

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 30 of 2014**

**BETWEEN:**                    **DIGICEL (FIJI) LIMITED**, a limited liability company having its business address and its registered address at Ground Floor, Kadavu House, Suva, Fiji Islands.

**PLAINTIFF**

**AND:**                            **FIJI RUGBY UNION**, a sports association having its business address at Fiji Rugby Union House, 35 Gordon Street, Suva, Fiji Islands.

**FIRST DEFENDANT**

**AND:**                            **VODAFONE FIJI LIMITED**, a limited liability company having its registered office at 168 Princess Road, Tamavua, Suva, Fiji Islands.

**SECOND DEFENDENT**

**BEFORE:**                    Hon. Acting Chief Justice Kamal Kumar

**COUNSEL:**                    Mr J. Turner and Ms M. Muir for the Plaintiff/Applicant  
Mr N. Lajendra for the First Defendant/Respondent  
Mr S. P Sharma for the Second Defendant/Respondent

**DATE OF RULING:**    28 May 2020

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**RULING**  
**(Application for Further and Better Particulars)**

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## **1.0 Introduction**

1.1 On 2 July 2014, Plaintiff (hereinafter referred to as **“the Applicant”**) filed Application seeking further and better particulars in respect to paragraphs 17, 18, 21, 23, 26, 27, 34, 40, 45, 50, 60, 78, 92 to 104 of First Defendant’s (hereinafter referred to as **“the First Respondent”**) Statement of Defence and Counterclaim and paragraphs 16 and 20 of Second Defendant’s (hereinafter referred to as **“the Second Respondent”**) Statement of Defence and Counterclaim.

**(“the Application”)**

1.2 The Application was called on 29 August 2014, when parties were directed to file Affidavit/Submissions and the Application was adjourned to 30 October 2014, for hearing.

1.3 The parties filed Submissions and made Oral Submissions on date of hearing.

1.4 Following Affidavits were filed on behalf of the parties:-

### **For Applicant:-**

Affidavit of Ana Tuiwawa sworn and filed on 2 July 2014 (**“Tuiwawa’s Affidavit”**).

### **For First Respondent:-**

Affidavit of Radrodro Tabualevu sworn and filed on 12 September 2014 (**“Tabualevu’s Affidavit”**).

### **For Second Respondent:-**

Affidavit of Premila Devi sworn and filed on 12 September 2014 (**“Devi’s Affidavit”**).

## **2.0 Application for Further and Better Particulars**

2.1 Following pleadings were filed by the parties prior to the Application being made by the Applicant:-

- (i) Amended Statement of Claim by Applicant;
- (ii) Statement of Defence and Counterclaim by First Respondent;
- (iii) Statement by Defence and Counter-claim by Second Respondent;
- (iv) Reply to Statement of Defence of the First Respondent and Defence to Counterclaim;
- (v) Reply to Statement of Defence of the Second Respondent and Defence to Counterclaim;
- (vi) First Respondent's Reply to Defence to Counterclaim;
- (vii) Second Respondent's Reply to Defence to Counterclaim.

2.2 Order 18 Rule 6(1) of High Court Rules 1988 ("**HCR**") provide as follows:-

*"6.-(1) Subject to the provisions of this rule, and rules 9, 10 and 11, **every pleading must contain, and contain only, a statement in a summary form of the material facts** on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits."*

2.3 Order 18 Rule 11 of HCR provide as follows:-

*"11.-(1) Subject to paragraph (2), **every pleading must contain the necessary particulars of any claim, defence** or other matter pleaded including, without prejudice to the generality of the foregoing words-*

- (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and*
- (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent*

*intention or other condition, of mind except knowledge, particulars of the facts on which the party relies.*

- (2) Where it is necessary to give particulars of debt, expenses or damages and those particulars exceed 3 folios, they must be set out in a separate document referred to in the pleading and the pleading must state whether the document has already been served and, if so, when, or is to be served with the pleading.*
- (3) The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or in any affidavit of his ordered to stand as a pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just.*
- (4) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of paragraph (3) the Court may, on such terms as it thinks just, order that party to serve on any other party-*
  - (a) where he alleges knowledge, particulars of the facts on which he relies, and*
  - (b) where he alleges notice, particulars of the notice.*
- (5) An order under this rule shall not be made before service of the defence unless, in the opinion of the Court, the order is necessary or desirable to enable the defendant to plead or for some other special reason.*
- (6) Where the applicant for an order under this rule did not apply by letter for the particulars he requires, the Court may refuse to make the order unless of opinion that there were sufficient reasons for an application by letter not having been made.*
- (7) Where particulars are given pursuant to a request, or order of the Court, the request or order shall be incorporated with the particulars, each item of the particulars following immediately after the corresponding item of the request or order.”*

