

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 169 OF 2017

BETWEEN : **MEDIA METRO LIMITED** a limited liability company having its registered office at HLB Crosbie & Associates, Chartered Accountants, 1st Floor, Harilal Mulji Building, 161 Main Street, Nadi, Fiji.

PLAINTIFF

AND : **KING'S NEON SIGN LIMITED** a limited liability company having its registered office at 17 Beddoes Circle, Namaka, Nadi, Fiji.

DEFENDANT

Appearances : Mr S.F. Koya with Ms R. Chand for the plaintiff
Ms Vreetika with Ms A.B. Swamy for the defendant

Date of Hearing : 17 May 2019

Date of Ruling : 07 August 2019

R U L I N G

[on preliminary issue]

Introduction

- [01] This ruling is concerned with a preliminary issue.
- [02] The preliminary issue was raised before Mackie J who could not hear and determine the matter before he left the bench. The matter therefore listed before me for the purpose of disposal of the preliminary issue.
- [03] By its notice of motion filed 8 November 2018, the defendant seeks an order striking out the plaintiff's claim on indemnity costs on the following grounds (*'the application'*):

- a. *The facts and issues of the claim has been already dealt in the matter of Media Metro Limited, Winding Up No.33 of 2015 where the parties are the same.*
- b. *That the Master of the High Court has already delivered its decision on the monies claim in this claim.*
- c. *The plaintiff was given opportunity to defend its case and it failed to do the same in the matter of Media Metro Limited, Winding Up No. 33 of 2015.*
- d. *That the claim has been decided and concluded by the Master of the High Court.*
- e. *That the claim filed by the Plaintiff is caught by the principles of Res Judicata.*

[04] The application is filed under Order 33, R 7 and Order 18, R 18 (1a) of the High Court Rules 1988, as amended ('HCR') and under the inherent jurisdiction of the Court.

[05] At the hearing, both parties made oral submissions, and in addition they have also filed their respective written submissions.

Background

[06] The brief background facts are as follows:

- 6.1 In February 2015, King's Neon Sign Ltd, the defendant presented a Winding Up notice against Media Metro Ltd, the plaintiff for the recovery of \$51,285.02 as debt due and owing.
- 6.2 The plaintiff did not file a response to the Winding-Up application within the time allowed. As result, it made an application seeking leave to file an affidavit in opposition. That application was rejected as the affidavit in support was sworn by a law clerk. This had resulted in the plaintiff making payment of \$51,285.02, the amount claimed to be due and owing, by the plaintiff. The payment, according to the plaintiff, was made to demonstrate that it (*the plaintiff*) is a solvent company.

6.3 The plaintiff has now filed a writ action against the defendant to recover the money paid (\$51,285.02) under the winding up proceedings with damages upon the cause of action that there is unjust enrichment on the part of the defendant to obtain a winding up order against the plaintiff and to claim the sum of \$51,285.02, which was at all times a disputed amount and had been deposited into Court.

6.4 The defendant has raised a preliminary issue of res judicata and thereby seeks to strike the claim out.

The legal framework

[07] The HCR, O 33, R 7, deals with dismissal of action after the decision of a preliminary issue. Rule 7 provides:

Dismissal of action etc after decision of preliminary issue (O 33, R 7)

7 If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

[08] In terms of O 18, R 18 (1a), 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 it discloses no reasonable cause of action or defence as the case may be.

The principles of res judicata

[09] The estoppel by *res judicata* takes three distinct forms.

[10] First, a narrow form of estoppel, known as estoppel by *res judicata* (a thing or matter which has been decided), which is the rule that the issues which were actually adjudicated upon by the Court have been finally resolved between the parties to the claim.

- [11] Secondly, wider form of estoppel, known as cause-of-action estoppel, which is founded on the rule in *Henderson v Henderson* (1843) 3 Hare 100. This rule is based on the public policy of encouraging finality in litigation and (subject to exceptional circumstances) prevents any party to a claim in which judgment has been given from raising in other proceedings any issue which could have been resolved in the adjudicated claim.
- [12] The third is the doctrine of issue estoppel. It is that if, after judgment is delivered in civil proceedings, two of the parties to these proceedings, or their successors in title are parties to further proceedings, then one of those parties cannot repeat, as against the other, in the second proceedings, an assertion which was found to be incorrect by the Court in the first proceedings (*Mills v Cooper* [1967] 2 QB 459 per Diplock LJ at pp.468 – 9).
- [13] The elements of *res judicata* as stated in *R (on the application of Coke – Walls) v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1 at [34], [2011] 2, AC 146 appear below:

‘In para 1.02 Spencer Bower and Handley makes it clear that there are a number of constituent elements in a case based on cause of action estoppel. They are that: “(i) the decision, whether domestic or foreign, was judicial in the relevant sense; (ii) it was in fact pronounced; (iii) the tribunal had jurisdiction over the parties and the subject matter; (iv) the decision was –(a) final; (b) on the merits; (v) it determined a question raised in the later litigation; and (vi) the parties are the same of their privies, or the earlier decision was in rem.” ‘

Discussion

- [14] The defendant has applied to this court for the dismissal of the plaintiff’s claim on the ground of *res judicata*.
- [15] The court may dismiss an action if it appears to the court that decision of any question or issue arising in a case substantially disposes of the case or renders the trial of the case unnecessary (see: O 33, R 7).

