

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 116 of 2016

**BETWEEN:** **VODAFONE FIJI LIMITED** a limited liability company duly incorporated in Fiji and having its registered office at 168 Princess Road, Tamavua, in the Republic of Fiji.

PLAINTIFF

**AND:** **DIGICEL (FIJI) LIMITED** a limited liability company having its registered office at First Floor, Kadavu House, Victoria, Tamavua, in the Republic of Fiji.

DEFENDANT

**BEFORE:** Master Vishwa Datt Sharma

**COUNSEL:** Ms. Devan - for the Plaintiff  
Mr. Katia - for the Defendant

Date of Ruling : 18<sup>th</sup> October, 2017

**RULING**

*[Application by the Defendant seeking an order to strike out the Plaintiff's Statement of Claim pursuant to Order 18 Rule 18 Rule 18 of the High Court Rules, 1988 and the Court's Inherent Jurisdiction.]*

**APPLICATION**

1 This is the Defendant's Summons to Strike Out, and seeks the following orders:

- (a) That the 1<sup>st</sup> cause of action of false and misleading advertising as stated in paragraphs 19 to 27 of the Plaintiff's Writ of Summons and Statement of Claim that was filed on 16<sup>th</sup> May, 2016, be struck out on the grounds that it discloses no reasonable cause of action;

- (b) *That paragraphs 29 to 33 of the Plaintiff's Statement of Claim pertaining to sections 75 and 76 of the Commerce Commission Decree 2010 be struck out on the grounds that it is statue barred and frivolous and vexatious;*
  - (c) *That the Plaintiff's Writ of Summons and Statement of Claim be struck out on the grounds that allegations of fraud and special damages have not been pleaded with the necessary particulars as required by law and it is otherwise an abuse of the process of the court;*
  - (d) *That the costs of this action be paid by the Plaintiff;*
  - (e) *Any other orders that this Court deems just and expedient.*
2. The application is made pursuant to *Order 18 Rule 18 Rule 18 of the High Court Rules 1988 and the Court's inherent jurisdiction.*
  3. The Plaintiff opposed the Defendant's Striking out application.
  4. Both Counsels took the stance that because the Striking Out application sought determination on the **Ground of "No Cause of Action"**, there was no need to file and serve Affidavits. Nevertheless, this Court granted time to the Defendant to file and serve Affidavit but the Defendant chose not to file and serve any Affidavit.
  5. The application was heard in terms of the **oral and written submissions** made in this proceeding by the Plaintiff and the Defendants.

#### THE LAW and PRACTICE

6. The law on striking out pleadings and endorsements is stipulated at *Order 18 Rule 18 of the High Court Rules 1988* which states as follows-

*18.-(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any 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) it may prejudice, embarrass or delay the fair trial of the action; or*
- (d) it is otherwise an abuse of the process of the court;*

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

*(2) No evidence shall be admissible on an application under paragraph (1) (a).*

7. In Paulo Malo Radrodro vs Sione Hatu Tiakia & Others, HBS 204 of 2005, the Court stated that:

"The principles applicable to applications of this type have been considered by the Court on many occasions. Those principles include:

- a. A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered - Lord Pearson in *Drummond Jackson v British Medical Association* [1970] WLR 688.
- b. Frivolous and vexation is said to mean cases which are obviously frivolous or vexatious or obviously unsustainable - Lindley LJ in *Attorney General of Duchy of Lancaster v L.N.W Ry* [1892] 3 Ch 274 at 277.
- c. It is only in plain and obvious cases that recourse would be had to the summary process under this rule - Lindley MR in *Hubbuck v Wilkinson* [1899] Q.B. 86.
- d. The purpose of the Courts jurisdiction to strike out pleading is twofold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice; defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.
- e. "The first object of pleadings is to define and clarify with position the issues and questions which are in dispute between the parties and for determination by the Court. Fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that the opposing parties can bring evidence on the issues disclosed - *ESSO Petroleum Company Limited v Southport Corporation* [1956] A.C at 238" - James M Ah Koy v *Native Land Trust Board & Others* - Civil Action No. HBC 0546 of 2004.
- f. A dismissal of proceedings "often be required by the very essence of justice to be done"..... - Lord Blackburn in *Metropolitan - Pooley* [1885] 10 OPP Case 210 at 221 - so as to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless allegation - Lorton LJ in *Riches v Director of Public Prosecutions* (1973) 1 WLR 1019 at 1027"

#### ANALYSIS and DETERMINATION

8. There are **Three (3) issues** to be deliberated upon and determined by this Court-

##### 1<sup>st</sup> issue-

(a) Whether the First Cause of Action of "False and Misleading Advertising" be struck out on the grounds it discloses no Reasonable Cause of Action?

##### 2nd issue-

(b) Whether the Claim pertaining to Sections 75 and 76 of the Commerce Commission Decree 2000 be struck out on the grounds that it is Statute Barred and Frivolous and Vexatious?

