of the Statement of claim.*

*30.* *We submit that the terms "class action" and "representative action" are used in a generic manner and synonymously.*

*32.* *We respectfully submit that the Plaintiffs don't need to file amended Writ and Statement of Claim in their personal capacity. We submit that the issues of fact and law between all the Plaintiffs and the Defendants are identical namely:-*

*(a)* *Terms of Villa Owners Management Agreement (VOMA)*

(b) *Terms of VOMA breached by the First and the Second Defendants;*
(c) *Time of the breach;*
(d) *Circumstances of the breach;*
(e) *Nature of loss in form of villa revenue payable to villa owners.*

33. *We submit that by instituting a class action, the Plaintiffs have saved considerable legal cost. This has also saved the courts time as it can deal with all the issues between the Plaintiffs and the Defendants at once.*

34. *the Defendants have also raised the issue that the Plaintiffs cannot claim damages. We respectfully submit that we are not claiming damages under common law where the court has to decide what is the amount to be awarded. These damages are specific amounts that arose from the breach of contract. These amounts will be ascertained once an auditor is appointed by court.*

(6) **Striking Out**

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

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

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

Where, a claim to strike out depends upon the decision of one or more difficult points of law, the court should normally refuse to entertain such a claim to strike out. But, if

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

Returning back to the instant case, in my view, the facts pleaded in the Statement of Claim are appropriate to determine a question of law.

(7) Now let me return to the merits of the application, bearing the aforesaid legal principles uppermost in my mind.

(8) **<u>The Statement of Claim</u>**

As the first pleading in any action, a Statement of Claim is a very vital document. It plays a pivotal role in ensuring the advancement of a trial by defining and limiting the issues to their bare necessities. A Statement of Claim must state a summary of material facts of the Plaintiff's cause of action entitling him/her a relief or remedy. It is also crucial as it enables the Defendant to know the case that she/he has to encounter.

Let me have a closer look at the Statement of Claim.

As noted earlier, the Statement of Claim contains 42 paragraphs and 09 prayers.

When one looks at the Statement of Claim, it is apparent that;

- **There is no wrong doing alleged against the second Defendant.**

  **There is no justification whatever on the face of the Statement of Claim for the bringing of these proceedings against the Second Defendant.**

- The paragraph 42 of the Statement of Claim reads;

  *"The Villa Owners that would seek to follow the Plaintiff in its representative action are set out in Schedule A to this claim".*

- In this case, the Statement of Claim is unintelligent and vague and difficult to respond because there is no Statement in the Writ or the body of the Statement

of Claim where it is alleged that the suit is filed on behalf of the Plaintiff and the other purported Plaintiffs.

- By the wording of paragraph 42 of the Statement of Claim, it would appear that the other purported Plaintiffs would file separate Claims against the Defendants. Nowhere in the Statement of Claim does it say that the Claim is in fact filed for and on behalf of other purported Plaintiffs. Notwithstanding this, the relief as pleaded at page 10 of the Statement of Claim seeks to claim substantial damages and other ancillary relief on behalf of the other purported Plaintiffs.

- Moreover, there are references to trusts in the Schedule 'A' to the Statement of Claim. It is not competent to bring proceedings in the name of or a representative for "The Bloor Family Trust", "Bula Trust", Robert Radcliffe Trust", "GS & PK Pearce Family Trust" and "Houston Trust".

- The Plaintiff alleges that the First Defendant has not repaid VAT expenses incurred by the Plaintiffs and Villa owners pursuant to the agreement. (Paragraphs 29 – 32 of the Statement of Claim). But there is no figure as the amount of FIRCA refunds that the Plaintiffs claim nor are there any particulars on whether there has been any loss or damage occasioned as a result of the breach complained of.

- Moreover, the paragraph 32 of the Statement of Claim is in very uncertain terms as to the exact identities of the Plaintiff or the purported Plaintiffs who have been pursued by FIRCA for VAT payable.

- The relief 'C' in the prayer seeks specific performance of a 'Management Agreement'. The Villa owners are not a party to the 'Management Agreement' and have no standing to seek 'specific performance'.

- The relief 'E' in the prayer seeks damages for the misappropriation by LPML. But 'LPML' is not a party to the proceedings.

(9) For the reasons which I have endeavoured to explain in the above paragraph, I have no hesitation in concluding that the Statement of Claim is unintelligible and vague and difficult to respond. It is important to remember, as I significantly believe, pleadings cannot be prolix or embarrassing or confusing. It can hardly admit of doubt that the Writ as it stands is hopelessly bad.

