

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

**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 204 OF 2012**

**BETWEEN** : **VICTORY TOURS LIMITED** a limited liability company  
having its registered office at Crown Investment Building,  
Queens Road, Nadi

**1<sup>st</sup> Plaintiff**

: **MAHABUB MASHUK ALI** of Sigatoka, Businessman

**2<sup>nd</sup> Plaintiff**

**AND** : **MERCHANT FINANCE INVESTMENT COMPANY LIMITED** a limited liability company of registered office is  
at Level 1 91 Gordon Street, Suva.

**Defendant**

**Counsel:**

Mr Anand Sigh for plaintiffs

Mr J Sharma for defendants

**Date of Hearing** : 4 November 2014

**Date of Ruling** : 19 November 2014

## **R U L I N G**

### **INTRODUCTION**

[1] This ruling relates to a summons filed by defendant, **Merchant Finance & Investment Company Limited (MFICL)**.

[2] By the summons to strike out the writ of summons and statement of claim and for security for costs dated 8 November 2013 (the application) the defendant seeks the following orders:

1. *That the Plaintiff's Writ of Summons and Statement of Claim filed herein be struck out and dismissed;*

**ON THE GROUNDS THAT:**

- a) *it discloses no reasonable cause of action against the defendant;*
- b) *it is vexatious and an abuse of the process of the Court;*
- c) *the facts and matters relied on occurred more than six (6) years before the issue of this Writ of Summons and the claim (if any, which is denied) is barred by the Limitation Act, CAP 35.*
- d) *is an abuse of process*

**IN THE ALTERNATIVE**

- 2. *The 1<sup>st</sup> Plaintiff being a limited liability Company which has been wound up, do give such security for costs as this Honourable Court may deem fit within 7 days from the date of an Order being made;*
- 3. *That this action be struck out or stayed until the Plaintiff gives the required security as per paragraph 2 hereinabove;*
- 4. *The Plaintiffs pay the costs of this Application.*

[3] This application is made under O.18, r. 18 of the High Court Rules, 1988, other provisions of the High Court Rules 1988 (HCR), the Companies Act and the inherent jurisdiction of the court.

[4] The application is supported by an affidavit of Leonore Naivaluwaqa, Manager of the defendant.

[5] The plaintiffs filed two affidavits, one is affidavit in response filed on 11 December 2013 and another supplementary affidavit filed on 26 June 2012.

[6] At hearing, both parties made oral submissions and also tendered their respective written submissions.

## **BACKGROUND**

- [7] The 1st plaintiff was a limited liability company which has now been wound up by the Official Receiver. The 2nd Plaintiff was a Director and contributory of the 1st plaintiff. The 1st plaintiff owned a Motor Vehicle registration number DI 591. The 1st plaintiff obtained a loan from the Defendant on 1 August, 2000 and gave a Bill of Sale dated 30th August, 2000 over the Motor Vehicle DI 591 as a security for the said loan. Due to the 1st plaintiff breach of its loan repayment obligation the defendant issued a Custody Notice to the 1st Plaintiff on the 28th January, 2003 and repossessed the motor vehicle. Upon the 1st plaintiff's failure to fulfil its obligations under the Loan Contract and the Bill of Sale and upon its failure to rectify its default the defendant sold the motor vehicle via Public Auction on the 26th March 2003.
- [8] A winding-up order was made for the 1st plaintiff by the Suva High Court on the 20 June 2002. The 2nd plaintiff's former solicitors wrote to the Official Receiver a letter dated 30th November 2007 for permission to initiate the current proceedings. The Official Receiver gave permission to the 2nd plaintiff's former solicitors by letter dated 16th September 2008 to initiate the current proceedings. The plaintiffs filed a Writ of Summons with Statement of Claim on the 21st of September 2012. The matter is now at discovery and pre-trial conference (PTC) stage.

