IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 99 of 2011

BETWEEN : **FNPF INVESTMENTS LIMITED** a limited liability company having its registered office is at Level 4, Provident Plaza 2, 33 Ellery Street, Suva Fiji.

PLAINTIFF

AND : **VENTURE CAPITAL PARTNERS (FIJI) LTD** a limited liability company having its registered office at 14 Kimberly Street, Suva in Fiji.

1ST DEFENDANT

AND : **DINESH SHANKAR** a 237 Ratu Sukuna Road, Nasese Suva, Fiji, Company Director.

2ND DEFENDANT

BEFORE : **Justice Deepthi Amaratunga**

COUNSELS : **Mr. D. Sharma** for the Plaintiff
Ms. M. Rakai for the 2nd Defendant

Date of Hearing : **7th March, 2013**
Date of Decision : **22nd March, 2013**

DECISION

A. INTRODUCTION

1. The Plaintiff being a subsidiary of the FNPF filed this action seeking damages from 1st and 2nd Defendants for investing in ventures which were non-profitable, in violation of investment management agreement between Plaintiff and 1st Defendant, thus incurring substantial loss to the Plaintiff. The claim is based

on investment management agreement and the alleged failure of the Defendants to perform due diligence as per the management agreement and or failure to advise as *'professional investment managers'*, in terms of the investment management agreement that was entered into between the Plaintiff and 1st Defendant, which was terminated in 2010 and also for mismanagement of a company by the 2nd Defendant, which resulted loss to the Plaintiff.

2. The Plaintiff allege substantial loss to its fund due to alleged failure of the Defendants to exercise due diligence as '*investment managers*' and also advising wrongly of its fund relating to investment decisions, and or violations of investment management agreement of their fund.

3. The Defendants have acknowledged the service through its solicitors. The 1st Defendant has already filed their statement of defence through its solicitors Munro Leys and the same solicitors have filed summons seeking strike out of the 2nd Defendant from the statement of claim. Before the determination of the said summons, the Plaintiff's solicitors filed an application for recusal of the solicitors, which I granted with reason for such recusal and presently the 2nd Defendant is represented by a different solicitor firm, and they sought to pursue the summons filed by the 2nd Defendant for strike out of the claim against the 2nd Defendant.

B. LAW

4. The 2nd Defendant without filing a statement of defence has filed the summons seeking strike out of the claim against the 2nd Defendant, in terms of Order 18 rule 18 (1) (b) and (d). At the outset there was a typographical error and both parties consented to the said position. Order 18 rule 18 (1) of the High Court Rules of 1988 states as follows.

> *'Strike out pleadings and indorsements*
>
> *18.-(1) The Court may at any stage of the proceedings order to be struck out or amend any pleading or the indorsement of*

any writ in the action, or anything in nay 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) …
(d) It is otherwise an abuse of the process of the court.

may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.'

5. Supreme Court Rules of (White Book) 1988 p 322 18/19/14 states as follows

'**Scandalous**- The Court has a general jurisdiction to expunge scandalous matter to any record or proceeding (even in bill of costs, Re Miller (1884) 54 L.J. Ch 205) AS to scandal in affidavits, see O.41, r6.

Allegation of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the issue (Everett v Prythergch (1841) 12 Sim. 363……)" The mere fact that these paragraphs state a scandalous fact does not make them scandalous" (per Brett L.J. in Millington v Loring (1881) 6 Q.B.D 190, p. 196). But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (Blake v Albion Assurance Society (1876) 45 L.J.C.P 663)……

When considering whether a particular passage in a pleading is embarrassing regard must be had to the form of the action. Thus averments in aggravation of damages may be, and often are, made in actions for trot, but cannot (it is submitted) be properly made in actions for

breach of contract except in three cases mentioned by Lord Atkinson in Addis v Grammophone Co, Ltd [1909] A.C. 488, p 495
At 18/19/15

"**Frivolous or vexatious**"- By these words are meant cases which are obviously frivolous or vexatious, or obviously unsustainable per Lindly L.J in Att.-Gen. of Duchy of Lancaster v L. & N.W.Ry [1892] 3 Ch. 274, p 277; Day. William Hill (Park Lane) Ltd [1949] 1K.B. 632; .....

The Pleading must be "so clearly frivolous that to put it forward would be an abuse of the process of the Court" (per Jeune P. in Young v Hlloway [1895]p 87, p90 ....." (emphasis added)

C. ANALYSIS

6. FNPF is a statutory body established under section 3 of the Fiji National Provident Fund Act (Cap. 219) .The Fiji National Provident Fund Decree (No 52) of 2011 presently regulates FNPF. Under the said Decree FNPF Act (Cap 219) was fully repealed except for the provisions that are not made operational till a gazette notification is made, but FNPF continued to be a statutory body under the said decree though the provisions contained therein has now changed, which is irrelevant to the issue before me. The Plaintiff is a limited liability company having its registered office at Level 4, Provident Plaza 2, 33 Ellery Street, Suva, Fiji and in the statement of claim at paragraph 3 the 2nd Defendant is described as the Director of the 1st Defendant and principle officer and agent of the 1st Defendant in Fiji and further state that he was the liaison between the Plaintiff and the 1st Defendant. These facts are not denied since there is no statement of defence filed on behalf of the 2nd Defendant, but admitted in this summons. The 2nd Defendant had admitted the said management agreement and also the fact that he signed it as an agent of the 1st

Defendant. The 2nd Defendant had also in the affidavit in support had admitted he being a Director of the 1st Defendant, but also state that there were other directors. The 2nd Defendant was not made a party to this action based on his capacity as a Director, but on his actions which resulted heavy losses to the Plaintiff.

