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

**Civil Action No 69 of 2009**

**BETWEEN** : **RONALD SANJAY KUMAR** son of Satendra Kumar of 4 Sulua Street, Lautoka, Welder/Fabricator/Rigger.

**Plaintiff**

**A N D** : **POWER PLANTS & EQUIPMENT LIMITED** a limited liability company having its registered office in Suva and its place of business at Garden City, Raiwai, Suva.

**1st Defendant**

**A N D** : **DIGICEL (FIJI) LIMITED** a limited liability company having its registered office at Suva, Mobile Phone Network Provider.

**2nd Defendant**

**A N D** : **MARTIN WAQANIVALU** of Digicel (Fiji) Limited, Nadi Back Road, Nadi, Construction Supervisor.

**3rd Defendant**

# R U L I N G

## INTRODUCTION

[1]. Before me is an application by the 2nd and 3rd defendants for an order that the plaintiff's claim against them be struck out with costs on indemnity basis on the following grounds:

(i) the statement of claim discloses no reasonable cause of action against the 2nd and 3rd defendants.
(ii) it is also scandalous, frivolous and/or vexations.
(iii) it is otherwise an abuse of process.

[2]. The application is supported by an affidavit sworn by Liliviwa Turaga, the in-house solicitor for Digicel (Fiji) Limited and also by a supplementary affidavit of Ritesh Chandra Singh, the Legal Executive in the law firm of Messrs Sherani & Co. The plaintiff resists the striking out application and has filed an affidavit of Rakesh Pramod Kumar, the Chief Law Clerk of the law practice of Messrs Krishna & Co.

## FACTS AS PLEADED IN STATEMENT OF CLAIM

[3]. The plaintiff was employed as a welder, fabricator and rigger by Power Plants & Equipment Limited (**"PPEL"**). His work, I imagine, would involve cutting, bending and assembling metal pieces using special equipment, and then assembling these from ground level up in a rising sequential procedure.

[4]. On 29 June 2008, he was part of a group of PPEL workers rigging a 45-meter tower at the Sabeto Hills. PPEL was actually contracted by Digicel (Fiji) Limited (**"Digicel"**)

to construct the tower which was to link airwave-signals from Digicel mobile phones to Digicel's mobile network. The rigging work essentially involved constructing the tower from ground level up in a rising sequential procedure. As such, the plaintiff was expected to **"progressively climb upwards"** as he puts it. This, he did by pulling himself up by hand. The statement of claim pleads that the plaintiff was **"pulling himself up by hand from the 10 meter section to 15 metres section of the planned 45 metre tower under construction [when he] slipped and fell from a height of 15 metres to the hard and stoney ground below"**. He suffered very serious injuries as a result and was admitted at the Lautoka Hospital from **29 June to 23 July 2008**. He attended several follow up clinics afterwards. The particulars of injuries he suffered are detailed in paragraph 11 of the statement of claim as:

(i) comminuted fracture and displaced left radius and ulna intra-articular.
(ii) tear drop fracture of the two vertebras.
(iii) cuts and bruises all over the body.
(iv) body muscular injuries.

[5]. The plaintiff claims he suffers some continuing disabilities. These are particularised in paragraph 11 of the claim. He alleges negligence severally and/or collectively against the defendants. The particulars of negligence alleged are set out in detail in paragraph 6 (a) to (f) of the statement of claim. Frankly, he alleges that the defendants had breached their duty of care in failing to have in place at all material times a fall protection and/or fall arrest system and/or a safe system of work. He claims general and special damages plus costs and interest against the defendants.

[6]. The plaintiff pleads that the 3rd defendant, namely Martin Waqanivalu, was at all material times the Construction Supervisor at the site. Waqanivalu was employed by Digicel and **"did supervise and give instructions and directions to the plaintiff on matters relating to the subject construction works being the construction of the said tower"**[1].

## AFFIDAVITS IN SUPPORT OF STRIKING OUT

[7]. Turaga's affidavit in support draws attention to what she considers concession on the part of the plaintiff that he was, at all material times, employed by PPEL. Furthermore, it was PPEL which directed the plaintiff to work at the construction site. Turaga deposes that Digicel cannot be liable for any injury or disability suffered by the plaintiff for the following reasons:

(i) Digicel had contracted PPEL in 2006 to construct the tower in question.

[1] Paragraph 4 of the statement of claim.

(ii) clauses 14.1 and 14.2 of their contract provides that PPEL shall be liable for and shall indemnify Digicel against any liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of personal injury or death of any person arising out of or in the course of or caused by the execution of the tower erection or construction.

(iii) clause 3.0 of the contract states that all labour, methods or processes, implements, tools, machinery, transportation, fuel, explosives, supplies and other facilities required to construct and put in good order the installation of the tower shall be furnished by PPEL.

