

FIJI DEVELOPMENT BANK v RICHARD IHAKA (aka RICHARD CLARENCE) (HBC0006 of 2005L)

HIGH COURT — CIVIL JURISDICTION

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PHILLIP J

11 July, 4 August 2006

10 Practice and procedure — pleadings — strike out — whether statement of defence and third party notice and statement of claim disclosed no reasonable cause of action, an abuse of the process of the court, scandalous, frivolous or vexatious — High Court Rules O 18 r 18(1), O 20 r 4(2).

15 The Plaintiff sought an order pursuant to O 18 r 18(1) of the High Court Rules to strike out the statement of defence dated 28 April 2005, amended on 28 July 2005, on the grounds that it disclosed no reasonable defence, was scandalous, frivolous or vexatious and was otherwise an abuse of process of the court.

On the other hand, by its motion, the Third Party sought to strike the Defendant's third party notice and claim against it on the grounds similar to those raised by the Plaintiff.

20 In 2003, the debtor Ratu's Bus Tours acquired a loan from the Plaintiff. On 5 September 2003, the Defendant signed a deed of guarantee guaranteeing the repayment of the loan advanced. The debtor defaulted in its obligation and the Plaintiff demanded payment of the debt from the Defendant pursuant to the guarantee. The Defendant failed to pay on demand. Thus, on 13 January 2005, by writ of summons, the Plaintiff claimed the sum of \$57,545.45 with interest. The Defendant filed a statement of defence admitting signing the guarantee and pledging repayment of the loan advanced to the debtor. He alleged that he was not given ample time to repay the debt and sought dismissal of the claim against him and that an arrangement be made between him and the Plaintiff for the repayment of the outstanding obligation. Subsequently, the Defendant filed two amended statement of defence.

30 On 5 December 2005, the Defendant was granted leave to join Carpenters Shipping Ltd (Third Party) to the proceedings. The Defendant pleaded an alleged contract between himself and the Third Party wherein the Third Party agreed, for a consideration of \$20,000, to ship a bus to Fiji from Japan. The Defendant claimed he paid \$20,000 to the Third Party, which \$20,000 was the subject matter of the Plaintiff's claim. He alleged that in breach of the contract, the Third Party used the \$20,000 amount without his authority and did not ship the bus from Japan thereby causing him losses and as a result of which he was entitled to be indemnified by the Third Party against the Plaintiff's claim.

35 The Plaintiff filed summons to strike out the amended statement of defence. Likewise, the Third Party filed a motion to strike out the third party notice and statement of claim against it.

40 The issues were: (1) whether or not the Defendant's amended statement of defence should be struck out on the grounds that there was no reasonable cause of action, it was scandalous, frivolous or vexatious, and was an abuse of process; and (2) whether or not the third party notice and statement of claim should be struck out on the same grounds.

Held — (1) It was clear that the facts pleaded by the Defendant constituted an admission of the Plaintiff's claim. There simply was no defence disclosed against the claim. The only contest raised by the Defendant to the claim was between the Defendant and the Third Party. Thus, the amended statement of defence should be struck out. Moreover, the court upheld that the Defendant had used the court's processes improperly to delay the payment of his debts.

50 (2) The evidence established that there was apparent unconvincing attempt by the Defendant to provide explanations with regard to the uncontested evidence produced by the Third Party in the affidavits filed in support of its application. The Third Party

disclosed evidence of the payment and the purpose and use of the funds. The Defendant did not dispute the Third Party's evidence. The only explanation the Defendant offered in reply was that Mr Raju was "an unreliable witness and is not telling the truth". His submission on alleged non-disclosure was not convincing and the legal proposition he relied on was misconceived.

5 Application granted.

Cases referred to

10 *Attorney-General of Duchy of Lancaster v LNW Ry Co* [1892] 3 Ch 274; *Hemant Kumar v Suresh Kumar* (unreported, Civil Action No 33/2003); *Hewitt v Habib* (unreported, ABU 0007/2004S); *Hubbuck v Wilkinson* [1889] 1 QB 86; *Kemsley v Foot* [1952] AC 345; [1952] 1 All ER 501, cited.

15 *National NBF Finance (Fiji) Ltd v NemaniBuli* (unreported, Civ App ABU0057/1998); *Krishna v Automart Ltd* (unreported, Civil Action No HBC0388/2000L); *Attorney-General v Shiu Prasad Halka* [1972] 18 FLR 210, considered.

20 *Young & Associates* for the Plaintiff

Defendant in person

25 *Suresh Maharaj & Associates* for the Third Party

[1] **Phillip J.** There are two applications before me. The first is the Plaintiff's summons to strike out the statement of defence dated 14 June 2005 (Plaintiff's application). The second is the Third Party's motion dated June 2006 for orders that the Third Party notice and statement of claim against it be struck out (Third Party's application).

