

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**WESTERN DIVISION**

Civil Action HBC 37 of 2010

**BETWEEN** : **WILLIAM FRANK BENNETT** of Nadi, in the Republic of Fiji.

**Plaintiff**

**AND** : **AANUKA ISLAND RESORT LIMITED** t/a Amunuca Island Resort (In Receivership)

**1<sup>st</sup> Defendant**

**AND** : **KORDA MENTHA** as Receivers for Aanuka Island Resort Limited t/a Amunuca Island Resort of Martintar, Nadi.

**2<sup>nd</sup> Defendant**

**AND** : **NATIONAL BANK OF FIJI LIMITED** t/a **COLONIAL NATIONAL BANK** a body corporate duly constituted under the Companies Act (Cap 247) of 3 Central Street, Suva, Fiji as Mortgagees of the 1<sup>st</sup> Defendant

**3<sup>rd</sup> Defendant**

Solicitors : Pillai Naidu & Associates for the Plaintiff  
Howards Lawyers for the Defendant

## **RULING**

### **INTRODUCTION**

1. The defendant applies under Order 18 Rule 18(1) & Order 34 of the High Court Rules 1988 and on the inherent jurisdiction of the Court to strike out the plaintiff's statement of claim against it on the following grounds:
  - (i) It discloses no reasonable cause of action or defence,
  - (ii) It is scandalous, frivolous and vexatious
  - (iii) It is an abuse of process.
  - (iv) The plaintiff has failed to pursue this action diligently and in accordance with the rules as such it be dismissed for want of prosecution
2. The application was filed on 07 March 2011. It is supported by an affidavit of Leighton Turner sworn on 03 March 2011.
3. Turner is a litigation clerk at Howards Lawyers. He administers all litigation files. He swears the affidavit by virtue of the knowledge and awareness that he has on this matter in having assisted the solicitors in their management and handling of their related file.
4. Turner deposes that the action was commenced by Bennett on 18 February 2010. The statement of defence was filed on 31 March 2010. After that, the plaintiff has taken no further steps to proceed with the matter.
5. On 22 October 2010, Howards wrote a letter to Pillay Naidu & Associates. In that letter, they highlighted:



- (i) how Pillai Naidu and Associates has been dilatory in prosecuting the claim and,
  - (ii) how the first defendant was wound up by the court on 12 April 2010 and the Official Receiver appointed as Liquidator and,
  - (iii) accordingly, why Bennet must lodge his claim with the Liquidator by virtue of his status as an unsecured creditor
  - (iv) fourthly, that if no action is taken within the next seven days, Howards Lawyers was under instruction to file a striking out application.
6. On 14 October 2010, Pillai Naidu & Associates responded by letter which advised that they were in the process of filing an amended statement of claim.
  7. An Affidavit of Sanjani Lata sworn on 27 April 2011 was filed on 27 April 2011 in opposition to the striking out application. Lata is the Litigation Clerk employed at Pillai Naidu & Associates. In her affidavit, Lata admits to some allegations as she refutes others.
  8. Notably, at paragraph 9, she deposes that:

.....our client only became aware of the winding up of the 1<sup>st</sup> Defendant upon receipt of this application.
  9. Bennet also swore an affidavit on 23 May 2011 which was filed on 16 June 2011. I observe that he offers no comment on Lata's assertion that he knew nothing of the winding up of the 1<sup>st</sup> defendant company. If I may say so, I do not believe that he was unaware of the winding up proceedings or the winding up order. I say that because the winding up petition in question was in fact placed before me. The 1<sup>st</sup> defendant's case against the winding up petition was premised on some very extensive affidavits sworn by Bennet (see **Re Aanuka Island Resort Ltd** [2010] FJHC 116; HBF0047.2007 (12 April 2010)).

## **BACKGROUND**

10. The plaintiff claims from the defendants the sum of \$126,950-00 (One Hundred Twenty Six Thousand Nine Hundred & Fifty Dollars Only) s being unpaid salary from 17 March 2003 to 30 May 2009. It is alleged that the plaintiff was engaged by the defendants in various positions for development



work on the 1<sup>st</sup> defendant's resort from March 2003 to the position of Operations Project Manager.

11. It is alleged that the first defendant promised many things to the plaintiff in terms of remuneration and /or undertakings but these were not honoured.
12. These alleged promises are not particularised.
13. However, in an affidavit sworn by the plaintiff on 23 May 2011 in response to the striking out application, he annexes a draft amended statement of claim. He prays that he be given leave to file the amended statement of claim. At paragraph 5 of the proposed amended statement of claim, Bennet pleads:

THAT the 1<sup>st</sup> defendant filed his claim for salary with the 2<sup>nd</sup> Defendants.

14. A three-paragraph statement of defence was filed on 31 March 2010.

## **THE LAW**

### *No Reasonable Cause of Action*

15. As the Courts have said numerous times throughout the common law world, they will strike out a proceeding on this ground 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 will the courts act to strike out a claim.
16. 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. (as per Mr. Justice Kirby in **Len Lindon -v- The Commonwealth of Australia** (No. 2) S. 96/005 )

### *Scandalous*

17. An allegation in a pleading is scandalous and must be struck out if:
  - (i) it states matters which are indecent or offensive, and
  - (ii) is made for the mere purpose of abusing or prejudicing the opposite party (see **Christie v Chrisitie** [1873]8ch. App.499).
18. However, if the scandalous allegation is relevant and material to the case of whoever pleads it, then the allegation need not be struck out (see **Cracknall v Janson** [1879] 11 ch.d1.EA).