(iv) if equipment and plant are unsafe or the workers were not provided with safe equipment and plant, PPEL must be liable for any consequential employee-injury. This is what Digicel and PPEL contracted.

(v) PPEL was obliged to abide and comply with all laws, ordinances, statutes, permits, rules and regulations whilst constructing and erecting the said tower.

(vi) and the independent contractor principle would preclude any liability being ascribed to Digicel in the circumstances of this case. No master-servant relationship existed between the plaintiff and Digicel. And if PPEL is liable, Digicel cannot be vicariously liable for PPEL's negligence based on the independent contractor principle.

**PLAINTIFF'S AFFIDAVIT IN OPPOSITION**

[8]. The plaintiff opposes the application and has filed the affidavit of Rakesh Kumar to that effect. Kumar is the Chief Law Clerk at the law practice of Messrs Krishna & Co. The main thrust of Kumar's affidavit is that the matters pleaded at paragraphs 4 to 10 of the statement of claim are matters of contention between the defendants.

**DIGICEL'S SUPPLEMENTARY AFFIDAVIT IN SUPPORT**

[9]. Ritesh Chandra Singh, Legal Executive of Messrs Sherani & Company, has sworn a supplementary affidavit in support of Digicel's striking out application. He reiterates that PPEL and Digicel did enter into a contract which was executed on 13 December 2006 for the constructions of the tower in question. He points out that the said contract has been discovered to the plaintiff's Solicitors, Krishna & Co 009. He annexes a copy of the contract to his affidavit.

## THE LAW

*No Reasonable Cause of Action*

[10]. It is only in exceptional cases where, on the pleaded facts, the plaintiff could not succeed as a matter of law or where the cause of action is so clearly untenable that it cannot possibly succeed[2], will the courts act to strike out a claim on this ground. If the facts as pleaded do raise legal questions of importance, or a triable issue of fact on which the rights of the parties depend, the courts will not strike out the claim. His Lordship Mr. Justice Kirby in **Len Lindon -v- The Commonwealth of Australia (No. 2) S. 96/005** summarised the applicable principles succinctly[3].

[11]. I am of the view that the plaintiff has a reasonable cause of action against Digicel in this case, based on what he pleads at paragraphs 4,5,6,7,8,9 and 10 of the Statement of Claim. If the second defendant, Mr. Waqanivalu, was indeed the Construction Supervisor, employed by Digicel, and if he was in fact involved in giving instructions, directions and supervision over the rigging and construction work, and if the plaintiff was indeed following his instructions when he fell, then it is more than arguable that Mr. Waqanivalu is partly at fault, and accordingly, that Digicel is vicariously liable. Whether Mr. Waqanivalu was really in a supervisory position, and whether or not he really gave the instructions and directions which the plaintiff followed to his detriment, are indeed triable issues.

[12]. I see that Digicel relies on its contract with PPEL and the various indemnity and/or immunity clauses therein to resist being held accountable for the plaintiff's injuries. However, the plaintiff was not privy to that contract. And I agree with Mr. Krishna's argument that the contract is purely a matter between PPEL and Digicel. It is hardly a valid ground to strike out a claim against a party who is not privy to it.

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[2] (see **Attorney General –v- Shiu Prasad Halka 18 FLR 210 at 215**, as per Justice Gould VP; see also New Zealand Court of Appeal decision in **Attorney -v- Prince Gardner [1998] 1 NZLR 262 at 267**. An example of such a case is when a fact pleaded is so false that judicial notice can be taken as to its falsity (**National MBf Finance (Fiji) Limited –v- Nemani Buli [2000] ABU 0057/98**).

[3] Kirby J outline the relevant principles as follows:

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. This 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 .....A question has arisen as to whether O 26 r 18 applies to part only of a pleading
6. The guiding principle is, as stated in O 26 r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading 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.

*Scandalous, Frivolous & Vexatious*

[13]. The Courts will strike out a pleading on this ground if the claim, even if known in law, is factually weak, worthless or futile. The White Book Volume 1 1987 edition at para 18/19/14 states as follows:

