

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

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 48 OF 2013

BETWEEN : **MOHAMMED KHATIB** trading as **NATADOLA TAXI AND TOURS** of Natadola, Nadroga.

PLAINTIFF

AND : **MARLIN CRUISE LINES (FIJI) LIMITED** a limited liability company having its registered office at Suva, Fiji

DEFENDANT

Before: Master M H Mohamed Ajmeer

Counsel:

Ms A Swamy for the plaintiff

Mr A Patel for the defendant

Date of Hearing : 17 April 2014

Date of Ruling : 12 June 2014

Date of Written Reasoning : 19 June 2014

INTERLOCUTORY RULING

[Written reasons]

Introduction

[1] There is a summons before me filed on 16 October 2013 by defendant (“the application”) seeking the action to be struck out on the ground that (i) it discloses no reasonable cause of action, (ii) it is scandalous, frivolous or vexatious, or (iii) it is otherwise an abuse of the process of

the court. The application is supported by an affidavit of Ross Alexander Galloway sworn on 14 August 2013 and filed on 16 August 2013 (“the supporting affidavit”). The supporting affidavit annexes three documents marked “A”-“C”.

[2] The application is made pursuant to Order 18 Rule 18 (1) of the High Court Rules 1988 (“the HCR”). That rule provides:

“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 cause 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;*

[3] Plaintiff objects the application and filed an affidavit sworn on 18 September 2013 and filed on 20 September 2013. His affidavit annexes a document marked exhibit “1”.

[4] Both the parties have filed their respective written submissions. I was greatly guided and assisted by their written submissions.

Background

[5] By an Originating Summons the Plaintiff Mohammed Khatib trading as Natadola Taxi and Tours commenced proceedings against **MARLIN CRUISE LINES (FIJI) LTD** (“MCL”) seeking; inter alia (a) declaration that the agreement dated 16th January 1995 entered between the Plaintiff and the Defendant is valid and binding on each of them and (b) an order that the defendant permit and allow the plaintiff to operate its taxi business from Natadola Beach Resort situated at Natadola, Nadroga.

- [6] According to the plaintiff, on 16 January 1995 he entered into an agreement with the defendant. The defendant agreed that the operators of the Natadola Taxis and Tours shall be entitled to exclusively operate their taxi and hire car business from Defendant's business location known as Natadola Beach Resort situated at Natadola, Nadroga ("the resort). The defendant further agreed that no other taxi operator shall be allowed to carry on business from the said resort and that this agreement is valid for an indefinite period and shall be binding on each of them and their Executors, Administrators and successors. Relying on that agreement the plaintiff obtained Taxi and Tour permits and since has been operating from the Resort from January 1995.
- [7] The plaintiff claims that the defendant has breached the agreement by allowing other Tour & Taxi operator to conduct business from the Resort and systematically refraining or refusing to allocate any contracts to the Plaintiff.
- [8] The defendant filed an affidavit of Ross Alexander Galloway in response to the plaintiff's claim and stated the following grounds for opposing the relief sought by the plaintiff:
- a. *The owner of Natadola Beach Resort is Marlin Cruise Lines Limited and not Marlin Cruise Lines (Fiji) Limited.*
 - b. *The plaintiff does not possess legal standing in commencing this action (see clause 17 of the Galloway Affidavit, section 113 of the Property Law Act and the Certificate of Registration of Natadola Taxis Tours in the name of Mohammed Hafiz, Mohammed Saud and Mohammed Khatib (the Plaintiff) and the Hire Permits attached to the annexure of the Khatib Affidavit).*
 - c. *The purported agreement is illegal, null and void ab initio in the first affidavit thereof required the operators of Natadola Taxis and Tours to operate from the Natadola each resort situated at Natadola, Nadroga and the third recital thereof the operators would park their vehicles at*

spaces provided by Marlin Cruise Line (Fiji) Limited. The defendant's lease is a Protected Lease under the provisions of section 13 of the Crown Lands Act now State Land Act (see annexure B of the Galloway Affidavit and section 13 of the Crown Lands Act).

Discussion

[9] The defendant applied to court to strike out the matter on the grounds that the statement of claim does not disclose a reasonable cause of action, or it is scandalous, frivolous and vexatious or otherwise abuse of the process of the court. It is to be noted that defendant relies on the grounds (a), (b) & (d) stated under Ord.18, r.18 (1).

No Reasonable Cause of Action

[10] When dealing with the issue that whether a pleading discloses a reasonable cause of action or not, I must consider only the pleading itself. No evidence, including affidavit evidence, on an application on this ground. In that case it is only the pleading itself which is being examined. The court is required to assume that the facts pleaded are true and undisputed. In terms of Ord. 18, r. 18 (2)-No evidence shall be admissible on an application under paragraph (1) (a) [application to strike out any pleading on the ground that it disclosed no reasonable cause of action.

[11] Ord.18, r. 18 (3) provides:

*"(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).*

[12] In this case the defendant applies to strike out an originating summons (supported with an affidavit) on the ground that it does not disclose a reasonable cause of action. The striking out provisions stated in Ord.18, r.18 (1) will apply to an originating summons pursuant to Ord.18, r.18 (3). But the question would then arise whether Ord.18, r. 18 (2), the rule that no evidence shall be admissible will apply to an originating summons.