(10) Leave all that aside for a moment and let me assume that the Plaintiff brings these proceedings on behalf of itself and all other persons listed in schedule (A) of the Statement of Claim.

The sole basis for bringing 'representative/class proceedings' in Fiji is laid down in Order 15, r.14 (1) which provides;

***Representative proceedings (O.15, r.14)***

> *14.-(1) Where numerous persons have the **'same interest'** in any proceedings, not being such proceedings as are mentioned in rule 15, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.*
>
> *(Emphasis Added)*

The language of the High Court Rule is unmistakably clear, i.e., '*where numerous persons have the same interest in any proceedings*'.

As a fundamental rule of practice, and of pleadings, two or more different Plaintiffs, each having a separate and different cause of action, cannot be joined in the same action. To cite authority for this proposition seems superfluous.

In '**John v Rees** **'(1970)' Ch 345, 370 C.A**, the representative procedure was described as one 'being not a rigid matter of principle but a flexible tool of convenience in the administration of justice'.

There is a clear public interest in encouraging and developing representative actions. They save costs and significant court time. They dispose of legal matters efficiently. They bring many people to justice.

The representative action is designed to simplify litigation, to render the administration of justice more convenient for parties and tribunal, and to eliminate a multiplicity of suits where the rights and liabilities of numerous and similarly interested litigants may be fairly adjudicated in a single action. Use of the representative action is predicated in part upon the existence of a number of parties, Plaintiff or Defendant whose 'common interest' in a controverted question is such as to constitute them a 'class' of litigants, which will be affected favourably or adversely in the same manner by the judicial determinations to be made. When numerous parties are so related by a 'community of interest', an action may be sued or defended by one or more representatives of their class.

As Lord Macnaghten pointed out in **Duke of Bedford v Ellis [1901] AC 1,** the representative order was originally the product of the Court of Chancery, and it was closely related to the rule that all persons interested in the subject matter of a suit should be joined as parties to the proceedings. His Lordship said (at 8):

> *"... The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at justice', to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a*

*representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."*

The object was to facilitate disposition of cases where parties were so numerous that the proceedings would be unmanageable if all were named. In the words of Lord McNaghten in **Duke of Bedford v Ellis [1901] AC 18** quoted recently by Vinelot J in **Prudential Assurance Co Ltd v Newman Industries Ltd [1979] 3 All ER 507, 511 – 512:**

> *"The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at justice', to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the Plaintiff proposed to represent."*

In **Duke of Bedford v Ellis** (*supra*) the House of Lords permitted a representative order where the Plaintiffs claimed to represent growers of fruits, flowers and vegetables, within the meaning of the Covent Garden Market Act 1828 (UK). They claimed to enforce, on behalf of all such growers, certain rights in relation to the market. They were said to be vindicating, as against the landlord, and as against the public, a valuable privilege which they enjoyed by virtue of the statute. The House of Lords held that a representative action can be brought by persons asserting a common right under a statute.

(11) **Three requirements for permitting a representative/class action:**

The pre-conditions to the bringing of a representative action, were established by **'Duke of Bedford v Ellis' (1901) AC 1** to be proof by the representor that all members of the class nominated would;

- ❖ have a common interest
- ❖ have a common grievance; and
- ❖ secure relief which, in its nature, would be 'beneficial to all'.

Now turning to the application before me, it is argued for the Defendants that there is no 'common interest' such as where there is a fund in which all members have a 'common interest' or where a class of people have a 'community of interest' in some subject mater. It is urged that what is being advanced is really a series of separate damage claims and that in the circumstances a representative action does not lie. It is

further urged that no representative action can lie where the main relief sought is damages, because they have to be proved separately in the case of each Plaintiff and therefore the possibility of representation ceases.

In *adverso*, Counsel for the Plaintiffs submit; (Reference is made to para 32 of the Plaintiff's written submissions)

> *Para 32* *We respectfully submit that the Plaintiffs don't need to file amended Writ and Statement of Claim in their personal capacity. We submit that the issues of fact and law between all the Plaintiffs and the Defendants are identical namely:-*
>
> *(a)* *Terms of Villa Owners Management Agreement (VOMA)*
> *(b)* *Terms of VOMA breached by the First and the Second Defendants;*
> *(c)* *Time of the breach;*
> *(d)* *Circumstances of the breach;*
> *(e)* *Nature of loss in form of villa revenue payable to villa owners.*

(12) What concerns me is, can it be said that the schedule 'A' to the Statement of Claim is comprised of persons, having with the Plaintiff, a common interest, common legal grievance and entitlement to relief 'beneficial to all'?