- [16] The only argument advanced at the hearing by the defendant was that the claim of the plaintiff should be dismissed as it is caught by the principles of *res judicata*. The defendant did not press its application under R 18 (1a) that the statement of claim discloses no reasonable cause of action. I would therefore consider whether the *res judicata* principles apply to the plaintiff's claim.
- [17] On behalf of the plaintiff Mr Singh contended that the Winding-Up decision was a final decision for which the plaintiff had later made an application for permanent stay of the winding-up order. The defendant had consented for permanent stay of winding up order upon payment of the sum by the plaintiff. He further contended that the winding-up order was made by the court on the merits of the case by the defendant. The plaintiff had failed to make payments to the defendant for the work done and no grounds were established to show why payments ought not to be paid.
- [18] In contrast, Ms Chand, counsel for the plaintiff, argued that: the winding-up action was not determined on questions of law and neither by findings of fact. There were no notes on evidence adduced by either party from where a judgment could have been delivered. Further, there is no actual merger and neither the plaintiff's claim actually decided on at any stage by the court. The plaintiff could not have claimed damages for the defective works carried out by the defendant in a winding-up proceeding. As a matter of fact, in a winding-up proceeding, a respondent cannot file a counterclaim against the petitioner but merely defend the proceedings to stop a winding-up order being made.
- [19] Apparently, the winding order in the first action was not decided on merits. It is because the plaintiff's application to file a response in the winding-up proceedings out of time was dismissed since the affidavit in support was sworn by a law clerk.
- [20] I will call the winding-up proceedings brought by the defendant against the plaintiff as 'the first action'.

- [21] In these proceedings, the current action/the second action, the plaintiff seeks judgment against the defendant in the sum of \$51, 285.02, the sum they paid as a result of the winding-up proceedings. The current claim is based on unjust enrichment and breach of agreement. The money paid under the winding up proceedings is claimed as general damages for breach of agreement dated 16 July 2012.
- [22] The plaintiff says that it was compelled to pay the money under the winding-up proceedings to demonstrate that it is a solvent company in order to avoid a winding-up order.
- [23] The defendant's preliminary issue appears to be a cause-of-action estoppel *res judicata*. It is based on *Henderson (above)* rule which prevents any party to a claim in which judgment has been given from raising in other proceedings any issue which could have been resolved in the adjudicated claim.
- [24] The cause-of-action which the plaintiff has raised in the current proceeding should not have been raised in the first action as it was a winding-up proceeding. The focus in the winding-up proceeding was on whether the company should be wound up on the ground that it is unable to pay its debts. It is doubtful whether a counterclaim for breach of agreement can be brought in a winding-up proceeding. I agree with the plaintiff that in a winding-up proceeding a respondent cannot file a counterclaim against the petitioner but merely defend the proceedings to stop a winding-up order being made.
- [25] The current issue/cause-of-action that the defendant had breached the agreement should not have raised and resolved in the first action (winding-up proceedings). Therefore, *Henderson* rule, in my view, does not apply to the current claim.
- [26] The only element of *res judicata* that was put in dispute was that the winding-up order was not based on the merits.

[27] In *R (on the application of Coke – Walls) v Institute of Chartered Accountants in England and Wales*, above the court said, as one of the elements of *res judicata*, that the decision was final and made on merits.

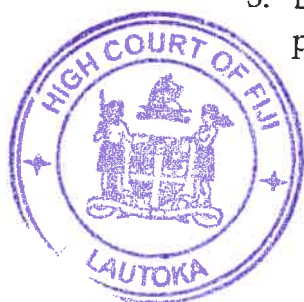
[28] The winding-up order was not made on the merits. It was made without any opposition. The plaintiff's application for leave to file affidavit in opposition was struck out as the supporting affidavit was sworn by the law clerk. Further, the question raised in the current proceeding was not determined in the adjudicated winding-up proceeding. Therefore, *res judicata* principles do not apply to the current claim.

Conclusion

[39] For the reasons I have set out above, I conclude that the current claim of the plaintiff has not been caught by the principles of *res judicata*. I would accordingly overrule the preliminary issue raised by the defendant with summarily assessed costs of \$600.00, payable to the plaintiff by the defendant within 21 days. The matter will now proceed to trial.

The outcome

1. Preliminary point overruled.
2. Matter will proceed to trial.
3. Defendant will pay the summarily assessed costs of \$600.00 to the plaintiff within 21 days.



At Lautoka
7 August 2019

M.H. Mohamed Ajmeer
2/8/19
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M.H. Mohamed Ajmeer
JUDGE

Solicitors:

Siddiq Koya Lawyers, Barristers & Solicitors for the plaintiff
Patel & Sharma, Barristers & Solicitors for the defendant