[13] In **Re Caines, Knapman v Servian** [1978] 2 All ER 1 it was held that:

“In the case of an application to strike out an originating summons on this ground, RSC Ord. 18, r.19 (2) [Equivalent of our Ord. 18, r. 18 (2)] does not apply to an affidavit already filed in support of the originating summons...”

[14] It follows that the affidavit filed along with the originating summons will be considered in deciding whether the originating summons discloses a reasonable cause of action or not.

[15] Moreover, the defendant in support of the application relies both upon the provisions of Ord. 18, r. 18 (1) and upon the inherent jurisdiction of the court. To establish that the statement of claim discloses no cause of action only allegations in the pleadings are to be examined. However, where the inherent jurisdiction of the court is invoked, affidavit evidence may be and ordinarily is used, see para 18/19/5 the **White Book**.

[16] On behalf of the defendant, Mr A Patel submitted that the purported agreement upon which the plaintiff relies is on the face of it null and void and unenforceable as being acted upon in contravention of section 13 of the State Lands Act. The agreement, he also submitted that, is so uncertain the court was unable to give it business efficiency in that the agreement does not contain term of hire of the vehicles. He further submitted that the agreement produced by the plaintiff was not duly stamped and is inadmissible as evidence pursuant to section 41 of the Stamp Duty Act.

[17] A reasonable cause of action means with some chance of success only the allegations in the pleading are considered (per Lord Pearson in **Drummond-Jackson v British Medical Association** [1970] WLR 688; [1970] 1 All ER 1094, CA”, see para 18/19/10 of the White Book.

[18] **Ratumaiyale v Native Land Trust Board and Pacific Octopus Ltd**
[2000] FJHC 250; [2000]1 FLR 287 the court stated that:

“It is clear from the authorities that the court’s jurisdiction to strike out on the ground 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”

[19] I would summarize the issues raised by the defendant regarding the pleading (originating summons) as follows:

1. Whether the plaintiff has *locus standi* to bring the action against the defendant as the agreement was signed between the defendant and Mohammed Hafiz, Mohammed Khatib (plaintiff) and Mohammed Saud?
2. Whether an agreement could be entered between the parties for an indefinite period?
3. Whether a valid contract could be made without consideration?
4. Whether a contract is invalid and/or null and void for uncertainty?
5. Whether the contract is null and void by reason of s.13 of the State Land Act in that any dealing affecting the protected land without the consent of the Director of Lands will be null and void?
6. Whether the plaintiff can rely on unstamped document?

Validity issues

[20] Question 1 appears to be technical. The agreement was signed by the three individuals stated in question 1 and the defendant. The defendant submitted that since the agreement was between the three individuals all of businessmen t/a Natadola Taxis and Tours (NTT) and the defendant, the plaintiff alone cannot bring this action without adding the other two as parties to these proceedings. The agreement has in it a clause that the said agreement is, binding each of them and their executors, administrators, successors, etc. In an application

to strike out the pleading on the ground that it discloses no reasonable cause of action the court may strike the claim if it is filed by the defendant, or enter judgment in favour of the plaintiff if it is filed by the plaintiff or the court may order amendment of the pleading if it is capable of amendment. The issue raised in question 1, in my judgment, is capable of amendment and can be amended without prejudice to the defendant in any case.

[21] The agreement between the parties was made in January 1995 and the parties were acting according to that agreement until the defendant breached by systematically refraining or refusing to allocate any contract (hire) to the plaintiff in about 2009. The issue raised in question 2 that, whether a contract could be made for indefinite period, in my judgment, is a question of law that must be decided at trial and that cannot be determined summarily.

[22] As to the issue in question 3, that whether a valid contract possible without consideration. Valid contract may be made without consideration if the parties so desire. What is important in interpreting a contract is the intention of the parties. The court will always give validity to the intention of the parties to a lawful contract. The issue in question 3 is question of law and fact that, in my judgment, must be decided at trial after hearing evidence that would be adduced by both parties.

Uncertainty issue

[23] I now turn to the question 4, the issue whether the agreement is null and void on account of uncertainty. An agreement could be in writing, oral or by conduct or in combination of these. The terms of an agreement may be inferred from a written or oral agreement or by conduct of the parties. Parties to a written agreement might have orally or by conduct agreed to certain terms that are not included in the written agreement. The court will try to uphold contracts. Although the courts have in the past sometimes taken a strict

approach to the problem of uncertainty, the modern approach is, as pointed out above, to uphold contract despite lack of clarity, see **Cheshire and Fifoot's Law of Contract** (sixth Australian Edition) para [162] at page 99. The defendant never disputed the existence of an agreement as alleged by the plaintiff. According to the agreement, the plaintiff shall be entitled to exclusively operate their taxi and hire car business from the Resort. To determine whether this agreement is a nullity for lack of clarity evidence from both parties will be required and that must be determined at trial.