##### 3rd issue-

(c) Whether the allegations of Fraud and Special Damages have not been pleaded with necessary particulars and is an Abuse of the Process of the Court?

1<sup>st</sup> Issue- Whether there is No Reasonable Cause of Action

9. The Defendant in its Statement of Defence stated that 'False and misleading Advertising' does not constitute a cause of action at common law as alleged by the Plaintiff, but in its Reply to the Statement of Defence the Plaintiff states that it has a valid cause of action based on consumer protection laws and regulations of Fiji.

The Plaintiff is relying on section 78 of the Decree in relation to "False and misleading Advertising"

Sections 75 and 76 of the Decree under the Plaintiffs cause of action titled "Breach of the Commerce Commission Decree 2010- comes under Part 7 of the Decree.

10. The Plaintiff stated it has a valid cause of action in law against the Defendant.

The Plaintiff's claim against the Defendant is for false and misleading advertising, unlawful comparative advertising or commercial disparagement which are all categories of conduct regulated under the Commerce Commission Decree 2010 of Fiji. The Commerce Commission Decree is the legislation that protects not only the consumers but persons in trade against unfair competition and unfair or deceptive practices in advertising, marketing and trade competition in Fiji.

'Commercial disparagement' (as pleaded in paragraph 30 of the claim), is a common law tort closely related to Defamation. It is defined as a false statement intended to call into question the quality of a competitor's goods or services in order to inflict pecuniary harm.'

False Advertising is prohibited by the Commerce Commission Decree 2010. Part 7 of the Decree provides for consumer protection and unfair trade practices.

11. It is for the Plaintiff to establish that he has a Cause of Action in this case against the Defendant in terms of the facts and the Pleadings filed herein.
12. On the other hand, the Defendant must establish that the Plaintiff does not have a Cause of Action in this case against him.
13. Reference is made to the following notes to Order 17 r19 of the Supreme Court Practice (UK) 1979 Vol. 1 or 18/19/11 on what is meant by the term 'a reasonable cause of action' sufficiently provides the answer to the applications.

*".....A reasonable cause of action means a cause with some chance of success when only the allegations in the pleadings are considered (per Lord Pearson in Drummond Jackson v British Medical Association [1970] 1 WLR, 688; [1970] 1 All ER 1094 CA). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 QB 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed is no ground for striking out (Moore v Lawson (1915) 31 TLR 418, CA.; Wenlock v Moloney [1965] 1 WLR 1238 1 W.L.R. 1238 [1965] 2 All ER 871, CA)...."*

14. Reference is also made to Lindley M.R. in *Hubbuck & Sons, Ltd v Wilkinson, Heywood & Clark Limited* [1899] 1QB 86 at page 91 said:

*".....summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression "reasonable cause of action" in rule 4 shows that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases".*

15. The Plaintiff has instituted this Claim alleging *False and Misleading Advertising* and *Breach of Commerce Commission Decree 2010* on the part of the Defendant. All along the proceedings, the Defendant has denied these claims.
16. However, after a careful consideration of the submissions made by both parties and upon the perusal of the Pleadings herein, it is obvious that the Plaintiff's Claim raises issues in terms of the facts and law.
17. Therefore, these issues need to be investigated and determined by Court in terms of the evidence tendered at a proper hearing which will entitle the Defendant to cross examine and satisfy its standing in the matter.
18. This particular ground of the Defendant that there is "no cause of action" accordingly fails.

2<sup>nd</sup> Issue Whether the Claim pertaining to Sections 75 and 76 of the Commerce Commission Decree 2000 be struck out on the grounds that it is Statute Barred and Frivolous and Vexatious

19. The Defendant relies on *Section 146 of the Commerce Commission Decree 2010* which deals with *Actions on Damages*.
20. Further, the Defendant submitted that that clearly, the Decree relied on by the Plaintiff excludes to provide the requisite *locus standi*.
21. Similarly so, he stated that *section 78* of the Decree regards the commission of an offence under the Decree. The Plaintiff does not have the authority to prosecute this offence, and even if they did, then they are bringing it before the wrong forum even if its cause of action pursuant to sections 75 and 76 of the Decree were to survive, this application to be struck out.
22. However, the Plaintiff submitted that this action is not **statute barred**. The date of the advertisements are 28<sup>th</sup> April 2016 and 03<sup>rd</sup> May, 2016 respectively and this action was filed on 16<sup>th</sup> May, 2016, within a few days of the second advertisement being published.
23. The Plaintiff submitted citing her contention that the Defendant does not specify in its summons the legal basis on which he claims that this action is statute barred. No legislative provisions are relied upon by the Defendant to seek an order for strike out. The Defendant's summons is defective to this extent and the Plaintiff relies on section 146 of the Commerce Commission Decree 2010.

