SUGAR FESTIVAL COMMITTEE v FIJI TIMES LTD AND SPECIAL ADMINISTRATOR (HBC0078 of 2010)

HIGH COURT — CIVIL JURISDICTION

TUILEVUKA M

1 November 2012

Procedure — application to strike out statement of claim — whether reasonable cause of action disclosed — conduct of second defendant — claim was poorly pleaded — High Court Rules O 18.

The second defendant applied to strike out the plaintiff's statement of claim on the grounds that it disclosed no reasonable cause of action. The plaintiff's case centred around the second defendant's alleged involvement in instigating and orchestrating queries which led to an official investigation into the plaintiff's affairs and accounts. The plaintiff argued that the second defendant's actions demeaned the plaintiff's reputation. The plaintiff sought damages and an injunction to restrain the second defendant from interfering with the management and control of the affairs of the plaintiff.

Held –

(1) It is the association and not the committee which is incorporated under the Charitable Trusts Act and which has locus to institute proceedings in this or in any other court. Further, the second respondent had been sued, purportedly as an office, however, the allegations levelled against the office holder are all personal.

(2) The claim is poorly pleaded and lacks depth in the way it mobilises the facts to the cause. Notwithstanding the defects of pleadings, it appears that the plaintiff may have a reasonable cause of action which it has failed to put in proper form. In those circumstances, a court would ordinarily allow the plaintiff to reframe its pleading.

Len Lindon v The Commonwealth of Australia (No 2) S 96/005, followed.

Application dismissed.

Cases referred to

Goldsmith v Sperrings Ltd [1977] 2 All ER 566; *Broxton v McClelland* [1995] EMLR 485; *Bradford & Bingley Building Society v Seddon* [1999] 1 WLR 1482; *Manson v Vooght* [1999] BPIR 376, not followed.

Kevueli Tunidau for the Plaintiff/Respondent.

Natasha Khan for the Defendant/Applicant.

Tuilevuka M.

INTRODUCTION

[1] The second defendant applies under O 18 r 18 (1) (a) 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. The ground stated is that the claim against the second defendant discloses no reasonable cause of action. No affidavit is filed in support of the application. This is to be expected as O 18 r 18(2) requires no evidence to be presented for any striking out application on this ground.

[2] Order 18 r 18(1)(a) states as follows:

> 18 (1). The Court may at any stage of the proceedings order to be struck out or amended any pleading or 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

BACKGROUND

[3] The plaintiff ("committee") is the organizing committee for the Sugar Festival Association ("association").The association was incorporated under the Charitable Trusts Act (Cap 67). The committee is elected by the association[1] and is the body that actually manages and controls the affairs of the association[2]. The association is widely acknowledged for its role as the vehicle for the annual Sugar Festival in the municipality of Lautoka.

[4] Primarily, the festival is a fundraising activity for charity.Funds raised from the festival are usually earmarked for various community and social projects in and around the municipality.

[5] Every year, the Lautoka City Council ("council") would, either sponsor a charity queen candidate to the festival, or, it would release its members for *ad-hoc* involvement in the committee. For many years, the council and the association had a symbiotic relationship. This began to sour in 2009 – it appears - when the committee refused to bow to certain personal whims and caprices of the SA.

[6] The following instances are pleaded:

(i) sometime in 2009, the SA had sought funds from the committee to pay for his daughter's tuition fees. At first, the committee had declined the request. Later however, on 08 July 2009, the committee obliged and paid the requested sum of $1,818 to the SA. But this was only because of pressure from SA in the form of a threat to withdraw its sponsorship of a contestant at the 2009 Sugar Festival. This amount was refunded in March, 2010 after the issue was highlighted by the committee. I gather that the committee only highlighted this incident after the Fiji Times had published an article in February 2010 which queried the affairs of the association (see below).

(ii) in November, 2009, the SA had requested the committee to use a hearse owned by the committee. The committee refused.

(iii) in December, 2009 the SA directed the committee to purchase various materials of corrugated iron roofing, steel pipes and poles worth about $2,000 for his personal use. The committee again declined.

(iv) sometime before 20 February 2010, the SA met with the committee chairman in the presence of a Fiji Times reporter. At the meeting, the SA quizzed the chairman on various committee accounts as well as a medical insurance cover that the committee had taken up for its members. It turns out that the committee was setting aside $10,000 annually for this purpose.