Background

[2] By writ of summons issued on 13 January 2005 the Plaintiff claimed the sum of \$57,545.45 and interest thereon of 13.5% per annum accruing from 1 December 2004 (the debt) against the Defendant. It alleged that the Defendant had signed a deed of guarantee on 5 September 2003 (the guarantee), guaranteeing repayment of a loan advanced to Ratu's Bus Tours Ltd (the debtor). The Plaintiff alleged that the debtor defaulted in its repayment obligations and it had demanded payment of the debt from the Defendant pursuant to the guarantee but the Defendant had failed to pay on demand.

The first statement of defence

[3] In April 2005 the Defendant filed a statement of defence (first statement of defence). He admitted signing the guarantee, pledging repayment of the loan advanced to the debtor. By way of defence, he alleged that he was not given enough time by the Plaintiff to repay the debt as he was out of the country. His states that the claim be dismissed and that an arrangement be made between him and the Plaintiff for the repayment of the outstanding debts.

[4] On 1 July 2005 he was granted leave to file an amended statement of defence by 3.30 pm on 21 July 2005. The Plaintiff's application had by then been issued.

The amended statement of defence

[5] On 28 July 2005 the Defendant filed an amended statement of defence (amended defence). He maintained his admissions to paras 1–3 of the statement of claim — that is, that he had guaranteed the repayment of the debtor's loan. The essence of his defence is stated at para 2 as follows:

5 *THAT* the Defendant denies paragraph 4. The facts are as follows. The plaintiff paid a cheque of \$35,000.00 to Carpenters Shipping Limited, this cheque was to pay for transport cost of Bus from Japan and duty. This money was used by Carpenters Shipping Limited without the Defendants authority, this Bus is still in Japan. The Defendant did receive \$15,000.00 from the plaintiff and is prepared to repay this money. The Defendant would ask that Carpenters Shipping Limited be joined into this action.

Second amended statement of defence

10 [6] On 29 September 2005 another amended statement of defence was filed by the Defendant (second amended defence). Several new allegations were made against the Plaintiff by way of defence. These can be summarised as follows:

- (i) that he was misled into signing the guarantee by the Plaintiff;
- (ii) that the Plaintiff informed him that “he would only receive the loan” if he signed all his shares over to his indigenous Fijian partner;
- 15 (iii) he only signed the guarantee on the undertaking that his partner would also be signing a personal guarantee and he would not have signed a personal guarantee had he been properly informed and had known that he was the only guarantor;
- 20 (iv) that he has no shares in the company and has not benefited personally in any way from the loan.

Application to join Third Party

25 [7] On 5 December 2005 the Defendant was granted leave to join Carpenters Shipping Limited (Third Party) to the proceedings. In the third party Notice subsequently filed, he claimed to be indemnified against the Plaintiff’s claim to the extent of \$20,000 on the grounds that “the plaintiff gave the third party \$20,000.00, which was guaranteed by him, to bring a bus from Japan which it did not do but instead used the moneys elsewhere”.

30 [8] A statement of claim against the Third Party was filed on 26 January 2006. In it he alleged that *he* paid the Third Party \$20,000. He alleged that “it was an implied term and condition that the Third Party thereby guaranteed:

- (a) that the third party would ship the bus from Japan to Fiji
- (b) that the defendant would have and enjoy quiet possession of the bus
- (c) that the third party used the \$20,000.00 without the defendant’s authority.

35 Preliminary issue

[9] At the hearing learned counsel for the Plaintiffs applied to have the second amended statement of defence struck out on the ground that the document was filed without leave of the court being sought or granted.

40 [10] Having carefully considered all three statements of defence now before the court, I am satisfied that the Defendant would have been refused leave to further amend had he applied for leave before filing the second amended statement of defence on 29 September 2005. The Defendant filed two affidavits opposing the Third Party’s application. He did not file an affidavit in reply to those filed by the
45 Plaintiff as ordered by the court. However it is clear from his affidavit evidence that no dispute is raised about the circumstances surrounding the signing of the guarantee. There is no evidence from him in support of his allegations of misrepresentation by the Plaintiff. Had he made a proper application for leave to further amend, he would have had to provide evidence to justify the proposed
50 amendments. As learned counsel submitted he had endorsed his acceptance of the terms and conditions contained in the Plaintiff’s loan offer letter by signing it as

a director of the debtor. One of those conditions, contained in cl 37 of the offer letter dated 26 August 2003 was that the Plaintiff's security for the loan would include a personal guarantee given by Richard Ihaka for total liability. He knew or ought to have known well in advance of signing the guarantee that he was to be the only guarantor — he acknowledged and agreed to it. Whereas in the two earlier defences filed, he admitted his obligations under the guarantee, in the defence filed in September 2005, a little over a month after his amended defence, he does not respond to the allegation at all. His later statement is in complete contrast to those he made earlier. The Plaintiff's affidavit by Salote Tarainavesi dated 10 June 2005 exhibits a copy of the guarantee signed by the Defendant on 5 September 2003. There are also two letters from the Defendant exhibited in her affidavit, which are undisputed, clearly showing that the Defendant had acknowledged his indebtedness to the Plaintiff and had sought further time to repay his debt. The letters are consistent with the initial defence he filed where he admitted the guarantee and his obligations thereunder but asked that the action be struck out to facilitate repayment arrangements between him and the Plaintiff for repayment of the outstanding debts.

