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

CIVIL ACTION No. HBC 124/2003

BETWEEN **MOHAMMED NASIR KHAN & MOHAMMED NAZIM KHAN** both sons of Mohamed Yakub Khan formerly trading as MOHAMMED YAKUB KHAN & COMPANY a firm of Lautoka but now trading as MOHAMMED YAKUB KHAN & COMPANY LIMITED a limited liability company having its registered office at Lautoka.

PLAINTIFF

AND **TROPIC WOOD INDUSTRIES LIMITED** a limited liability company having its registered office at Lautoka.

DEFENDANT

APPEARANCES : Mr S Nand for the Plaintiff/Respondent
Mr Haniff for the Defendant/Applicant

DATE OF HEARING : 23 October 2020

DATE OF JUDGMENT : 24 November 2020

DECISION

1. This matter has a long history, which I outlined briefly in a ruling on 6 July 2020 ([2020] FJHC 502) as follows:

> 1. *This proceeding was commenced by the plaintiff in 2003. The last amended statement of claim dated 3 May 2007 included seven causes of action arising from a contract between the parties dated 1 July 1997 (which I understand redocuments an arrangement that has been in place since 1987, and is still in effect and being performed by the parties). Pursuant to this contract the plaintiff is responsible for carting woodchip from the defendant's sawmill at Drasa to the defendant's woodchip storage and loading facility at Lautoka Port, and for managing and maintaining the storage. For this work the plaintiff is entitled to payment at an agreed - stipulated in the contract - rate of $3.28 (including VAT) per tonne of woodchip moved by the plaintiff.*
> 2. *Of the seven causes of action that were extant in 2007, all but one have been settled, resolved or abandoned. It is not necessary here to explain how. The single remaining cause of action, the Fourth, relates to the review of the per tonne payment amount. In 2007 this issue was referred for mediation, but it seems that the parties could not resolve the matter. Nothing then happened for 10 years, until in 2017 new solicitors for the plaintiff sought to resurrect the matter, and sought a hearing date. The defendant filed, but later abandoned an application to strike out the plaintiff's claim, and the matter came before me in December 2019 for trial.*
> 3. *At trial, the plaintiff's first witness was Mr Zarin Khan, a chartered accountant who sought to prove the amount claimed. It quickly became apparent that Mr Khan was applying a formula that had not been pleaded to accounting information that had*

not been disclosed by the plaintiff to arrive at the amount he suggested was due. The defendant complained that it was taken by surprise by this evidence, and sought an adjournment, which I granted, to enable the plaintiff to provide further particulars of its claim, and further and better discovery.

4. *Because the parties were not able to agree on the details of the further particulars to be provided, or the extent of further discovery, the defendant eventually made a formal application for these. This decision relates to that application, filed in February, but heard only now because of the court's suspension, and my absence, as a result of the Covid 19 pandemic.*

2. In that ruling I ordered the plaintiffs to file and serve:

   i. *An amended statement of claim properly pleading what is currently the Fourth Cause of Action.*
   ii. *A further list of documents complying with Order 24, Rules 2 & 5 relating to the matters still in issue.*

and in doing so set out the relevant clause of the contract (clause 22):

> *TROPIK shall pay the CONTRACTOR for the satisfactory services performed as specified in this Agreement at a rate of $3.28 ... inclusive of VAT per tonne based on net weight of woodchips recorded over TROPIK's Drasa weighbridge. The rates specified above will be subject to review by the parties hereto every July and will be increased or decreased with retrospective effect from the first day of this month if the parties agree that the CONTRACTOR's costs (exclusive of depreciation), assessed on the basis of a standard formula acceptable to both parties, have changed to a significant degree over the course of the preceding year.*

and what I thought that any amended statement of claim might include:

18. *It is not the function of the court or the responsibility of the defendant to plead the plaintiffs' case for them, but at the very least I would expect to see, in addition to the assertion as to the terms of the contract,*
    - *an explanation of what the acceptable standard formula is that the plaintiff says is applicable to any review of the payment rates,*
    - *information as to how the contractor's costs have changed to a 'significant degree' over the course of the preceding year(s) (whatever that is said to be)*
    - *an assertion that the proper application of the formula results in the plaintiff being entitled to an increased payment rate under the agreement*
    - *how that formula produces the figure claimed by the plaintiffs in paragraph 27 of its claim.*

19. *In this case the formula is obviously a calculation based on financial information relating to the capital and consumable costs incurred by the plaintiffs in carrying out the carriage, storage and woodchip management services they have contracted to provide. Therefore a coherent and informative pleading must include (whether by way of primary pleading or particulars does not really matter) sufficient additional information as to how data is applied to populate the formula to arrive at the figure claimed, and how and from what that data is derived.*

3. As directed the plaintiff did file an amended statement of claim (actually they filed an amended writ of summons and statement of claim), but chose to adopt a different approach to that suggested in my ruling. The new statement of claim (which for reasons that escape me also includes, along with the Fourth Cause of Action that remains to be resolved, all of the other causes of action, even though

these have now all been disposed of in some way as set out above) seeks $809, 359.53 in place of the original claim for $252,879.13. In response the defendant has filed, by summons dated 11 August 2020, an application under O.18, r.18(1) High Court Rules to strike out the plaintiff's claim on the basis that it:

i. discloses no reasonable cause of action,
ii. is scandalous, frivolous or vexatious.
iii. may prejudice, embarrass or delay the fair trial of the action.
iv. Is otherwise an abuse of the process of the Court.