(13) **Common Interest**

The essential condition of a representative action is that the persons who are to be represented have the common interest as the Plaintiff in one and the same cause or matter. There must therefore be a common interest alike in the sense that its subject and its relation to that subject must be the same.

The requirement of common interest descends from the original equitable principle that 'given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the Plaintiff proposed to represent'; **Duke of Bedford v Ellis (1901) AC 1.**

The convenience of a representative action is to avoid multiplicity of parties. However, convenience is not to facilitate baseless claims or to shut out available defences.

As stated by Vinelot J in '**Prudential Assurance Co. Ltd. V Newman Industries Ltd.** (supra, 517);

> *"First, no Order will be made in favour of a representative Plaintiff if the Order might in any circumstances have the effect of conferring on a member of the class represented a right which he could not have raised in such proceedings. Secondly, no Order will be made in favour of a representative Plaintiff unless there is some element*

*common to the Claims of all members of the class which he purports to represent."*

Therefore, it is necessary for a representative Plaintiff to demonstrate common claims and common defences to such claims.

The determination of the type of interest which a number of parties Plaintiff or Defendant have in the subject matter of a particular controversy is one of the most vexatious of pleading problems.

Obviously, the ultimate explanation of so broad a term in a legislative enactment as common interest is dependent upon judicial construction. Courts have declared the use of the representative action to be proper and have found a common interest among Plaintiffs or Defendants in the following types of action:

(1) By bondholders to foreclose a trust deed and to obtain the appointment of a receiver (**Clay v Selah Valley Irrigation Co. 14 Wash, 543, 45 Pac. 141 (1896)**

(2) By creditors of a defunct bank to enforce the statutory liability of stockholders. (**Adams v. Clark, 36 Col. 65, 85 Pac. 642 (1906); Gaiser v Buck, 179 N.E. 1, 82 A.L.R. 1348 (1931); R.F.C. v. Central Republic T.Co., 11 F. Supp. 976 (1935).**

(3) By retail dealers to restrain an illegal conspiracy among wholesalers who combined to drive non-combination members out of business. (**Hawarden v. Lehigh Coal Co., 111 Wis. 545, 87 N.W. 472 (1901)**

(4) By stockholders of a dissolved corporation to recover on a promissory note. (**Marshall v Witting, 205 Wis. 510, 238 N.W. 390 (1931)**

(5) By heirs claiming title under a will to set aside a fraudulent conveyance (**Thames v. Jones, 97 N.C. 121, 1 S.E. 692 (1887)**.

(6) By taxpayers to restrain the collection of, or to recover, taxes illegally assessed (**Commonwealth v Scott, 112 Ky. 252, 65 S.W. 596 (1901)**

(7) By beneficiary to recover death benefits from an unincorporated association (trade union) insuring the lives of its members. (**Colt v. Hicks, 97 Ind. App. 177, 179 N.E. 335 (1932)**

(8) By legatees, entitled to separate benefits, to establish a will. **McKenzie v L'Amoureux, 11 Barbour 516 (1851)**

(9) By trustees to recover trust funds (**Wheelock v First Presbyterian Church, 119 Cal. 447, 51 Pac. 841 (1897)**

(10) By printing employers of a city to enjoin members of a typographical union from conspiring to compel employers to accept a closed shop (**Trade Press Pub. Co. v Milw. Typo. Union, 180 Wis. 449, 193 N.W. 507 (1923)**

(11) By creditors to obtain the appointment of successor trustees of mortgage certificates issued by a guaranty company (**Acken v N.Y. Title & Mortgage Co., 9 Fed Supp. 521 (D.C. N.D. New York, 1934)**

(12) By policy holders to enjoin the use of company funds (**Supreme Tribe of Ben Hurr v. Cauble, 255 U.S. 356, 41 Sup. Ct. 338, 65 Led 673 (1921)**.