## **THE LAW**

- [9] The relevant law involved in these proceedings is O.18, r.18 (1) of HCR. That rule provides that:

'Striking out pleadings and indorsement (O. 18, rule 18)

18.-(1) **The court** 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.*

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

### **DEFENDANT'S CONTENTION**

[10] On behalf of the defendant, Mr J Sharma contended that based on the material before the court, the 2<sup>nd</sup> defendant does not have any cause of action against the defendant. Any action that the 1<sup>st</sup> plaintiff, or even the 2<sup>nd</sup> plaintiff, may have had against the defendant is now statute barred. In the circumstances, he submitted, the action against the defendant ought to be struck out with cost summarily assessed at \$8,000.00 being the costs incurred by the defendant to date.

### **PLAINTIFF'S CONTENTION**

[11] On the other hand, Mr Anand Singh, counsel for the plaintiff argued that, the defendant's application has no merit. The plaintiff's claim is sustainable and the order sought by the defendant does not fulfil the requirements to dismiss an action on the basis that no reasonable cause of action. The ground alleging that the statement of claim is vexatious and abuse of power of the court lacks merit. The allegation of fraudulent misrepresentation has been properly pleaded in the statement of claim. The defendant has now belatedly made an application for security for costs. The 2<sup>nd</sup> defendant has given sufficient financial background as to his means and as to his assets and liabilities.

## **DETERMINATION**

[12] The defendant wants to strike out the action. The defendant relies on O.18, r.18 (1) of HCR. Rule 18 empowers the court to summarily strike out any pleading on the grounds stated therein, grounds (a), (b), (c) & (d), see para 9 above. The defendant has invoked all the grounds stated in r.18 except ground (c) that it may prejudice, embarrass or delay the fair trial of the action. I will deal with all the grounds raised by the defendant in turn.

### **No Reasonable Cause of Action (O.18, r.18 (1) (a))**

[13] Firstly, I will deal with the first and main ground raised by the defendant that the writ of summons and statement of claim discloses no reasonable cause of action against the defendant (r.18 (1) (a) ground). No evidence is admissible on an application under paragraph (1) (a); see O.18, r.18 (2). For this purpose, I will consider the statement of claim itself and assume that the allegations pleaded in it are true and undisputed.

[14] The Court of Appeal in **National MBF Finance (Fiji) Limited v Buli** [2000] FJCA 28; ABU0057U.98S (6 July 2000) succinctly summarized the principles as follows:

*'The law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations 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. In this case the Judge's task was made more difficult because a considerable amount of factual material was placed before him. We wish to point out that this is inappropriate and undesirable. The Judge's task*

*was also made more difficult by the wording of both statements of claim and defence which do not raise the questions at issue with clarity.'*

- [15] Mr Sharma's main argument is that based on the material before the court, the 2<sup>nd</sup> defendant does not have any cause of action against the defendant. According to Mr Singh, the statement of claim discloses sufficient allegations of fraud. The fraudulent misrepresentation constituting the fraud was the representation that the vehicle was sold whereas in fact it was not. The plaintiffs have succinctly pleaded what their complaint is and how the statement made by the defendant was false.
- [16] The statement of claim filed on 21 September 2012 states that, the 1<sup>st</sup> plaintiff, Victory Tours Limited (VTL) is wound up and has authority of the Official Receiver to institute these proceedings. The 2<sup>nd</sup> plaintiff was the director and a contributory of VTL. VTL was the registered owner of the motor vehicle registration number DI 591. On 30 August 2000 the 2<sup>nd</sup> defendant had advanced to VTL and taken the vehicle as security for the loan advanced. VTL then executed a Hire Purchase Agreement (HPA) in favour of the defendant over the vehicle in the sum of \$76,307.28. In January 2003 the defendant repossessed the vehicle on the ground that there were defaults in instalment payment of HPA. The defendant issued arrears notice on 23 January 2003 advising the plaintiff was in arrears of payment of \$23,651.22. The 2<sup>nd</sup> plaintiff thereafter obtained loan from Colonial National Bank of Fiji to purchase the said vehicle in the sum of \$24,540.00 from the defendant on 26 March 2003. The plaintiff informed the defendant and its employees of the approval of the loan. Despite having the information and knowledge that the 2<sup>nd</sup> plaintiff had obtained a loan for the purchase of the said vehicle, the defendant fraudulent misrepresentation informed the 1<sup>st</sup> plaintiff and the Colonial National Bank of Fiji that the vehicle had been disposed of knowing the same to be untrue, see paras 1-10 of the statement of claim.

