

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

**Civil Action No. HBC 48 of
2010**

BETWEEN : **THE FANTASY COMPANY OF FIJI** a limited liability company having its registered office at Lot 16 SO 3958, Fantasy Road, Fantasy subdivision Wailoaloa, Nadi.

PLAINTIFF

AND : **MASATOSHI KAYANO** of Lot 22 & 23, Kayano Road Fantasy Subdivision, Wailoaloa Nadi, Shareholder and Director.

SECOND PLAINTIFF

AND : **JAI PRASAD** of Votualevu, Nadi, Shareholder and retired School Teacher.

DEFENDANT

R U L I N G

INTRODUCTION

1. Before me is a Summons to Strike Out the Statement of Claim on the ground that it discloses no reasonable cause of action and further that the claim is scandalous and vexatious.
2. In a nutshell, the facts as pleaded are that, on 07 February 2001, the defendant, who was then secretary of the plaintiff company, and some other persons, who, together with the defendant, were minority shareholders in the 1st plaintiff company, broke into the registered office of the said company and took away all chattels, documents and company records. It is alleged that the actions of the defendant and his cohort on the occasion were unlawful and illegal and were executed on the pretext that they held majority shares in the company.
3. The above events led to the filing of an Originating Summons by one Abbas Ali (who was then a shareholder of the company) to determine the shareholding and the control of the company (HBC 006 of 2001L). Mr. Justice Gates (as the Honourable Chief Justice then was) handed down a judgement on these issues on 22 March 2004. The effect of the judgement clarified a lot of issues concerning the shareholding and control of the plaintiff company. Gates J also made some observations concerning the defendant's conduct which appear to be consistent with the above (as at paras [28], [34], [39] of the judgement).
4. The causes of action pleaded against the defendant are premised on the allegation that his actions were in breach of his fiduciary duty to the company. I observe that

the facts as pleaded are consistent with the observations of the Court in HBC 006 of 2001L.

5. Against that background, the plaintiff seeks the following relief:

- (i) Declaration Order that the defendant conducted himself fraudulently, deceitfully and committed a breach of his fiduciary duty.
- (ii) Declaration Order that the defendant committed perjury or an offence akin to perjury
- (iii) General damages for loss and suffering suffered by the Plaintiff's due to the defendant's conduct.
- (iv) Order/sentence against defendant for the offence of perjury or akin to perjury.
- (v) General damages for loss of income and revenue for 2 years suffered by the 1st Plaintiff.
- (vi) General damages for mental agony, distress and suffering suffered by the 2nd Plaintiff.
- (vii) Any further or other order this Honourable Court may deem just.
- (viii) Costs of this action in favour of both the Plaintiffs on solicitor client/indemnity basis.

NO REASONABLE CAUSE OF ACTION

6. 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 on this ground.
7. The courts will not strike out a claim on this ground if the pleaded facts, assuming they are proved, do raise a legal question of importance, or if they raise a triable issue of fact on which the rights of the parties depend.
8. His Lordship Mr. Justice Kirby in **Len Lindon -v- The Commonwealth of Australia (No. 2) S. 96/005** summarised the applicable principles as follows:-

1. 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.

2. 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 actionor is advancing a claim that is clearly frivolous or vexatious...

3. an opinion of the Court that a case appears weak and such that it 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 argument and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.

4. 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 so in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.

5. 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 pleadingA question has arisen as to whether O 26 r 18 applies to part only of a pleading

6. 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.

SCANDALOUS, FRIVOLOUS & VEXATIOUS

9. The Courts will strike out a pleading on this ground if the claim, even if known in law, is factually weak, worthless or futile. The White Book Volume 1 1987 edition at para 18/19/14 states as follows:

Allegations of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the 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 if degrading charges be made which are 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.C.P. 663).

The sole question is whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief prayed (per Selbourne L.C. in *Christie v Christie* (1873) L.R. 8 Ch. App 499, p. 503; and see *Cahsin v Craddock* (1877) 3 Ch. D. 376; *Whitney v Moignard* (1890) 24 Q.B.D 630). In *Brooking v Maudslay* (1886) 55 L.T 343, plaintiff made allegations in statement of claim of dishonest conduct against defendant, but he stated in his reply that he sought no relief on that ground. The allegations thus became immaterial, and were struck out as scandalous and embarrassing. So in an action on marine policies, a paragraph which purported to state what took place at an official inquiry held by the Wreck Commissioners was struck out as an attempt to discredit the plaintiffs and to prejudice the fair trial of the action (*Smith v The British Insurance Co.* [1883] W.N. 232; *Lumb v Beaumont* (1884) 49 L.T. 772).....

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If any unnecessary matter in a pleading contains an imputation on the opponent, or makes any charge of misconduct or bad faith against him or anyone else, it will be struck out, for it then becomes scandalous (*Lumb v Beaumont* (1884) 49 L.T. 772; *Brooking v Maudslay* (1886) 55 L.T. 343. In *Murray v Epsom Local Board* [1897] 1Ch. 35, an imputation that one member of the Board was opposing the plaintiff's claim, not on public grounds, but for his own private interest, was struck out.

When considering whether a particular passage in a pleading is embarrassing regard must be had to the form of the action. Thus, averments in aggravation of damages may be, and often are, made in actions for tort, but cannot (it is submitted) be properly made in actions for breach of contract except in three cases mentioned by Lord Atkinson in *Addis v Gramophone Co. Ltd* [1909] A.C. 488, p. 495.

10. In **Bullen, Leake and Jacobs: Pleadings and Precedents 12th edn at p145**, it is there stated that a pleading or an action is frivolous when it is without substance, is groundless, fanciful, wasting the Court's time, or not capable of

reasoned argument. A pleading is vexatious when it is lacking in bona fides, is hopeless, without foundation, and/or cannot possibly succeed or is oppressive.

CONCLUSION

11. I am of the view that there is a reasonable cause of action disclosed in the facts as pleaded. Also, in my view, it can hardly be said that the claim is factually weak, worthless or futile so as to make it scandalous, frivolous and vexatious.
12. However, the declarations that the plaintiff seeks (see paragraph 5 (i) and (ii) above) and the Order/sentence sought for the alleged offence of perjury (see paragraph 5 (iv)) do appear to be somewhat ill-advised. There are potential issues of res judicata/estoppel involved in as far as the declarations sought are concerned. And the question of perjury might be inappropriate for this court to make a ruling upon. These however, can be a matter of submissions after trial. However, the prayer for compensation for damages allegedly suffered by the company as a result of the defendant's conduct is a genuine one.
13. Accordingly, I dismiss the application to strike out. Costs in the Cause. The case is adjourned to 05 March 2014 at 8.30 a.m. before Master Ajmeer.

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Anare Tuilevuka
JUDGE
19 February 2014