(13) By negro children to restrain the enforcement of an order prohibiting their participation in the social functions of a public school. (**Jones v. Newton, 81 Colo 25, 253 Pac 386, 50 A.L.R. 1263 (1927)**. *In speaking of the propriety of using the representative action in this instance, the court remarked: "The wrong is done by entry and enforcement of the order made and enforced against each of the Plaintiffs by Defendants in the same capacity, injuring each of the Plaintiffs in the same way, in violations of the same Constitutional provision, and requiring the same judgment, i.e. the abrogation of the Order."*

(14) In partition proceedings of property held under a will (by defendants). **Coquillard v. Coquillard, 62 Ind. App 426, 113 N.E. 474 (1916); Springs v. Scott, 132 N.C. 548, 44 S.E. 116 (1903); Jordan v. Jordan, 145 Tenn. 378, 239 S.W. 423 (1922).**

The foregoing illustrations indicate that the representative action is more adaptable to equitable than to purely legal proceedings.

However, the priority of permitting the use of the representative/class action in tort cases or in case requiring the payment of money damages only is doubtful. An interpretation of the term 'Common or general interest' which would embrace the interest of one Plaintiff in the money damages of another Plaintiff would seem abortive, for as stated in '**Cavanogh v Hutcheson' 250 N.Y. Supp. 127 (1931).**

Returning back to the case before me, the representative Plaintiff in the instant case brings these proceedings on behalf of itself and all other persons listed in the schedule "A" to the Statement of Claim who had entered into contracts with the first Defendant under which the first Defendant manages their respective Villas on their behalf.

In my view, the class sought to be represented cannot be joined as Plaintiffs, nor could their respective causes of action be joined in the same proceedings, because there is no community of interest or same interest between the Plaintiffs within the meaning of Order 15, r.14 (1) due to the followings;

- ❖ The causes of action here did not arise out of the same transaction. They arose out of entirely distinct transactions, creating entirely distinct legal liabilities.

- ❖ The claims for recovery of alleged unpaid villa revenue involved quite distinct issues which would involve the investigation of different set of facts in respect of each Plaintiff, viz, size of the villa, quality of the villa and the revenue stream for each villa.

- ❖ The relief claimed is in respect of, or arises out of several distinct transactions when the participation of each individual Plaintiff is limited to participation in one transaction the other Plaintiffs not participating in the series.

- ❖ No Plaintiff has any interest in the claim for alleged unpaid villa revenue of any other Plaintiff. A right to recover the alleged unpaid villa revenue is individual to each Plaintiff.

- ❖ There is clearly no transaction to which all the Plaintiffs are party.

- ❖ Each Plaintiff has a separate cause of action against the Defendant to recover the alleged unpaid villa revenue and no other Plaintiff having an interest in that cause of action or in its subject matter.

- ❖ The claim for alleged unpaid villa revenue depends on multiple representations to different Plaintiffs at different times.

- ❖ The claim for alleged unpaid villa revenue depends on act of reliance by different Plaintiffs at different times.

- ❖ There is nothing on the Writ to show that each of the persons/Plaintiffs listed in schedule 'A' to the Statement of Claim did in fact enter into identical contractual agreements with the first Defendant.

- ❖ There is no bond or contract uniting the persons whom the Plaintiff affects to represent. They are in no way connected.

Therefore, I refuse to permit the action to be brought as a representative action because the common or general interest among the Plaintiffs to be wanting.

I further rely and I am inclined to be guided by the decision of the English Court of Appeal in "**Market & Co. Ltd. v Knight Steamship Co. Ltd (1910) 1 KB 1021** as the correct approach to the application before this court.

In this case the Plaintiffs shipped goods on a general ship of the defendants for a voyage from New York to Japan. Before arriving at its destination the ship was sunk by a Russian cruiser on the ground that she was carrying contraband of war, and both ship and cargo were lost. In the writs in the action, the Plaintiffs were respectively described as suing "on behalf of themselves and other owners of cargo lately laded on board the steamship Knight Commander", and the writs were indorsed with a claim for "damages for breach of contract and duty in and about the carriage of goods by sea." A letter written by the Plaintiffs' solicitors to the defendants' solicitors on the day of the issue of the writs stated that Plaintiffs were suing on behalf of themselves and fourty-four other persons, firms, or companies (whose names were given) who had shipped goods on board the ship. The Court held that;

> *"Upon the writs as they stood, the plaintiffs and those whom they purported to represent were not "persons having the same interest in one cause or matter" within the meaning of Order XVI., r.9, and that the Plaintiffs, were not entitled to bring representative actions".*