2.4 At paragraph 18/12/2 of Supreme Court Practice White Book 1993 Vol. 1 in respect to almost similar provision it is stated as follows:-

**“Function of particulars-** This rule imposes on the parties a primary obligation to state in their pleadings all the “necessary particulars” of any claim, defence or other matter pleaded, and if any pleading does not state such particulars or

states only some or insufficient or inadequate particulars, the rule enables the Court to order a party to serve either (1) particulars or further and better particulars of any claim, defence or other pleaded, or (2) a statement of the nature of the relied on, or (3) both such particulars and statement. **It is therefore an essential principle of the system of pleading that particulars should be given of every material allegation contained in the pleading.**

**The function of particulars** is to carry into operation the overriding principle that the **litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises and incidentally to reduce costs** (cited with approval by Edmund Davies L.J. in *Astrovlanis Compania Naviera S.A. v. Linard* [1972] 2 Q.B. 611; [1972] 2 All E.R. 647). This function has been stated in various ways as follows:-

- (1) to **inform the other side of the nature of the case** they have to meet as distinguished from the mode in which that case is to be proved (per Lindley L.J. in *Duke v. Wisden* (1897) 77 L.T. 67, p.68; per Buckley L.J. in *Young & Co. v. Scottish Union Co.* (1907) 24 T.L.R. 73, p.74; *Aga Kan v. Times Publishing Co.* [1924] 1 K.B. 675, p.679);
- (2) to **prevent the other side from being taken by surprise at the trial** (per Cotton L.J. in *Spedding v. Fitzpatrick* (1888) 38 Ch.D. 410, p.413; *Thomson v. Birkley* (1882) 31 W.R. 230);
- (3) to **enable the other side to know what evidence they ought to be prepared with and to prepare for trial** (per Cotton L.J. *ibid.*; per Jessel M.R. in *Thorp v. Holdsworth* (1876) 3 Ch.D. 637, p.639; *Elkington v. London Association for the Protection of Trade* (191) 27 T.L.R. 329, p.330);
- (4) **to limit the generality of the pleadings** (per Thesiger L.J. *Saunders v. Jones* (1877) 7 Ch.D. 435) **or of the claim or the evidence** (*Milbank v. Milbank* [1900] 1 Ch.376, p.385);
- (5) **to limit and define the issues to be tried**, and as to which discovery is required (*Yorkshire Provident Life Assurance Co. v. Gilbert* [1895] 2 Q.B. 148; per Vaughan Williams L.J. in *Milbank v. Milbank* [1900] 1 Ch.376, p.385);

- (6) **to tie the hands of the party so that he cannot without leave go into any matters not included** (per Brett L. J. in *Philipps v. Philipps* (1878) 4 Q.B.D. 127, p.133; *Woolley v. Broad* [1892] 2 Q.B. 317) see n. “All material facts” para.18/7/5; and *Woolley v. Broad* [1892] 2 Q.B. 317). But if the opponent omits to ask for particulars, evidence may be given which supports any material allegation in the pleadings (*Dean of Chester v. Smelting Corp.* [1902] W.N. 5; *Hewson v. Cleeve* [1904] 2 Ir.R. 536).

It is **not the function of particulars to take the place of necessary averments in the pleading, nor “to state the material facts omitted ... in order by filling the gaps, to make good an inherently bad pleading”** (per Scott L.J. in *Pinson v. Lloyds, etc.*, Bank [1941] 2 K.B. 72, p.75).

Whenever either party is imputing fraud, negligence, or misconduct to his opponent, the facts must be stated with especial particularity and care. Thus, in an action of wrongful dismissal, a plea justifying the dismissal on the ground that the servant was incompetent or dishonest must state the charge specifically and in detail; so must all charges of bad workmanship, want of skill, negligence, and contributory negligence. **“The Court will require of him who makes a charge that he shall state that charge with as much definiteness and particularity as may be done, both as regards time and place** (per Lord Penzance in *Marriner v. Bishop of Bath and Wells* [1893] P. 145; and see the remarks of Thesiger L.J. in *Saunders v. Jones* (1877) 7 Ch.D. 435, p.452).

The Court will not sanction an attempt to serve interrogatories under the guise of seeking particulars (*Lister v. Thompson* (1891) 7 T.L.R. 107).”