24. The **Plaintiff's action** stems from the two (2) Newspaper Advertisements published by the Defendant when it is alleged to have sought to compare new regulated prepaid rates of service providers in Fiji with its own rates. The first advertisement published in the Fiji Times and Fiji Sun newspapers on 28<sup>th</sup> April 2016 whilst the second advertisement published on 03<sup>rd</sup> May, 2016 when the Defendant purported to correct its earlier misstatements after the Plaintiff raised concerns with the Fiji Commerce Commission.
25. The Plaintiff referred Court to particulars at paragraph 24 (i) - (vi) of its claim and stated that the second advertisement still contained false and misleading information.
26. I find that the **Defendant** has not **challenged** the dates of the two (2) Newspaper Advertisements and has failed in its bid to establish any **legal basis** on which it claims that the Plaintiff's Claim is **statute barred**. After all, the Plaintiff's Claim hinged on the two (2) Newspaper Advertisements.
27. For the above rational, the Defendant's ground citing that the **Plaintiff's Claim** is **statute barred** also fails.

3<sup>d</sup> issue- (c) Whether the allegations of Fraud and Special Damages have not been pleaded with necessary particulars and is an Abuse of the Process of the Court?

28. It is well settled that this Court has **inherent jurisdiction** to strike out the claim or pleadings for **abuse of Court process**. Reference is made to paragraph 18/19/18 of the Supreme Court Practice 1993 Vol. 1.-

At paragraphs 18/19/17 and 18/19/18 of Supreme Court Practice 1993 (White Book) Vol 1 it is stated as follows:-

*"Abuse of Process of the Court"- Para. (1) (d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court." This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see Castro v. Murray (1875) 10 P. 59, per Bowen L.J. p.63). See also "Inherent jurisdiction," para.18/19/18."*

*"It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the issue of fraud after the self-same issue has been tried and decided by the Irish Court (House of Spring Gardens Ltd. v. Waite[1990] 2 E.R. 990 C.A)."*

*"Inherent Jurisdiction - Apart from all rules and Orders and notwithstanding the addition of para.(1)(d) the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process (see Reichel v. Magrath (1889) 14 App.Cas. 665). (para 18/19/18).*

- 
28. The **Defendant's** Summons seeking orders to strike out the Plaintiff's Writ of Summons and the Statement of Claim on the ground that "allegations of fraud and special damages" have not been pleaded with the "necessary particulars" as required in Law and it is otherwise "**an abuse of the process of the Court**".
29. I have perused the Plaintiff's Claim and find that there are no allegations of "**fraud and special damages**." I do note that there is a claim for **General Damages** in terms of unlawful comparative advertising and for **breaches** of the Commerce Commission Decree or seeks other **Remedial orders**.
30. Therefore, I find that the **Defendant's Summons** is rather **misconceived** in the above circumstances and accordingly this **ground seeking striking out** of the Plaintiff's Claim also **fails**.
31. I will now deal with the **issue of costs** in light of my findings to the Defendant's striking out Summons.
32. The **Plaintiff** submitted that the application filed by the Defendant ought to be struck out 'with full indemnity costs or on a higher scale of costs considering that the Plaintiff's solicitors had notified the Defendant's solicitors in writing on 28 February 2017 that the application was being made with inordinate delay and there was no legal basis for strike out application to be made.
33. The **Defendant** in reply stated that they wanted to **expedite** this case and that is why they came with the **striking out application**.
34. The Plaintiff's Writ of Summons was filed, commenced and also served on **16<sup>th</sup> May, 2016**.
35. The matter reached the stages of the **Pre-Trial Conference** to be held between the parties to the proceedings and the minutes to be formalised. The Plaintiff issued Notice requesting Pre-Trial Conference but still no Pre-Trial Conference minutes (if indeed PTC was held) appears on the Court file.
36. The **Defendant** instead filed an Interlocutory Summons seeking orders for striking out on 02nd March, 2017, notably some 10 months after the service of the Plaintiff's Writ.
37. Both parties filed written submissions and made appearances. Both have obviously incurred costs. Since the **Defendant's** striking out application fails against the Plaintiff, the **Plaintiff** is entitled in the circumstances to **costs** summarily assessed at **One Thousand Five Hundred Dollars (\$1,500)**.
38. In **Conclusion**, I make the following **orders** accordingly-
- (i) **That the Defendant's Summons seeking the Striking Out of the Plaintiff's Writ of Summons and the Statement of Claim hereby fails.**

- (ii) The Defendant to pay to the Plaintiff summarily assessed costs of \$1,500 within 14 days.
- (iii) Matter to take its normal cause and adjourned to 21<sup>st</sup> November, 2017 @ 9am for further directions.
- (iv) Orders accordingly.

Dated at Suva this 18<sup>th</sup> day of October, 2017



MR VISHWA DATT SHARMA  
Master of High Court, Suva

cc: *Neel Shivam Lawyers, Suva.*  
*Switibau and Sloan, Suva.*