19. A scandalous allegation is relevant and material if it would be admissible in evidence to show the truth of any material allegation in the pleading 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)<sup>1</sup>.
20. In **Brooking v Maudslay** (1886) 55 L.T 343 for example, the plaintiff pleaded allegations of dishonest conduct but 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.
21. A pleading is embarrassing if it places the opposite party in the position that he or she does not know what is alleged against him or her or it does not make clear to the opponent what is alleged or leaves the opponent in doubt about how to respond, is unintelligible, is vague, and too general (see **Byrd v Nunn** (1877) 7 Ch D 284 at 287).

#### *Frivolous*

22. Frivolous matters on the other hand are those which are clearly unsustainable (**Dey v William Hill Park Lane Ltd** [1949] 1 All ER 219 CA).
23. In **Bullen, Leake and Jacobs: Pleadings and Precedents** 12th edn at page 145, 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.

#### *Vexatious*

24. A pleading is vexatious if it lacks *bona fides* and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble or expense (**see Burstil v Bey Jus** [1884] 26 ch.D.35) and/or cannot possibly succeed or is oppressive.

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<sup>1</sup> 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).



## *Abuse of Process*

25. The Courts will strike out a claim on this ground if its processes are not being used in good faith and for improper purposes as, for instance, where the court's process is being used as a means of vexation or oppression or for ulterior purposes.
26. Courts will rarely find that there is an abuse of process unless it concludes that the later proceedings amount to "unjust harassment" (see **Goldsmith v Sperrings Ltd** [1977] 2 All ER 566<sup>2</sup>).
27. 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.
28. 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".

## **COMMENTS**

29. There is nothing pleaded against the 3<sup>rd</sup> defendant. Accordingly, I strike out the claim against the National Bank of Fiji Limited t/a Colonial National Bank.
30. As for the claim against the 1<sup>st</sup> and second defendants, the allegations are so vague and lack particularity.
31. The defendants' counsel cite **Bruce v Oldhams Press Ltd** [1936] 1 KB 697 at 713 and **Rubeinstein v Truth & Sportsman Ltd** [1960] VR 473 at 476 as authority that, I quote from their submissions:

.....material facts should appear with clarity and appropriate particularity on the face of the pleadings and an application to strike out the whole or part of an embarrassing pleading is often preferred to an attempt to remedy it by a request for further and better particulars

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<sup>2</sup> Denning LJ said:

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.



32. In this instant case before me now, the proposed amended statement of claim annexed to the affidavit of Bennet does nothing more than what was originally poorly pleaded. In any event, there is no application pending before me to seek leave to amend the statement of claim.
33. Below, I juxtapose the original pleading and the proposed amendment, not to consider the proposed amendment, but, if only, to highlight the point:

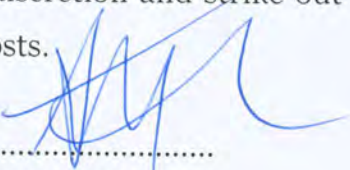
<i>Original Pleading</i>	<i>Proposed Amendment</i>
1. ...the Plaintiff claims from the Defendants the sum of Australian \$126, 950.00..being unpaid salary from 17 <sup>th</sup> March 2003 to 30 <sup>th</sup> May 2009.	(paragraph 1 same as Original)
2. ...the 1 <sup>st</sup> Defendants engaged the services of the Plaintiff in various positions for development work on the 1 <sup>st</sup> Defendants Resort from March 2003 onwards eventually making the Plaintiff the Operations Project Manager.	2...the 1 <sup>st</sup> defendant by letters dated 11 <sup>th</sup> November 2002 engaged the services of the plaintiff as project manages (sic) from March 2003 at a weekly salary of AUD\$1500 per week (sic).
3. ...the Defendants made various promises to the Plaintiff in terms of remuneration and benefits.	3...the plaintiff was paid part of salary by the 1 <sup>st</sup> defendant than (sic) accountants Messrs KPMG AUD\$30,450.00 at various times during his employment.
4. ...the Defendants have failed to honour their promises and/or undertakings.	4...the Plaintiff also carried out various other duties assigned by the 1 <sup>st</sup> Defendants and purchased certain items and goods and services for which the 1 <sup>st</sup> Defendant has not been paid (sic)
5. THE Plaintiff suffers loss and damages.	5...the 1 <sup>st</sup> Defendant (sic?) filed his claim for salary with the 2 <sup>nd</sup> Defendants

34. I accept that, sometimes, it may be preferable to allow a plaintiff to amend his statement of claim to plead the cause of action better. There is every indication in this case that to prolong Bennet's claim would be pointless. In saying that, I take into account the lack of particularity in the current statement of claim, and the real prospect that the plaintiff would not be able to improve on it anymore as he has already demonstrated in the proposed amendment. Also, I consider the fact that a part of Bennet's claim would be statute barred anyway, for that (unaccounted) portion of his claim relating to unpaid monies earned in 2003 and 2004.

## **ORDERS**

35. In this case, I will exercise my discretion and strike out the claim against all the defendants. No order as to costs.



  
 .....  
 Anare Tuilevuka  
**JUDGE**  
 12 May 2016