- 2.5 In **Australian Competition and Consumer Commission v. ANZ Banking Group Limited** [2008] FCA, QUD 252 of 2007 (“**ACCC case**”), Respondent applied to strike out Applicant’s claim, Statement of Claim and in the alternative sought further and better particulars in relation to various paragraphs in the Statement of Claim.

In respect to the need to plead material facts and need to provide material facts Court took following remark of Scott J in **Bruce v. Odhams Press Ltd** [1956] 1 KB 697 at 712 - 713 as important:-

“The cardinal provision ... is that the statement of claim **must state the material facts**. The word “**material**” means **necessary for the purpose of formulating a complete cause of action; and if any one “material” fact is omitted**, the statement of claim is bad; it is “demurrable” in the old phraseology, and in the new is **liable to be “struck out”**. **The function of “particulars” is quite different**. They are **not to be used in order to fill material gaps** in a demurrable statement of claim - gaps which ought to have been filled by appropriate statements of the various material facts which together constitute the plaintiff’s cause of action. The use of particulars is intended to meet a further and quite separate requirement of pleading, impose in fairness and justice to the defendant. Their function is to fill in the picture of the plaintiff’s cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial. Consequently in strictness particulars cannot cure a bad statement of claim. But in practice it is often difficult to distinguish between a “material fact” and a “particular” piece of information which it is reasonable to give the defendant in order to tell him the case he has to meet; hence in the nature of things there is often overlapping.”

Court struck out **ACCC’s** Statement of Claim on the ground that **ACCC** failed to plead material facts.

2.6 In **Ho & Anor. v. Ho** [1993] HPP No. 10 of 1989 (3 June 1993) His Lordship Justice Byrnes (as he then was) stated as follows:-

***The general principle governing the delivery of further particulars of any pleading is that these will be ordered by the Court if it is considered desirable to elucidate the issues to be tried and prevent “surprise” at the trial. No hard-and-fast line can be laid down as to the degree of***

*particularity which is required of a pleader and which an opponent may demand of him when formulating either a claim or defence.*

*It is, however, **essential that each party should give his opponent a fair outline of the case which will be raised against him at the hearing**, and for this purpose he must set out in the body of his pleading all particulars which are necessary to enable his opponent properly to prepare his case for trial.*

***Particulars need be given only of facts and not of evidence** but as much certainty or particularity will be directed in a particulars case as is reasonable having regard to the circumstances and the nature of the acts alleged - see *Ratcliffe v. Evans* (1892) 2 Q.B. 524, at 532. In *Bullen and Leake and Jacob's Precedents of Pleadings* 12<sup>th</sup> Edition the authors remark at p.113 that the tendency of modern practice is to give full particulars as may be necessary of the matters pleaded, and to respond to a request for further and better particulars of pleading more fully than previously. However the **law has always held against a party to litigation attempting to obtain information by way of particulars which can only be obtained by interrogatories** - See *Lister & Company Limited v. Thompson* (1891) 7 T.L.R. p.107.”*

- 2.7 Justice Byrnes comment was adopted with approval in **Hillview Limited v. Construction (Fiji) Limited** [2012] C.A. 41 of 2008 (10 February 2012).
- 2.8 This Courts feels the following Statement of Fisher J in **TPC v. David Jones (Australia) Pty Ltd** (1985) ATRL 40-607 and quoted at paragraph 44 of Applicant's Submission makes it clear, that a party must disclose material facts in the pleadings but not conclusion drawn from facts that do not form part of the pleadings.

“Paragraph 15 of the statement of claim does not state any material facts.  
**It is merely a statement of a conclusion drawn from facts which are**



**not in the statement of claim.** Standing alone, paragraph 15 does not disclose a reasonable cause of action against the respondents.”

***(emphasis added)***

### **First Respondent’s Statement of Defence and Counterclaim**

#### **2.9 Paragraph 17**

First Defendant pleads that provision of the Agreements between Applicant and First Respondent are unenforceable as it breaches Part 6 of Commerce Commission Act 2010 (“**CCA**”).

Part 6 of CCA had 14 sections.

In order for Court to determine this issue.

First Respondent should provide particulars of breach by stating which provision of the Digicel 7s Agreement and Digicel Cup Agreement (hereinafter collectively referred to as “**Digicel Agreement**”) are unenforceable and breaches which section and subsection of CCA.

It must be noted the particulars that First Respondent is to supply is not to include matter such as how the breach occurred. All First Respondent is to say is “which provision Digicel Agreement breached which section of CCA”.