Illegality issue

[24] I next come to the issue in question 5. Any dealing affecting a protected land must be done with the consent of the Director of Lands in view of s.13 of the State Lands Act. The defendant has entered into this agreement as a proprietor of the protected leasehold property. Is operation of taxi and car business by the plaintiff from the defendant's business location a dealing affecting land? Here the defendant is not transferring or renting out the property. I would provisionally say the plaintiff's business operation for the defendant's premises is not a dealing affecting land as contemplated under s.13 of the State Lands Act.

Unstamped Agreement

[25] Mr Patel submitted that the agreement produced by the plaintiff is unstamped therefore it is not admissible as evidence in view of s. 41 of the Stamp Duties Act. Again it appears to be a technical issue. It can be cured prior to hearing and the plaintiff seeks to tender a stamped copy at the hearing.

Abuse of Process

[26] I will now embark into the issue of abuse of process. The defendant also applies to strike out the originating summons on the ground of abuse of process.

[27] An abuse of the process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexatious or oppression or for inferior purposes, or, more simply, where the process is misused, see **Sheetal Investment Ltd v Australia and New Zealand Banking Group Ltd** [2011] FJHC; HBC 227.2010 (13 May 2011) & **Janov v Morris** [1981] 3 All ER 780.

[28] In the present case the plaintiff has filed an originating summons verified by an affidavit. He claims remedies for breach of a written agreement, which never denied by the defendant. The plaintiff has pleaded the facts that are necessary for his claim. The plaintiff has brought this action with good faith and there is thing before the court to show that the plaintiff has abused the process of the court. In the circumstance it would be incorrect to dismiss the originating summons filed by the plaintiff on the ground of abuse of process.

Scandalous, Frivolous and vexation

[29] Frivolous and vexation is said to mean cases which are obviously frivolous or obviously unsustainable. The court will strike out a pleading on this ground if the claim, if known in law, is factually weak, worthless or futile. The white Book Volume 1 1987 Edition states as follows:

“Allegations of dishonesty and outrageous conduct, etc., are not scandalous, it relevant to issue (Everett v Prythergch (1841) 12 Sim. 363; Rubery v Grant (1872) L.R 13 Eq. 443). ‘The mere fact that these paragraphs state a scandalous fact does not make them scandalous’ (per Brett L.J. in Millington v Loring (1881) 6 Q.B.D 190, p. 196). But degrading charges be made which irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (Blake v Albion Assurance Society (1876) 45 L.J. CP 663)”

[30] The above paragraph was adopted and cited by the High Court in **Ronald Sanjay Kumar v Power Plants and Equipment Limited** (Civil Action No.69 of 2009).

[31] The plaintiff has only pleaded material facts that are relevant to his claim. He has based his claim on an agreement entered into with the plaintiff and signing of that agreement was not denied by defendant. The originating summons does not plead any dishonesty, bad faith, misconduct or outrageous conduct on the part of the defendant. Therefore it cannot be said that pleading of the plaintiff-originating summons is scandalous, frivolous or vexatious. The allegation that the plaintiff's claim is scandalous, frivolous or vexatious is doomed to fail.

Striking out & inherent jurisdiction

[32] The court has an inherent jurisdiction to strike out pleadings and other documents which are shown to be frivolous, vexatious or scandalous. This is in addition to its power under the High Court Rules. So under its inherent jurisdiction the court may strike out the whole or part of the indorsement or stay or dismiss the action which is frivolous or vexatious or an abuse of process. This is a discretionary power which will be exercised with great circumspection and only where it is perfectly clear that the plea cannot succeed.

[33] In this case the defendant has failed to show that the plaintiff's pleading to be frivolous, vexatious or scandalous. Therefore the originating summons filed by the plaintiff cannot be strike out even exercising the court's inherent jurisdiction.

Conclusion

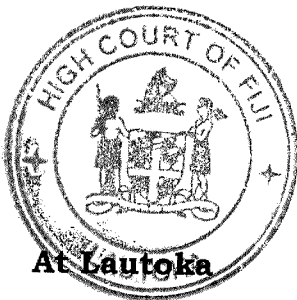
[34] To conclude, the originating summons filed by the plaintiff discloses a reasonable cause of action which has some chance of success. Moreover, the defendant has not shown the originating summons to be frivolous, vexatious or scandalous. The allegation of an abuse of process will be bound to fail, as I have determined that the originating discloses a reasonable cause of action. Further there are serious issue to be determined at trial. I therefore decline to strike out the originating summons filed by the plaintiff and I will order the

defendant to pay the cost of \$400.00, which is summarily assessed, to the plaintiff within 21 days.

[35] These are my written reasons for dismissing the defendant's summons to strike out the action with the cost of \$400.00 on 12 June 2013.

Final Orders

1. The defendant's striking out application filed on 16 October 2013 is dismissed and struck out with summarily assessed cost of \$400.00 payable by the defendant to the plaintiff in 21 days.
2. Order accordingly.



At Lautoka

19/06/14

M H Mohamed Ajmeer

M H Mohamed Ajmeer

Master of the High Court

Solicitors:

Messrs Patel & Sharma, Barristers & Solicitors for the plaintiff

Messrs S B Patel & Company, Solicitors for the defendant.