[17] When considering the facts and allegations stated in the statement of claim alone and assuming that those facts and allegations are true and undisputed, the statement of claim, in my judgment, discloses reasonable cause of action against the defendant and the plaintiff have a claim for damage against the defendant.

### **Limitation Act**

[18] I now turn to the argument that the cause of action, if any, against the defendant is time barred.

[19] The defendant also makes application to strike out the claim on the ground that the claim is time barred. The defendant says the facts and matters relied on occurred more than 6 years before the issue of the writ of summons and the claim, if any, is time barred by the Limitation Act, Cap 35. The defendant's contention was that, the writ was filed on 21 September 2012. The 1<sup>st</sup> plaintiff obtained loan from the defendant on 30 August 2000 and gave Bill of Sale. The defendant issued Custody Notice to the 1<sup>st</sup> plaintiff on 28 January 2003. The writ was therefore issued about 8 years and 5 months from the date of the Bill of Sale. The defendant accordingly submitted that when the 2<sup>nd</sup> plaintiff received the Official Receivers permission dated 16 September 2008 to initiate the proceedings, six years from the date of the sale of the vehicle had not expired. The plaintiff had taken 4 years from the date of grant of permission to issue the proceedings.

[20] In contrast, Mr Singh contended that the cause of action has arisen as a result of the fraudulent conduct of the defendant or its servants or agents. The period of limitation in terms of section 15 of the Act runs from 16<sup>th</sup> September, 2008, the date of the Receiver's consent.

[21] It appears that the plaintiff's claim is founded on simple contract. If so, section 4 (1) (a) of the Limitation Act would apply. In term of section 4 (1) (a) actions founded on simple contract or on tort shall not

be brought after the expiration of six years from the date on which the cause of action accrued. However, section 15 provides for postponement of limitation period in case of fraud or mistake. That section, so far as material, provides:

**'Where**, in the case of any action for which a period of limitation is prescribed by this Act, either-

- (a) **the action is based upon the fraud of the defendant** or his agent or his servant or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person; or
- (c) the action is for relief from the consequences of a mistake,

**the period of limitation shall not begin to run until the plaintiff has discovered the fraud** or the mistake, as the case may be, or could with reasonable diligence have discovered it:' (Emphasis provided).

[22] It is true that the plaintiffs in their statement of claim have pleaded the fraud of the defendant or its employees or agents. The allegation of fraudulent misrepresentation has been properly pleaded in the statement of claim with sufficient particulars. I am unable to accept the argument that there is insufficient allegation of fraud in the statement of claim.

[23] Since the plaintiffs have pleaded the fraud of the defendant, the period of limitation, pursuant to section 15 of the Limitation Act, will not begin to run until the plaintiff discovered the fraud. Therefore the question arises when the plaintiff discovered the fraud of the defendant. The statement of claim does not give the time when the plaintiff discovered the fraud of the defendant. When the plaintiff discovered the fraud of the defendant is a question of fact. Evidence will be required to decide that question. It cannot be determined at this stage without evidence on that issue.