(v) the above meeting led to the printing of three articles in the Fiji Times between February and March 2010[3]. The first of these articles spotlighted the queries (and later investigations) on the association's affairs. Notably, the second of these articles highlighted the same allegations of impropriety against the SA (see (i) to (iii) above).

1. See clause 5(h) of the association's constitution.
2. Clause 17 states that **"[t]he management and control of the affairs of the Association shall be vested in an Executive Committee"**.
3. In paragraphs 35 to 37, the plaintiff sets out the three newspaper articles in question. These, the plaintiff pleads at paragraphs 46 to 52, were in their natural and ordinary meaning, meant and were understood to mean that the committee was dishonest in the management and control of the sugar festival funds and that the committee members were dishonest, corrupt and unreliable and were not fit for their office and that in consequence, the plaintiff's reputation has been seriously damaged.

The third article reported that the SA had made representations to the Office of the Commissioner Western for an independent audit of the committee's accounts[4].

GIST OF THE CLAIM

5 **[7]** The case theory against the SA centers around his alleged involvement in instigating and orchestrating queries which led to an official investigation into the committee's affairs and accounts. All this had lowered the committee's status and reputation and also caused mental anxiety to its members[5].

10 **[8]** The claim– rather subtly - contextualizes the SA's probe into its affairs against the regressing souring relationship that has emanated from the *"tuition fee"* and the *"sugar festival contestant"* matter, the *"hearse"* incident, and the *"corrugated iron"* issue (see paragraph [6] (i) to (iii) above). I say "subtly" because there is no direct allegation of ill-motive or malice against the SA in the 15 statement of claim. But, with or without such allegation, the position at law remains that the due adminitration of charitable trusts set up for public purposes under the Charitable Trusts Act (which is what the association is) is, genuinely, a matter of public concern. Furthermore, those charged with the administration of such trusts should not have any proprietary or beneficial interest in the trust 20 funds.

[9] Against that background, one would think that the SA had every entitlement to query the association's affairs – as a matter of public interest – if there are genuine grounds for an inquiry or investigation. The question I ask is: does it matter what his motives were – if it were to turn out that the association was 25 indeed overreaching in creating and maintaining the accounts and the health insurance cover in question (assuming that its members were engaged on a "voluntary" basis and had other full-time vocations)? Or did the SA go overboard, if assuming, that he did orchestrate the involvement of the media – and the public spectacle that ensued?

30 **[10]** Ms. Khan submits that the statement of claim pleads no specific cause of action against the SA. However, Mr. Tunidau maintains that the SA's actions demeaned the committee's reputation in the eyes of right thinking members of society. Although (as stated), no malice or ill-will is pleaded, Mr. Tunidau

35

4. In paragraphs 38 to 45 and 53 to 56, the plaintiff sets out the facts it alleges against the SA. The allegation is that it was the SA who had initiated the queries on the committee's accounts through a letter it had written to the Commissioner Western seeking a re-audit of the committee's accounts by an independent auditor. On 06 March 2010, after the Fiji Times printed its third article which inter alia highlighted that the association had paid the SA's 40 daughter's tuition fees, the SA did turn up at the committee chairman's residence with other men and refunded all monies that the association had paid towards the SA's daughter's tuition and related expenses. Two or three days later, the Commissioner Western then caused a meeting with the committee to sort out some key issues and some three weeks later, the SA directed his staff members who were members of the committee to step down from their positions in the committee. It is alleged at paragraph 45 that:**…the action of the 2nd Defendant discredited 45 the status of the Plaintiff**
5. Pparagraphs54 to 56 of the statement of claim plead as follows:
   54. …the conduct of the 2nd Defendant referred to in paragraphs 30-31, 34-36, 42, 44, 47, 53 and 59 *lowered the Plaintiff's status and reputation to right thinking members of the society and continued to injure the feelings and personality of members of the Plaintiff body*.
   55. …the action of the 2nd Defendant complained as at paragraphs 27-28, 33-34, 38-39, 41 50 and 53 *has caused some severe mental anxiety to the Plaintiff* and its *individual members*.
   56. …the action of the 2nd Defendant referred to at paragraph 41 *would likely cause the loss of employment to members of the Plaintiff in the employment of the 2nd Defendant*.

submits that the SA's conduct was personal and malicious and - as a result - the committee has lost major business and corporate sponsorships and finance.