#### **Paragraph 18**

In view of what is stated under Paragraph 17, I hold that First Respondent provide following particulars only:-

- (i) Provisions of Digicel Agreement that affects fair competition;
- (ii) Which sections and subsections of CCA is breached by those provisions;
- (iii) Which type of market is being affected.

What is sought in paragraph 1(b), (iii) to (vii) is refused on the ground Applicant cannot seek to fill gaps in the pleading by seeking material facts. If the Applicant on basis of legal advise received is of the view that First Respondent's pleading is devoid of material facts then it should move the Court to strike out those parts of the pleading for Court's determination. In simple terms, Applicant cannot seek details of material facts which are not pleaded.

### **Paragraph 21**

This Court repeats what is stated under Paragraph 17. The First Respondent should provide particulars as to which provisions of Digicel Agreement are unenforceable which section and subsection of CCA is breached by those provisions.

Court refuses to make any Order in respect to particulars sought under paragraph 1(c)(iii) of the Application for reason stated in refusing particulars sought in respect to paragraph 1(b)(iii) to (vii) of the Application.

### **Paragraph 23**

First Respondent needs to provide particulars of breach by only stating which provisions Digicel Agreement breached which sections and subsections of CCA.

Paragraph 1(d)(ii) is refused for same reason for refusing particulars sought under paragraph 1(b)(iii) to (vii) of the Application.

### **Paragraph 26**

First Respondent needs to provide particulars of which provisions Digicel Agreement breaches which sections and subsections of CCA only.

Prayer 1(e)(ii) of the Application is refused for the same reason for refusing prayer 1(b)(iii) to (vii) of the Application.

**Paragraph 27**

First Respondent provide particulars of which provision of Digicel Agreement breaches which section and subsections of CCA only.

Prayer 1(f)(ii) of the Application is refused for the same reason for refusing prayer 1(b)(iii) to (vii) of the Application.

**Paragraph 34**

First Respondent in Tabualevu's Affidavit states that consortium were identified in Pradeep Lal's Affidavit filed on 10 February 2014. It must be noted that trial will be conducted on basis of pleadings filed. Pradeep Lal's Affidavit is not pleadings and as such particulars of consortium should be provided to Applicant.

Since the First Respondent has already disclosed this information to Appellant it should provide particulars of consortium by disclosing their names in its Defence.

**Paragraph 40**

First Respondent needs to provide particulars of which provisions of the Digicel Agreement breaches which section and subsection of CCA only.

Prayer 1(h)(iii) of the Application is refused for the same reason for refusing prayer 1(b)(iii) to (vii) of the Application.

**Paragraph 45**

First Respondent needs to provide particulars of which provision of the Digicel Agreement breaches which section and subsection of CCA only.

Prayer 1(i)(ii) of the Application is refused for the same reason for refusing prayer 1(b)(iii) to (vii) of the Application.

**Paragraph 50**

First Respondent needs to provide particulars of which provision of the Digicel Agreement breaches which section and subsection of CCA only.

Prayer 1(j)(ii) of the Application is refused for the same reason for refusing prayer 1(b)(iii) to (vii) of the Application.

**Paragraph 60**

First Respondent needs to provide particulars of which provisions of the Digicel Agreement breaches which section and subsection of CCA only.

Prayer 1(k)(ii) of the Application is refused for the same reason for refusing prayer 1(b)(iii) to (vii) of the Application.

**Paragraph 78**

First Respondent needs to provide particulars of which provision of the Digicel Agreement breaches which section and subsection of CCA only.

Prayer 1(l)(iii) to (vii) of the Application is refused for the same reason for refusing prayer 1(b)(iii) to (vii) of the Application.

**Paragraph 92**

What Applicant is seeking at prayer 1(m) of the Application is to seek evidence and not particulars.

This Court notes that the Applicant has denied the allegations of advertisement.

If the Applicant continued to advertise its products using the First Respondent's logo and/or name and/or players that it should have the particulars.

On the other hand, if Applicant did not do so, then it should deny the allegation in which case, the First Respondent will have to call evidence to prove the allegation.

Particulars sought under prayer 1(m) the Application is refused.

**Paragraph 93 to 99**

What Applicant is seeking at prayers 1(n) to (t) of the Application is to seek evidence and not particulars.

This Court notes that the Applicant has denied the allegations of advertisement.

If the Applicant continued to advertise its products using the First Respondent's logo and/or name and/or players that it should have the particulars.

On the other hand, if Applicant did not do so, then it should deny the allegation in which case the First Respondent will have to call evidence to prove the allegation.