> Allegations of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the issue (Everett v Prythergch (1841) 12 Sim. 363; Rubery v Grant (1872) L. R. 13 Eq. 443). "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).
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> The sole question is whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief prayed (per Selbourne L.C. in Christie v Christie (1873) L.R. 8 Ch. App 499, p. 503; and see Cahsin v Craddock (1877) 3 Ch. D. 376;Whitney v Moignard (1890) 24 Q.B.D 630). In Brooking v Maudslay (1886) 55 L.T 343, plaintiff made allegations in statement of claim of dishonest conduct against defendant, but he stated in his reply that he sought no relief on that ground. The allegations thus became immaterial, and were struck out as scandalous and embarrassing. So in an action on marine policies, a paragraph which purported to state what took place at an official inquiry held by the Wreck Commissioners was struck out as an attempt to discredit the plaintiffs and to prejudice the fair trial of the action (Smith v The British Insurance Co. [1883] W.N. 232; Lumb v Beaumont (1884) 49 L.T. 772).....
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> If any unnecessary matter in a pleading contains an imputation on the opponent, or makes any charge of misconduct or bad faith against him or anyone else, it will be struck out, for it then becomes scandalous (Lumb v Beaumont (1884) 49 L.T. 772; Brooking v Maudslay (1886) 55 L.T. 343. In Murray v Epsom Local Board [1897] 1Ch. 35, an imputation that one member of the Board was opposing the plaintiff's claim, not on public grounds, but for his own private interest, was struck out.
>
> 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 tort, 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 Gramophone Co. Ltd [1909] A.C. 488, p. 495.

[14]. In **Bullen, Leake and Jacobs**: **Pleadings and Precedents 12th edn at p145**, it is there stated that a pleading or an action is frivolous when it is without substance, is groundless, fanciful, wasting the Court's time, or not capable of reasoned argument. A pleading is vexatious when it is lacking in bona fides, is hopeless, without foundation, and/or cannot possibly succeed or is oppressive.

[15]. I do not see how the plaintiff's claim can be scandalous, frivolous or vexatitious against Digicel or Waqanivalu. There is no allegation of dishonesty, bad faith, misconduct or outrageous conduct pleaded.

*Prejudice, Embarrass or Delay Fair Trial*

[16]. A pleading will be struck out on this ground if it is so badly drafted as to be obstructive of any fair trial. The **White Book Volume 1 1987 edition at para 18/19/14** states as follows:

> 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 tort, 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 Gramophone Co. Ltd [1909] A.C. 488, p. 495.

*Abuse of Process*

[17]. The Courts will strike out a claim on this ground if its process is being used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes or where its process is being misused. Courts will rarely find that there is an abuse of process unless it concludes that the later proceedings amount to "unjust harassment". In the English case of **Goldsmith v Sperrings Ltd** [1977] 2 All ER 566, Lord Denning said as follows at 574:

> In a civilized society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abuse when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.

[18]. In **Broxton v McClelland** [1995] EMLR 485 at 498 Simon Brown LJ said:

> Only in the most clear and obvious case will it be appropriate upon preliminary application to strike **out** proceedings as an abuse of process so as to prevent a plaintiff from bringing an apparently proper cause of action to trial.

[19]. In **Cooper v Public Trustee Corporation Ltd** [2004] FJHC 250; HBC0082d.2000s (13 October 2004) – Pathik J said:

> As to what is an abuse of process the following passage from Halsbury's Laws of England 4th Ed. Vol. 37 para 434 is apt:
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> > *"An abuse of the process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for* ***striking out,*** *the facts may show that it constitutes an abuse of the process of the court, and on this ground the court may be justified in* ***striking out*** *the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court."*

[20]. In **Bradford & Bingley Building Society v Seddon [1999]1 WLR 1482**, Auld LJ in a judgment with which Nourse and Ward LJJ concurred said at p.1492:

> "As Kerr LJ and Sir David Cairns emphasised in Braggs v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1982]2 Lloyd's Rep. 132, 137, 138-139 respectively, the Courts should not attempt to define or categorise fully what may amount to an abuse of process; see also per Stuart-Smith LJ in Ashmore v British Coal Corporation [1992] QB 338, 352. Sir Thomas Bingham MR underlined this in Barrow v Bankside Agency Ltd [1996] 1 WLR 257 stating at page 263 B, that the doctrine should not be circumscribed by unnecessarily restrictive rules since its purpose was the prevention of abuse and it should not endanger the maintenance of genuine claims; see also per Saville LJ at page 266 D – E".

[21]. In **Manson v Vought and Others** [1999] BPIR 376, May LJ said at p.388:

> "Abuse of process is a concept which defies precise definition in the abstract. In particular cases, the Court has to decide whether there is abuse sufficiently serious to prevent the offending litigant from proceeding".

## CONCLUSION

[22]. I am not at all convinced that the claim against Digicel and/or Waqanivalu lacks any reasonable cause of action or is an abuse of process or is scandalous, frivolous or vexatitious. Accordingly, I dismiss the application. Costs in favour of the plaintiff which I summarily assess at $1,500 -00 (one thousand and five hundred dollars). This case is adjourned to Wednesday 14 August 2013 for mention at 8.30 a.m.

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**Master Tuilevuka**
**02 August 2013.**