4. The defendant complains, and I agree, that the amended statement of claim is hopelessly confused and confusing. It does not spell out what it says is the standard formula which the plaintiff presumably argues is the basis for the calculation of the rate per tonne originally agreed ($3.18 including VAT, according to clause 22), nor does it say whether or how the plaintiff's costs have risen to the 'significant degree' that clause 22 requires for any review of the cartage rates. As it currently stands, the plaintiff's claim is unsustainable; it simply doesn't make sense as a statement of claim.

5. During the course of the hearing of the defendant's strike out application counsel for the plaintiff came to accept that the claim as now pleaded is defective, but sought time to file a further amended statement of claim. This was opposed by counsel for the defendant, who argued that there should be a limit to the indulgence the court allows to the plaintiff, and that the claim should be struck out.

6. Counsel pointed out that this claim was first filed in 2003 and arises from a contract entered into in 1997, but a commercial relationship between the parties that goes back to 1987. As was apparent at the first aborted trial in December 2019, this long history means that the basis for the original calculation of the cartage rates may not be known by those currently involved in the business. Nevertheless, the defendant is entitled to know the basis for the claim against it. This is particularly important where, as I understand is the case, the plaintiff is still undertaking the woodchip transportation, management and loading for the defendant. In these circumstances the claim is not simply about the recovery of amounts due had the tonnage rate increased as provided and as the plaintiffs say they should have, but is also about what should be the prevailing rate going forward, and how future annual reviews are to be conducted.

The law

7. Order 18, rule 18(1) High Court Rules states:

> ***Striking out pleadings and indorsements (O.18, r.18)***
> *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.

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

(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.

8. The legal principles to be applied on an application for striking out are well understood, and not in contest here. Only in exceptional circumstances will evidence play a part. Usually it will be assumed that the plaintiff is able to prove the facts alleged in the statement of claim, and the question is only whether that results in a sustainable cause of action. As stated by Richardson P in the decision of the New Zealand Court of Appeal in **Attorney General v Prince & Gardner** [1998] 1 NZLR 262:

> *A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed (**R Lucas & Son (Nelson Mail) Ltd v O'Brien** [1978] 2 NZLR 289 at pp 294 – 295; **Takaro Properties Ltd (in receivership) v** Rowling [1978] 2 NZLR 314 at pp 316 – 317); the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material (**Gartside v Sheffield, Young & Ellis** [1983] NZLR 37 at p 45; **Electricity Corporation Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641**); but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction (Gartside v Sheffield, Young & Ellis).*

9. In **Lindon v The Commonwealth of Australia (No.2)** [1996] HCA 14 Kirby J set out the following principles to be applied in deciding an application for striking out a claim:

> *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. That 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 action or 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 pleading. ...*
>
> *6. The guiding principle is, as stated in O.26, r.18(2), doing what is just. If it is clear that proceedings with the concept of the pleadings 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.

Kirby J in that case (a claim seeking declarations relating to the use of nuclear weapons in Australia) turned his mind to whether the claim might with amendment be sustainable, and said:

I have given thought to whether, by amendment, Mr Lindon could refine his claims to present a different pleading with declarations which would be susceptible to proper legal determination. If I thought that were a possibility, I would afford Mr Lindon the opportunity to replead. But ... no reframing of the statement of claim could save it, without completely altering its character and presenting a different case.

10. In the Fiji Court of Appeal these issues were considered in **National MBF Finance (Fiji) Ltd v Buli** [2000] FJCA 28 in a case in which the adequacy of the pleadings was an issue. The court made the following opening observations:

The respondent brought proceedings against the appellant seeking orders in respect of the seizure of a motor vehicle ... and damages in respect of that seizure. ... a statement of defence was filed and the respondent then applied to have the statement of defence struck out on the basis that (a) the statement of defence disclosed no reasonable cause of action and/or (b) the action was scandalous, frivolous or vexations and/or (c) the action was an abuse of the process of the court. On that application the statement of defence was struck out and judgment entered in favour of the respondent's claim for damages which were to be assessed. It is against that judgment that this appeal has been brought.

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.

In that case the Court of Appeal allowed the appeal, so reinstating the plaintiff's claim. In doing so the court was critical of the pleadings (as per the comment above), and considered that the statement of claim clearly required amendment, nevertheless – the court found – there was sufficient in the claim to make it apparent that the plaintiff/appellant had a grievance that should be allowed to continue.