[11] Given the paucity of his evidence in relation to the allegations of misrepresentation in contrast to the uncontested evidence in the affidavits filed on behalf of the Plaintiff, I have acceded to the Plaintiff's application and have struck out the defence filed on 29 September 2005 pursuant to O 20 r 4(2) of the HCR. I am also satisfied that the defence raised is without merit and is not a bona fide defence. He alleged that the Plaintiff had informed him that "he would only receive the loan" if he signed his shares over to his indigenous partner. However the evidence before the court and confirmed by his own submission establishes conclusively that the loan was advanced to the *debtor company of which he was a director* and not to him. Whereas he says he did not benefit personally in any way from the loan, in the amended defence of 28 July 2005, he admits to receiving \$15,000 from the Plaintiff which he was prepared to repay. The statements contained in the various defences he filed contain such fundamental inconsistencies casting an extremely unfavourable impression of the bona fides of his assertions. As a consequence, I am compelled to say that his credibility has been adversely affected to a significant extent. The guarantee is enforceable against him. He is bound by his signature on the document whether he read it or understood it or not *Hewitt v Habib* (unreported, ABU 0007/2004S).

The Plaintiff's application

[12] The Plaintiff seeks an order pursuant to O 18 r 18(1) of the HCR that the statement of defence dated 28 April 2005 (amended on 28 July 2005) be struck out on the grounds that:

- (a) it discloses no reasonable defence;
- (b) it is scandalous, frivolous or vexatious;
- (c) it is otherwise an abuse of the process of the court.

[13] The Plaintiff relies on two affidavits filed in support of the application.

Principles of law in striking out

[14] A useful and succinct analysis of the principles I am required to consider are contained in the extempore judgment of Connors J in *Krishna v Automart Ltd* (unreported, Civil Action No HBC0388/2000L) at 2 where he said:

The provisions of Order 18 Rule 18 have been considered by the court on numerous occasions and the authorities which those considerations consistently rely on have not

changed in recent times. It is perhaps convenient to look at the decision of Mr Justice Byrne in Action No 0018 of 1986, His Lordship there referred to the relevant authorities on page 4 of his judgment where he said and I quote:

5 The law governing an application such as this is well settled. Lindley MR in *Hubbuck v Wilkinson* [1889] 1 QB 86 at p 91 said that it is only in plain and obvious cases that recourse should be had to the summary process under Order 18 Rule 18(1) of the Rules of the High Court. This was affirmed in *Kemsley v Foot* [1952] AC 345; [1952] 1 All ER 501. In *Attorney-General of Duchy of Lancaster v LNW Ry Co* [1892] 3 Ch 274 said that Rule 18 can only be invoked when the claim is on the face of it “obviously unsustainable”.

10 And again, the caution that should be exercised when considering applications of this type was highlighted by Mr Justice Pathik in *Hemant Kumar v Suresh Kumar* (unreported, Civil Action No 33/2003) where His Lordship in applying *Attorney-General v Shiu Prasad Halka* [1972] 18 FLR 210 at 215 said and I quote:

15 I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 Rule 18 should be very sparingly exercised, and only in exceptional cases. It should not be exercised where legal questions of importance and difficulty are raised.

20 [15] The Fiji Court of Appeal in *National NBF Finance (Fiji) Ltd v NemaniBuli* (unreported, Civ App ABU0057/1998) expressed the principles as follows:

25 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 provided. If a legal issue can be raised on the facts as pleaded then the Court 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 ...

30 [16] It is with these principles in mind that I go on to consider the Plaintiff’s application.

No reasonable defence disclosed

35 [17] In essence learned counsel for the Plaintiff submitted that given the admissions in the statements of defence filed by the Defendant this is a clear and obvious case of no reasonable defence being raised.