OBSERVATIONS

5 **[11]** The committee does go to great lengths in its pleadings to explain itself and to justify its position. A good part of its pleadings in fact is pleaded in the *"defence-mode"*. So much so, as to justify any suspicion that its claim is, but a public relations exercise to save face. For example, the committee has pleaded that:

10

(i) it does have powers in the association's constitution to open and operate bank accounts, to keep a reserve fund, and even to invest funds in accordance with its purposes.

(ii) it has always been transparent about these accounts. For example, its magazine which it has published annually (and widely circulated) since 2003, has always detailed its audited accounts. Furthermore, at every Executive and AGM, the treasurer has always presented a Finance Report which, inter alia, updates members as to the status of the association's interest bearing deposits.

15

(iii) the idea of a medical cover for committee members was first broached at one of its meetings. This finally came to fruition after much discussion, when it was finally agreed, unanimously, at an AGM in January 2006, that the sum of $10,000 be set aside each year on fixed deposit for the members' medical treatment.

20

(iv) the association's accounts have always been audited by various auditors. Also, the term deposit accounts and the amount set aside for insurance purposes are reflected in the Financial Statement for the year ending 31 December 2009.

25

(v) the operation of the accounts and the medical cover is consistent with the powers of the committee conferred by the association's constitution.

(vi) as if to further bolster the point that the committee is transparent in its affairs, paragraphs 25 to 34 plead that:

- in 2009 the office of the SA was invited by the committee to be an advisor to the Sugar Committee 2009. As an advisor, the SA was familiar with the general operation and affairs of the committee.

30

- the committee was comprised of executive and co-opted members who are respectable citizens of Lautoka City.
- some committee members both as executive and co-opted were in the employment of the SA.

35

- the sum of $1,818 was paid to the 2nd Defendant on 8 July, 2009. This amount was refunded in March, 2010 after the issue was highlighted by the Plaintiff.

[12] In paragraph 57, the committee pleads that on 19 March 2010, it contributed $10,000 to the Prime Minister's National Disaster Relief and Rehabilitation Fund - which contribution was personally acknowledged by the Prime Minister.

40

[13] The reliefs sought against the SA are general damages and an injunction to restrain the SA from interfering with the management and control of the affairs of the committee.

45

The Law

No Reasonable Cause of Action

[14] Courts rarely will strike out a proceedingon this ground. 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

50

possibly succeed[6] - will the courts act to strike out a claim. 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 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

[15] 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) LR 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 QBD 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 LJCP 663).
>
> The sole question is whether the matter alleged to 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) LR 8 Ch

6. (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-General 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) Ltd v Nemani Buli* [2000] ABU 0057/98).

App 499, at 503; and see *Cahsin v Craddock* (1877) 3 ChD 376; *Whitney v Moignard* (1890) 24 QBD 630). In *Brooking v Maudslay* (1886) 55 LT 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] WN 232; *Lumb v Beaumont* (1884) 49 LT 772)..........................

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 LT 772; *Brooking v Maudslay* (1886) 55 LT 343. In *Murray v Epsom Local Board* [1897] 1 Ch 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] AC 488, 495.

[16] 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.

Prejudice, Embarrass or Delay Fair Trial

[17] 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] AC 488, p. 495.

Abuse of Process

[18] 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.

[19] 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.

[20] 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:
>
> "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."

[21] 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 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'.

[22] In *Manson v Vooght* [1999] BPIR 376, May LJ said at 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

[23] It is the association and not the committee which is incorporated under the Charitable Trusts Act and which has locus to institute proceedings in this or in any other court. The association's name cannot be used as a façade by the committee to institute the current legal proceedings. But then again, 'proper authorisation' only becomes an issue if the committee had legal pesonality in the first place. I also observe that the Special Administrator is being sued, purportedly as an office. However, the allegations leveled are all personal against the office holder, who is not named in the intituling. If the office holder concerned leaves office – or has in fact left office – is the cause of action then abated, or does it subsist against the successor in office? The claim, I must say, is rather poorly pleaded and lacks depth in the way it mobilises the facts to cause. However, I take heed of Kirby J's words (supra) that: "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". Accordingly, I dismiss the application to strike out. Costs in the cause. The plaintiff is at liberty to amend its writ of summons and statement of

claim. These must be filed and served within 21 days (i.e. by 12 November 2012). 14 days thereafter to the defendants to file and serve an amended statement of defence (ie by 26 November 2012). Case adjourned to 27 November 2012 for mention at 8.30 am

Application dismissed.