11. In **Radrodro v Tiakia & Ors** [2005] FJHC 694 Connors J said:
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 caution 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 vexatious or obviously unsustainable – Lindley LJ 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 a recourse should be had to the summary process under this rule – Lindley MR in* ***Hubbuck v Wilkinson*** *[1899] 1 Q.B. 86.*

(d) *The purpose of the Courts jurisdiction to strike out pleading is two fold. 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. 218 at 238" –* ***James M. Ah Koy v Native Land Trust Board & Ors*** *– Civil Action No. HBC0546 of 2004.*

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

12. All of these cases refer to the reluctance that the courts must properly have to striking out proceedings summarily where there are genuine grievances to be decided, and show the preference of the courts (within reason) to allow such proceedings to continue.

Analysis

13. It is profoundly frustrating that the latest attempt at a statement of claim is, by a wide margin, more confusing and obscure than the original, and if I believed that this accurately presented the plaintiff's claim I would have no hesitation in striking out the proceedings. But while I sympathise with - and indeed share - the exasperation of the defendant with the failure of the plaintiff to properly plead its claim, and agree that there must be a limit to the number of opportunities given to the plaintiff to set out the claim in a coherent way, I am mindful of the fact that this litigation is between two parties who – as I have noted above - have a continuing commercial relationship which they have apparently maintained in spite of these ongoing proceedings. The defendant argues through its counsel that *the Claim cannot be improved or cured by amendment.* I don't agree, and have already suggested (paragraph 18 of my decision of 6 July 2020) how the claim might be properly pleaded. I note that the defendant does not argues that those thoughts were misconceived.

14. The defendant can (and will) be compensated in costs for the expense caused to it by these procedural issues, and I note that it has not provided any evidence of other prejudice to it from the very long delay in resolving the issues that arise from this aspect of the plaintiff's claim. Probably the defendant has made provision already

for the possibility that there will, in terms of paragraph 22 of the contract with the plaintiff, at some point be some adjustment in the contract rate for the plaintiff's carriage and management of the defendant's wood chip. It would be astonishing if this was not the case, taking into account how long this contract has continued.

15. This is, after all, a case where the plaintiff is seeking to give effect to a process that the parties have agreed they will follow to adjust the contract rate at which the plaintiff would be paid for its services. To strike out the plaintiff's claim at this point will not resolve the issue. As long as the contract continues, and for as long as the contract has continued, the plaintiff is entitled, if it can show that its costs have *changed to a significant degree over the course of the preceding year*, to seek annual adjustments to the contract rate in terms of clause 22 of the contract, subject only to limitation or waiver issues that the defendant might raise. Furthermore, the fact that such defences might be available to the defendant (in relations to some aspects of the claim) if a new claim were commenced today, does not mean that the lack of an ability to raise those defences in relation to the present proceedings is a prejudice to the defendant that it can rely on as a basis for its striking out application.

Conclusion

16. To apply the words of Kirby J in **Lindon** (supra), this appears to be a case where the plaintiff has *a reasonable cause of action which it has failed to put in proper form*. Notwithstanding the delays that have occurred in getting to this point, and what I said in paragraph 21 of my earlier decision about *very little further indulgence,* for the reasons discussed above I am willing to give the plaintiff one further, final, opportunity to do so, subject to paying the costs incurred by the defendant in making this application which would not have been necessary had the plaintiff properly pleaded its claim, either when it was first made, or when afforded the opportunity as per my decision of 6 July 2020. Accordingly, I make the following orders:

i. The plaintiff is, on or before the expiry of 21 days from the date of this decision, to file an amended statement of claim properly pleading its claim that clause 22 of the contract between them obliges the parties to review and amend the contractual rates originally agreed to and specifying what the plaintiffs say should be the basis upon which that review should be conducted, including the rate setting formula that the plaintiff says should apply to the review.

ii. The plaintiff is to pay the defendant's actual reasonable solicitor/client costs incurred in the making and hearing of this application, or the sum of $6,000 whichever is less. These costs are to be paid by the plaintiff to the defendant before the next mention date.

iii. The case, including the defendant's application/summons of 11 August 2020 to strike out the plaintiff's claim, is adjourned to 11 February 2021 at 10.30am for mention, to monitor compliance with these directions. If the plaintiff has failed by then to file a properly pleaded amended statement of the Fourth Cause of Action (we do not need another writ of summons, and

certainly do not need to see again the other claims now resolved or abandoned), the proceedings are likely to be struck out.

iv. There is no need for the defendant to file a statement of defence to the amended writ of summons dated 21 July 2020.

A. D. Stuart
Judge

At Lautoka this 24th day of November, 2020

SOLICITORS:
Nand Lawyers, Lautoka for the plaintiffs
Hanif Tuitoga, Suva, for the defendant