[24] In **Addis v Crocker** [1961]1 QB 11, [1960]2 All ER 629, it was thought:



*'That it was possible to distil from the pleadings clearly defined issues of law which it would have been appropriate to determine as preliminary questions and which can be answered in a way which disposes the action. It is also open to the court, when dealing with an application to strike out a pleading, for example on the ground that it discloses no reasonable cause of action, to order the question to be tried as a preliminary issue.'*

- [25] In the statement of defence, the defendant has raised the issue of limitation. Para 1 of the statement of defence states that, the plaintiff's claim is barred by the Limitation Act and his rights and title (if any) have been extinguished by virtue of the said Act. In the present application the defendant seeks to strike out the claim on the ground that it is statute barred. The application to strike out has been made at pre-trial conference stage. The defendant has every right to apply to court at the trial to try the issue of limitation as a preliminary issue. It would be more prudent to take up the question of limitation as a preliminary issue rather than making an application to strike out the claim on that ground.

### **SECURITY FOR COSTS**

- [26] I would now return to the issue of security for costs. The defendant alternatively applies for security for costs on the ground that 1<sup>st</sup> plaintiff being a limited liability Company which has been wound up, do give such security for costs.
- [27] In certain circumstances, the court may order the plaintiff to give such security for the defendant's costs of the action. The court is empowered to do so under O.23 of HCR, which provides:

*'1.-(1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court-*

- (a) that the plaintiff is ordinarily resident out of the jurisdiction, or*
- (b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other*

*person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or*

*(c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or*

*(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,*

*then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.*

*(2) The court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.'*

- [28] The Official Receiver has granted consent to the 2<sup>nd</sup> plaintiff to take legal proceeding in the name of the Company (in Liquidation) on the following conditions: (a) that legal cost will be on his own account and not the Provisional Liquidator, (b) that any cost award in favour of the Company by the court be for the liquidators benefit to satisfy all the creditors together with their fees and costs and that the Provisional Liquidator is indemnified from all risks of the action.
- [29] On behalf of the defendant, it was submitted that, in the event the court is of the view that the plaintiffs have a cause of action against the defendant which can be maintained, the defendant is entitled to security for costs in the sum of \$20,000.00.
- [30] The 2<sup>nd</sup> defendant is Fiji Citizen and permanent resident in Fiji. He is a businessperson and he has given his residential address. He is suing as the former director and contributory of the 1<sup>st</sup> plaintiff. If cost is ordered by the court, he has to pay it because he was granted permission to initiate proceeding on behalf of the 1<sup>st</sup> plaintiff, a wound up Company on that condition. In my view, the 2<sup>nd</sup> plaintiff is not a nominal plaintiff. He may be considered a plaintiff who is suing in a representative capacity. In those circumstances, order for security for cost against the 2<sup>nd</sup> plaintiff would be inappropriate.

## **CONCLUSION**

[31] I would, for the reasons set out above, conclude that the statement of claim discloses a reasonable cause of action against the defendant. The defendant may raise the question of limitation as a preliminary issue at the trial proper. I would dismiss the defendant's alternative application seeking order for security for cost against the 2<sup>nd</sup> plaintiff. I accordingly dismiss and struck out the defendant's summons filed on 8 November 2013 to strike out the writ of summons and statement of claim and for security for cost with summarily assessed cost of \$350.00 which is payable by the defendant to the 2<sup>nd</sup> plaintiff in 28 days.

## **FINAL RESULT**

[32] The final result is that the defendant's summons to strike out the writ of summons and statement of claim or to order for security for costs filed on 8 November 2013 is dismissed and struck out with summarily assessed cost of \$350.00 payable by the defendant to the 2<sup>nd</sup> plaintiff in 28 days.



At Lautoka

17/11/14

For plaintiff: Messrs Singh & Singh Lawyers, Barristers & Solicitors

For defendant: Messrs Janend Sharma Lawyers, Barristers & Solicitors

*M H Mohamed Ajmeer*  
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**M H Mohamed Ajmeer**  
**PUISNE JUDGE**  
**(as Master of the High Court)**