Particulars sought under prayers 1(n) to (t) of the Application is refused.

**Paragraph 100**

First Respondent needs to provide date of letter sent to the Applicant.

**Paragraph 101**

First Respondent should provide date of letter and to which media organisation the letter was sent to.

There is no need to provide other details sought in prayer 1(u)(i) of the Application.

**Paragraph 102**

This Court is of the view that there is no need for any further particulars provided. What is pleaded by the First Respondent at paragraph 102 of the Statement of Defence and Counterclaim is sufficient to put the Applicant on notice as to what is the issue and what evidence (if any) Applicant will need to produce in Court during the trial.

**Paragraph 103**

This Court is of the view that what is pleaded at paragraph 103 puts Applicant on notice as to what First Respondent intends to prove First Respondent's case during trial.

**Paragraph 104**

This Court is of the view that there is no need to provide the relevant provision of the Agreement between First and Second Respondents.

However, First Respondent needs to provide particulars of infringement to enable Applicant to prepare its case and it is only fair for Applicant to know what is the alleged infringement for it to challenge the allegation during trial if it desires to do so.

## **Second Respondent's Statement of Defence and Counter-claim**

### **Paragraphs 16 and 20**

This Court finds that Second Respondent has complied with requirement to plead material facts and provide particulars.

What is stated at paragraphs 16 and 20 of Second Respondent's Statement of Defence and Counterclaim is sufficient to identify the issues and cause of action.

This Court has no hesitation in refusing prayer 2(a)(b) of the Application.

### **3.0 Costs**

3.1 This Court takes into consideration that all parties filed Affidavits and comprehensive Submissions.

3.2 Cost of the Application be costs in the cause and be determined upon conclusion of this matter.

### **4.0 Orders**

4.1 This Court makes following Orders:-

(i) First Respondent (First Defendant) provide to the Applicant (Plaintiff) the particulars appearing in the table below by 18 June 2020.

<b>First Respondent (First Defendant) Statement of Defence and Counterclaim</b>	<b>Particulars to be provided by First Respondent (First Defendant)</b>
Paragraph 17	(i) Provisions of Digicel Agreement that are unenforceable; and

	(ii) Which provision of Digicel Agreement breaches which section and subsection of Commerce Commission Act 2010 (“CCA”)
Paragraph 18	(i) Provisions of Digicel Agreement that affects fair competition; and (ii) Which section and subsection of CCA is breached by those provisions; and (iii) What type of market is affected.
Paragraph 21	(i) Provisions of Digicel Agreement that are unenforceable; and (ii) Which provisions of Digicel Agreement breaches which section and subsection of CCA.
Paragraph 23	Which provision of Digicel Agreement breaches which section and subsection of CCA.
Paragraph 26	(i) Provisions of Digicel Agreement that are unenforceable; and (ii) Which provision of Digicel Agreement breaches which section and subsection of CCA.
Paragraph 27	(i) Provisions of Digicel Agreement that are unenforceable; and (ii) Which provisions of Digicel Agreement breaches which section and subsection of CCA.
Paragraph 34	The names of the other consortium members.
Paragraph 40	Which provisions of Digicel Agreement breaches which section and subsection of CCA.
Paragraph 45	Which provisions of Digicel Agreement breaches which section and subsection of CCA.
Paragraph 50	(i) Provisions of Digicel Agreement that are unenforceable; and (ii) Which provisions of Digicel Agreement breaches which section and subsection of CCA.
Paragraph 60	(i) Provisions of Digicel Agreement that are unenforceable; and (ii) Which provisions of Digicel Agreement breaches which section and subsection of CCA.



Paragraph 78	(i) Provisions of Digicel Agreement that are unenforceable and affects fair competition; and (ii) Which provisions of Digicel Agreement breaches which section and subsection of CCA.
Paragraph 100	Date of letter sent by First Respondent to the Applicant.
Paragraph 101	Date of letters sent to media organisations and names of media organisations letter was sent to.
Paragraph 104	Particulars of infringement.

- (ii) The Application against Second Respondent (Second Defendant) is dismissed and struck out.
- (iii) Cost of the Application for Further and Better Particulars be costs in the cause.



  
**K. Kumar**  
**ACTING CHIEF JUSTICE**

At Suva  
28 May 2020

**SIWATIBAU AND SLOAN for Applicant/Plaintiff**  
**LAJENDRA LAW for the First Respondent/Defendant**  
**PATEL SHARMA LAWYERS for the Second Respondent/Defendant**