7. In the statement of claim the Plaintiff state that the investment management agreement between the Plaintiff and 1st Defendant required strict compliance of the investment criteria to be followed coupled with reporting obligations which contained in schedule 2 and 3 respectively to the said agreement.

8. Paragraph 10 of the statement of claim describes the investment characteristics in detail and stated that 1st and 2nd Defendants had made recommendations for investments in five specific ventures out of which this action is based on three of the said investments. The statement of claim also state that the 2nd Defendant is made a party as an agent of the 1st Defendant, who made an active part in these failed loss making investments without due diligence and or in breach of the investment management agreement and its specific requirements as to the investments and also for mismanagement of a venture that incurred additional cost.

9. Paragraph 69 to 76 specifically deals with the mismanagement of the 2nd Defendant and a claim based on that mismanagement. The 2nd Defendant needs to reply to these allegations and cannot seek to evade by filing an application for strike out since he was also named in the said investment management agreement by his name and admittedly he was one of the members of the all important Investment Committee which was responsible for investment decisions. In terms of clause 4.01 of the investment management agreement between the Plaintiff and the 1st Defendant and he was also the only Director of the 1st Defendant that is named in the said agreement between the Plaintiff and the 1st Defendant. The 2nd Defendant was named in the said agreement by his name and he has also signed the agreement on behalf of the 1st Defendant as its agent and in the circumstances he was aware of the obligations that were placed on him in the said investment management agreement from the inception and now cannot seek refuge under the same

agreement and state that since the agreement was between the Plaintiff and the 1st Defendant hence, he is absolved from any liability. In the statement of claim there is a specific claim for mismanagement contained in paragraphs 69-76 which he needs a reply in his defence and this claim is not based on agency between the 1st and 2nd Defendant, but based on the actions and or inactions of the 2nd Defendant.

10. Clause 10 of the Investime Management Agreement between the Plaintiff and the 1st Defendant deals with the indemnities and states as follows.

> 'Article X
> Indemnities
> Section10.01. Limitation of Liability. Neither the Manager nor any of its Affiliates shall have any liability for any loss to the Company or the Fund arising in connection with the services to be performed under this Agreement, or under or pursuant to any management or advisory agreement or other agreement under which it provides or agrees to provide services to or in respect of the Fund or which otherwise arises in relation to the operation, business or activities of the Fund save in respect of any matter or omission resulting from its **fraud, willful, wanton or reckless misconduct, bad faith, wanton ro intentional or reckless disregard for its obligations and duties in relation to the Fund, its negligence, gross negligence, its breach of this Agreement or any management or advisory agreement or other agreement or side letter under which it provides or agrees to provide services to or in respect of the Fund ro the Company or which otherwise arises in relation to the operation, business ro activities of the Fund, its breach of fiduciary duty, its violation of any securities law or tis commission of a criminal offence or breach or any obligations which the Manager may have under any regulatory arrangements**

made or established under or pursuant to the Relevant Law.

Section 10.02. Indemnity. The Company agrees to indemnify any hold harmless the Manager and any of their Affiliates and any officer, director, partner or employee of any of them (the "Indemnified Party") against any and all liabilities, actions, proceedings, claims, costs, demands, damages, and expenses(including legal fees) incurred or threatened by reason of the Indemnified Party being or having acted as a manager or adviser in respect of the Fund or arising in respect of or in connection with any matter or other circumstances relating to or resulting from the exercise of tis powers as Manager or from the provision of services to or in respect of the Fund or the Company or which otherwise…….' (emphasis added)

11. It is important to plead the exact conduct of the Defendants with facts in order to overcome the indemnities contained in the said clause 10 of the investment management agreement. The general consensus between the parties were that if it does not fall in to the exceptions stated in the said provisions other acts are indemnified and in the circumstances the specific facts to overcome the indemnity is needed and such averments are essential to establish 'fraud, willful, wanton or reckless misconduct, bad faith, wanton ro intentional or reckless disregard for its obligations and duties in relation to the Fund, its negligence, gross negligence, its breach of this Agreement or any management or advisory agreement or other agreement or side letter under which it provides or agrees to provide services to or in respect of the Fund ro the Company or which otherwise arises in relation to the operation, business ro activities of the Fund, its breach of fiduciary duty, its violation of any securities law or tis commission of a criminal offence or breach or any obligations which the Manager may have under any regulatory arrangements made or established under or pursuant to the Relevant Law.'

12. Lord Atkinson in Addis v Grammophone Co, Ltd [1909] A.C. 488, laid down three exceptions applicable to inclusion of misconduct in the pleading for the measure of damages for breach of contract, namely, actions against a banker for refusing to pay a customer's cheque when he has in his hands funds of the customer's to meet it, action for breach of promise of marriage, and actions like that in Flureau v Thornhill (1776) W.BI 1078. But these three exceptions has no application to the present case as the allegations regarding the conduct of the 2nd Defendant is made not for aggravation of damages, but to establish the cause of action and to overcome the indemnity contained in the clause 10 of the investment management agreement which is necessary to maintain the claim against the 2nd Defendant.

13. So the statement of claim cannot be considered scandalous or frivolous under the circumstances of the case and cannot be considered as an abuse of process. Summons for strike out is dismissed. The Plaintiff is granted a cost of $1,000 to be paid by the 2nd Defendant as the cost of this summons.

D. FINAL ORDERS

a. The summons to strike out the claim against the 2nd Defendant is dismissed.
b. The Plaintiff is granted a cost of $1,000 assesses summarily.

Dated at **Suva** this **22nd** day of **March, 2013**

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Justice Deepthi Amaratunga

High Court, Suva