Fletcher Moultin L.J. said;

> *"The proper domain of a representative action is where there are like rights against a common fund, or where a class of people have a community of interest in some subject-matter. Here there is nothing of the kind. The defendants have made separate contracts which may or may not be identical in form with different persons. And that is all.* ***To my mind it is impossible to say that mere identity of form of a contract or similarity in the circumstances under which it has to be performed satisfies the language of r.9. It is entirely contrary to the spirit of our judicial procedure to allow one person to interfere with another man's contract where he has no common interest.*** *And to hold that by any procedure a third person can create an estoppel in respect of a contract to which he is not a party merely because he is desirous of litigating his own rights under a contract similar in form but having no relation whatever to the subject-matter of the other contract, is in my opinion at variance with our whole system of procedure and is certainly not within the language of r.9."*
>
> *(Emphasis Added)*

The wording of the above passage is precise and clear to me; ***'To my mind it is impossible to say that mere identity of form of a contract or similarity in the circumstances under which it has to be performed satisfies the language of r.9. It is entirely contrary to the spirit of our judicial procedure to allow one person to interfere with another man's contract where he has no common interest'.***

It is true that it has been held that the rules should be construed in a liberal sense so as to permit joinder of parties wherever reasonably practicable. See; **Re Beck (1918) 87 LJ (Ch) 335 and Payne v British Time Recorder Co. (1921) 2 KB 1.**

In the instant case, there is no common statutory right as there was in **Duke of Bed ford v Ellis** (*supra*), nor any common fund in course of formation as there was in **'Beeching v Lloyd' 3, Drew 227.** The common purpose in **'Beeching'** is of those who took shares to enter into a partnership.

In '**Beeching v Lloyd**' (*supra*), the fund there referred to was established by the Plaintiffs and the other persons intending to invest as shareholders in a Company under formation, and the action was directed at the recovery of the respective deposits in this fund by the Plaintiffs and all other intended investors.

(14) **Action for damages**

The relief claimed in the action before me is not confined to a declaration. The representative Plaintiff claims;

*D. Damages to the extent of unpaid Villa Revenue in the sum of*

*i. FJ$95,000 to the Plaintiff*

*ii. FJ$3,800,000 to the Schedule A Villa Owners.*

*E. Damages to the extent of misappropriation of revenue by LPML.*

*F. Damages to the extent of the Plaintiffs' indebtedness to FRCA in the sums owing to the Schedule A Villa Owners.*

In my view, not all villa owners have the same right of income as income from each villa is dependant on factors such as the size of the villa, quality of the villa and the revenue stream for each villa. Therefore, the damages of the case do require personal assessment. They have to be proved separately in the case of each Plaintiff. Therefore, the possibility of representation ceases.

The differing measure of damages together with the varying defences combine to destroy the commonality of interest requisite in founding a representative action.

To suggest that '*the damages are specific amounts that arose from the breach of contract*' stretches the judicial imagination quite unreasonably.

As I said earlier, the damages have to be separately assessed and it would be unjust to permit them to be claimed in a class action because the Defendants would be deprived of individual discoveries and in the event of success, would have recourse for costs only against the named Plaintiff although its costs were increased by multiple separate claims.

(15) Before I take leave of the matter, I ought to mention one thing. It is unfortunate that this application reaches this Court some four (04) years after the filing of Writ of Summons and the Statement of Claim. The proceedings have taken on a marathon character for the last four (04) years.

The Plaintiffs have been put to considerable expense in the meantime. Their rights under this type of action or under general contract action have no doubt decayed and even gave out of existence in some instances by operation of limitation legislation. All of these circumstances, however unfortunate, do not relieve me of the duty of determining the correct meaning of Order 15, rule 14 and its proper application in these circumstances.

I would conclude that the action may not be framed as a class/representative action under Order 15, rule 14 (1) of the High Court Rules, 1988.

In light of the long history of this litigation and the marathon character, there will be no Order as to costs.

Essentially that is all I have to say !!!

## (E) FINAL ORDERS

1. The proceedings against the Second Defendant is summarily dismissed.

2. The Statement of Claim filed against the First Defendant framed as a class/representative action is struck out and be re-pleaded under general contract action.

3. I make no order as to costs.

HIGH COURT OF FIJI
LAUTOKA

08/07/2016

**Jude Nanayakkara**
**Master**

**At Lautoka**
**08th July 2016.**