[18] In his amended statement of defence the Defendants repeats his earlier admissions. These were:

- 40 (i) that pursuant to a loan letter dated 26 August the Plaintiff lent \$50,000 to the debtor;
- (ii) he had guaranteed the repayment of the said loan to the Plaintiff by executing a deed of guarantee dated 5 September 2003;
- (iii) he does not dispute that the Plaintiff has served a demand notice on him demanding payment of the debt which he failed to pay;
- 45 (iv) although he denies the defaults and amount owed by the debtor, it is only a bare assertion, completely unsupported by facts. He says that the Third Party is at fault and he is entitled to be indemnified by it against the Plaintiff’s claim. I have upheld Mr Kumar’s submission that the only contest raised by way of defence to the claim is between the Defendant and third party. Further that the amended statement of defence fails to disclose any defence to the claim. I agree. There are no legal questions of importance and difficulty raised on the facts as pleaded. The facts
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pleaded by the Defendant constitute an admission of the Plaintiff's claim. There is simply no defence disclosed, that being so, I find that the Defendant's amended statement of defence must be struck out.

5 Abuse of process

[19] Having made the finding above, I need not traverse the Plaintiff's other grounds. Suffice it to say that the Defendant does not have a sustainable defence to the Plaintiff's claim — the amended statement of defence is frivolous.

10 [20] In addition I have also upheld learned counsel that the Defendant has used the court's processes and machinery improperly to stall payment of his debts — a delaying tactic to avoid the inevitable, as he put it. I agree.

Third party's application

15 [21] By its motion the Third Party seeks to strike out the Defendant's third party notice and claim against it on the grounds similar to those raised by the Plaintiff — no reasonable cause of action, frivolous, vexatious, an abuse of process and embarrassing.

20 [22] The Third Party contends that there was no contract in respect of shipping a bus from Japan between it and the Defendant as alleged. It submits that the Defendant's claim against it is completely without basis and is frivolous and vexatious. The Defendant pleads an alleged contract, undated, between himself and the Third Party wherein the Third Party agreed, for a consideration of \$20,000, to ship a bus to Fiji from Japan. The Defendant claims he paid \$20,000 to the Third Party on or about 9 September 2003, which \$20,000 is the subject matter of the Plaintiff's claim. He alleged that in breach of the contract, the Third Party used the \$20,000 without his authority and did not ship the bus from Japan thereby causing him losses (particularised on p 2 of his claim) and as a result of which he is entitled to be indemnified by the Third Party against the Plaintiff's claim.

30 [23] However in para 1 in his affidavit in reply dated 13 June 2006 he admitted that 2003 he approached the Third Party to attend to clearing a consignment of vehicles, particularised in para 5(ii) of Sudesh Raju's affidavit of 12 April 2006. The Bills of Lading pertaining to the consignments which the Defendant himself provided do not contain any reference to a bus. At para 3, he admits that he paid 35 \$20,000 to the Third Party on 15 September 2003. He does not dispute that the money was paid by way of a Bank cheque issued by the Plaintiff to clear the consignment. He denies seeing Mr Raju when he paid the \$20,000. That is immaterial. He also says for the first time that *he* paid the Third Party in excess of \$60,000 in different payments for vehicles shipped from Japan.

40 [24] What is apparent is an unconvincing attempt by the Defendant to provide explanations in regard to the uncontested evidence produced by the Third Party in the affidavits filed in support of its application. I am not convinced at all. The Defendant had claimed that he made a payment of \$20,000 to the Third Party in 45 September 2003 for a bus. When the Third Party disclosed evidence of the source of the funds and the date of payment to it, and its purpose which was to clear a consignment completely unrelated to the alleged bus, the Defendant raises new matters — that he had paid \$60,000 over time.

50 [25] The inconsistencies are a constant theme in his pleadings in these proceedings. His entire claim against the Third Party is premised on a payment to the Third Party of \$20,000 in September 2003 and an alleged contract between

them concerning a bus for which the \$20,000 was allegedly paid. The Third Party disclosed evidence of that payment and the purpose and use of the funds. The Defendant does not dispute the Third Party's evidence. The only explanation he offers in reply is that Mr Raju is "an unreliable witness and is not telling the truth". His submission on alleged non-disclosure was not convincing and the legal proposition he relied on was misconceived. His contention that the Third Party's quotations was proof of the bus contract is also misconceived.

[26] The Plaintiff's claim is so clearly unsustainable. I have upheld Mr Maharaj's submission that it is frivolous and vexatious. The facts he has alleged cannot be proved — in fact the Third Party has clearly established falsities in his factual contentions which I have taken judicial notice of. His claim is one which has become inevitably doomed to failure. I have also upheld learned counsels submission that the claim against the Third Party should also be dismissed as an abuse of the process of court.

Conclusion

[27] These are my orders:

- (1) The Defendant's amended statement of defence is struck out.
- (2) Judgment for the Plaintiff against the Defendant in the sum of \$57,545.45 together with interest at the rate of 13.5% per annum from 1 December 2004 until full payment.
- (3) The Defendant's third party notice and statement of claim filed on 26 January 2006 is struck out.
- (4) The Defendant is to pay the Plaintiff's and Third Party's costs of the applications assessed in the sum of \$1500 each.

Application granted.