

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 362 of 2015

BETWEEN : **ASIA PACIFIC LOGISTICS (PTY) LTD & ANTHONY'S LOGGING** a limited liability company and a firm respectively, whose registered office is at 68 Dilkusha Road, Nausori.

PLAINTIFF

AND : **LAND TRANSPORT AUTHORITY** a body corporate established under the Land Transport Authority Act 1998, with its headquarters located at Lot 1, Daniva Road, Valelevu, Nasinu.

DEFENDANT

Appearances : Ms. Vaurasi, L. for the Plaintiff
Ms. Ligabalavu, M. for the Defendant

Ruling : 27 September 2017

RULING

Introduction

1. This is the Defendant's summons filed pursuant to Order 18 Rule 11, seeking an order that the Plaintiff give further and better particulars of the matters pleaded in paragraphs 6 to 24 of the statement of claim.
2. The Plaintiffs are in the business of harvesting and transporting mahogany and other timber. It has logging contracts with Fiji Hardwood Corporation and uses its trucks to cart logs in pursuance of the said contracts. In the course of business, the Plaintiff purchased two trucks with a manufacturer's gross vehicle mass (GVM) of 46,000kg and was granted a permit by the Defendant to carry loads

of up to 32,000kg for a period of 3 years notwithstanding the manufacturer's GVM of 46,000kg. Towards the end of 2014, the Defendant refused to grant an exemption permit for the Plaintiff's trucks and instead reduced the maximum GVM for the said trucks from 32,000kg to 26,000kg even though it was exempting other trucks of a similar make and dimensions to carry an excess of 32,000kg, and to others, 46,000kg. The Plaintiff says in this way, its right to equal treatment before the law has been breached. It claims the Defendant continuously booked its trucks for carrying loads in excess of 26,000kg such that it had to recall its trucks, resulting in its inability to fully adhere to the contract terms and inter alia, loss of income, and harm to its reputation. It claims, amongst other things, for special, general and exemplary damages, interest, costs, and other relief as the Court deems just.

3. The writ was served on 24 November 2015 on the Defendant who acknowledged service on 25 November 2015. On the same day, the Defendant wrote to the Plaintiff's counsel seeking further and better particulars of the matters pleaded in paragraphs 1 – 24 of the statement of claim.
4. Dissatisfied with the Plaintiff's replies to its request, the Defendant filed this summons seeking an order for the Plaintiff to provide further and better particulars.

The law

5. Order 18 of the High Court Rules deals with procedural and formal requirements of pleadings. Rule 6 (1) requires, inter alia, that facts, not evidence, be pleaded:

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. (Underlining for emphasis)

6. The distinction between fact and evidence is not always clear and at times, overlap. The author of *Australian Civil Procedure* 4th Ed, at pg 182, illustrates this as follows:

To take an obvious example, in an action for negligence, the plaintiff must prove a duty of care and a breach of that duty by the defendant. The plaintiff alleges the duty of care and the defendant's breach of it. The facts that constitute the breach are evidence. If, for example, the defendant owes the plaintiff a duty to provide a safe system of work, facts that the defendant maintained machinery by a particular ineffective method are evidence. The ultimate fact in support of the breach of duty is, inter alia, that the defendant failed to properly maintain the machinery. What constitutes the actual impropriety is evidence.

7. In *Williams v Wilcox*, 112 E.R. 857 at 863, Denman CJ stated:

It is an elementary rule in pleading that, when a state of facts is relied on, it is enough to allege it simply, without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation...It is true that this mode of pleading does not disclose to the defendants the case on which the plaintiff relies: but to object to it on this ground, is to misconceive on object of pleading, and to forget another: the certainty or particularity of pleading is directed, not to the disclosure of the case of a party, but to informing the court, the jury, and the opponent of the specific proposition for which he contends, and a scarcely less important object is the bringing the parties to issue on a single and certain point, avoiding that prolixity and uncertainty which would very probably arise from stating all the steps which lead up to that point.

8. Order 18 rule 11 (3) of the High Court Rules gives the Court discretionary powers to order a party to serve on any other party particulars of their claim, defence, or other matter stated in his pleading or affidavit ordered to stand as a pleading.

9. The rule requiring a party to give particulars is premised on

...the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly, without surprises and, as far as possible, so as to minimise costs... (*The Supreme Court Practice* 1999, page 327, at 18/12/2)

10. *The Supreme Court Practice* (supra) sets out the function of particulars as being, to:

- (1) 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...
- (2) prevent the other side from the being taken by surprise at the trial...
- (3) enable the other side to know with what evidence they ought to be prepared and to prepare for trial...
- (4) limit the generality of the pleadings...
- (5) limit and define the issues to be tried, and as to which discovery is required...
- (6) tie the hand of the party so that he cannot without leave go into any matters not included... (*The Supreme Court Practice, supra*)

11. Particulars do not replace the necessary averments in the pleading, nor are they to fill in the gaps in the pleading. (*Pinson v. Lloyds, etc., Bank* [1941] 2 K.B. 72 at 75)

12. Particulars will not be ordered where the onus of proving the allegations lies with the applicant. (*Cheeseman v. Bowaters United Kingdom Paper Mills Ltd* [1971] 1 W.L.R. 1773; [1971] 3 All E.R. 513)

13. In *In re the Estate of Harry Janson Ho* Probate Action No. 10 of 1989, Byrne J set out the principles for further and better particulars 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

Particulars need be given only of facts and not of evidence but as much certainty or particularity will be directed in a particular 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 12th 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. The practical reason for this rule of practice is that whereas when interrogatories are delivered, the answers must be on oath and various objections to provide the answers such as privilege, oppressiveness and fishing and vexatiousness may be taken by the other party, the same is not true of further particulars. In addition, because answers to interrogatories must be sworn if, when the matter comes to trial the person interrogated when giving evidence appears to resile from or vary his answers to interrogatories, an attack may be made on his credibility. This is not true of further and better particulars so that a party may obtain an advantage over his opponent if further and better particulars are supplied when they would not necessarily have been if interrogatories had been delivered.

Analysis

14. The issue for the Court's determination is whether to grant the Defendant's application for further and better particulars.
15. It is settled that a cause of action must be pleaded with sufficient particulars to enable the Defendant to plead his defence. An order for

particulars will be made where the absence of the particulars sought will result in the inability of the Defendant to plead his defence.

16. In this case, the only cause of action pleaded by the Plaintiff is the violation of its Constitutional right to equal treatment under section 26 of the Constitution. The particulars of the alleged breach are pleaded in paragraph 15 of the statement of claim.
17. In respect of this paragraph, the Defendant seeks particulars of “the facts and circumstances alleged to have been made by the Defendant being relied upon by the Plaintiff to warrant the issue of prior notification on withdrawal of exemption of permits”. In my opinion, there is no need for further particularization. The request seems to be a search for evidence and not facts. Indeed, it is possible for the Defendant to plead to the facts in the claim, simply by denying unreasonableness in its withdrawal of exemption permit for the Plaintiff’s trucks.
18. The Defendant also seeks particulars of the Plaintiff’s claim in respect of:
 - the inspection of the Plaintiff’s trucks by the Defendant;
 - the use of the trucks for logging purposes and the need for exemption permits;
 - representation by the Defendant’s officers that an exemption permit would be issued for the Plaintiff’s trucks;
 - the purchase of a truck in reliance on the issuance of an exemption permit;
 - the subsequent refusal of the Defendant to grant exemption permits;
 - its contracts with Fiji Hardwood Corporation;
 - consequences of the failure of the Defendant to grant exemption permits to its trucks;
 - special and general damages.

19. With the authorities and guidelines above in mind, I have considered the nature of the requests by the Defendant. My findings are as follows:

1. The Plaintiff objects to the request for particulars for paragraph 6 of the claim, saying that the Defendant has in its system the information it seeks. With respect, it is no answer to a request for particulars to say that the information sought is within the knowledge or possession of the applicant. Thus in *Public Trustee v Mahar* 7/2/90 per Neazor J, HC Wellington, CP818/88, the Court stated:

...it is no objection to a request for particulars of a pleading that knowledge of the matter is in the hands of the opposing party; nor that the defendants are trying to bind the plaintiff to a definite story. The purpose of the statement of claim is to give notice of what the plaintiff alleges so that the defendant knows what has to be met, is not taken by surprise at trial, and can prepare evidence within the framework of the issues raised and defined by the statement of claim: the *Supreme Court Practice* 1988 para.18/12/44.

Notwithstanding, I uphold the Plaintiff's objection that the particulars sought are evidence, not facts.

2. Paragraph 7: Request is for evidence and not facts; (3) is in the form of interrogatories, and in any event, the Defendant's reply is sufficient.
3. Paragraphs 8 - 15: Seek evidence, not facts and in any event, the Plaintiff's replies to the requests in respect of paragraphs 9, 12 and 14 suffice.
4. Paragraphs 12 & 14: Seek evidence, not facts. The Plaintiff has also replied to part of these requests and I consider the replies provide sufficient particulars.

5. Paragraph 13 in my opinion is a proper request and I consider the Plaintiff ought to supply the particulars sought.
6. With the exception of 24 (ii) in the Defendant's schedule containing a list of particulars sought, the requests for particulars in respect of Paragraphs 15 – 20 of the claim seek evidence and not facts. The Plaintiff's reply to the request for particulars in respect of paragraph 18 suffices.
7. Particulars sought in respect of paragraphs 21, 23 – 24 seek evidence; the matters pleaded in paragraphs 23 – 24 are, in my opinion, sufficiently particularised and in any event, any further particulars are likely to be disclosed during discovery.

20. Order

1. With the exception of particulars sought in respect of paragraph 13 (as contained in item 17 of the Defendant's Schedule), and paragraph 16 (2) (as contained in 24 (ii) of the Schedule), I uphold all of the Plaintiff's objections.
2. Accordingly, the Plaintiff is to serve on the Defendant within 14 days of the date of this Order, further and better particulars sought for paragraph 13 and paragraph 16 of the statement of claim, as contained in items 17 and 24 (ii) of the Schedule.
3. Costs for the Plaintiff, summarily assessed in the sum of \$600.
4. This case is now adjourned to 13 October 2017 for mention at 9.00 a.m.



S.F. Bull
S.F. Bull
Acting Master