IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 17 of 2013

BETWEEN : **ADRENALIN (FIJI) PROPRIETORY LIMITED** a limited liability company duly incorporated in Fiji and having its registered office at Office 08, Building A, Port Denarau Marina Centre, Port Denarau, Fiji Islands.

PLAINTIFF

AND : **DENARAU INVESTMENTS LIMITED** a limited liability company duly incorporated in Fiji and having its registered office at c/- Parshotam & Co, Level 2 Mid City, Cnr Cumming Street/ Waimanu Road, Suva.

DEFENDANT

BEFORE : Acting Master Thushara Rajasinghe

COUNSEL : Mr. Saumatua B. for the Plaintiff
Mr. S. Singh with **Mr. V. Singh** for the Defendant

Date of Hearing : 7th November, 2013
Date of Ruling : 13th December, 2013

RULING

A. INTRODUCTION

1. This is the Summons filed by the Defendant pursuant to Order 18 rule 18 (1) (a) and (d) of the High Court Rules seeking following orders inter alia;

    i. That Plaintiff's Writ of Summons and Statement of Claim be struck out,

ii. In the meantime, all proceedings other than proceedings relating to this Summons be stayed,

iii. Such further or other orders as to the Court seems fit,

iv. Cost of this application,

2. Upon being served with this Summons, the plaintiff filed their affidavit in opposition in respect of the grounds contended by the Defendant pursuant to o 18 r 18 (1) (d). Subsequently this matter was set down for hearing on the 7th of November 2013 where learned counsel for the Defendant and the Plaintiff made their respective arguments and oral submissions. Both counsel tendered their written submissions during the hearing. However, at the conclusion of the arguments, the learned counsel for the Plaintiff sought permission to file a supplementary written submission which was allowed. The Plaintiff then filed their supplementary written submissions which was then followed by the reply submissions of the Defendant.

3. Upon careful perusal and consideration of the Summons, respective affidavits and written submissions of the parties and their respective oral arguments and submissions, I now proceed to pronounce my order as follows.

B. BACKGROUND,

Pleadings,

4. The Plaintiff instituted this proceeding by way of writ of summons together with their Statement of Claim seeking following orders inter alia,

i. The sum of NZD $ 56,681 and General Damages to be assessed in relation to the first cause of action,

ii. The sum of NZD $ 10,197.12 and General Damages to be assessed in relation to the second cause of action,

iii. The sum of FJD $ 32,572.10 and General Damages to be assessed in relation to the third cause of action,

iv. Interest on the whole judgment sum at the rate of 10% per annum from 3rd of September 2012 to the date of judgment pursuant to section 3 of the Law Reform (Miscellaneous Provisions) (Death and interest) Act cap 27,

v. Post judgment interest on the judgment sum at the rate of 5% per annum from the date of judgment to the date of payment,

vi. Cost of this action on an indemnity basis, and

vii. Any other reliefs this Honourable court deems just,

5. The Plaintiff's claim is based on three separate cause of actions, they are that;

i. Negligence by omission by the Defendant for failing to prevent the overpayment and deduction of withholding tax rate by the Stakeholder,

ii. Negligence by omission by the Defendant for failing to prevent deduction of commission by the stakeholder, and

iii. Claim under the settlement Deed executed between the Plaintiff and the Defendant,

6. The Plaintiff stated in their statement of claim, that they entered into four separate agreements with the Defendant to purchase four villas those were to be constructed and furnished by the Defendant. As per the clause 3 (1) (b) of these agreements, the Plaintiff was required to deposit 10% of the sale price with a Stakeholder nominated by the Defendant. The Defendant nominated Minter Ellison Rudd Watt (MERW) as the stakeholder with whom the Plaintiff deposited said sum of 10% of the sale price. Plaintiff stated that the stakeholder kept the said deposit until the completion of these agreements. The Plaintiff at all material times maintained a beneficial interest in the deposit and the interest earned thereon.

7. However, due to the failure of the Defendant, these agreements were cancelled by the parties upon the execution of a Deed of Settlement on 3rd of September 2012. Subsequently the Stakeholder was noticed to return the deposit with the interest accrued thereon to the Plaintiff. However, the Stakeholder wrongfully deducted NZ resident

withholding tax even after the Plaintiff informed the Stakeholder and the Defendant about the correct percentage for non residence withholding tax. Thereafter, the stakeholder further deducted 5% of the interest earned on the Deposit as a commission for the stakeholder, which the plaintiff objected as it was not agreed upon by the parties.

8. Having stated abovementioned facts, the plaintiff claims that the Stakeholder was nominated by the Defendant pursuant to the agreements. The Defendant had a special relationship with the stakeholder, wherefore the Defendant owed a duty of care to persuade and advise the stakeholder about the correct rate of withholding tax in New Zealand and to prevent the stakeholder from deducting 5% commission from the interest accrued on the deposit. The failure of the Defendant to exercise that duty of care has caused the Plaintiff loses and damages.

9. In respect of the third cause of action, the Plaintiff stated that the Plaintiff has a right to institute civil proceedings against the Defendant for claims arising from the cancellation of the Agreements pursuant to clause 3 (a) of the Deed of Settlement executed by the parties.

10. The Defendant categorically denied the existence of any special relationship with the Stakeholder and also the existence of any duty of care apart from the contractual obligation they had. The defendant further claimed that the deposit was deposited with the stakeholder as per the agreement and the Defendant did not reduce any withholding tax or commission thereon. It was the stakeholder who acted pursuant to the agreements and deducted the withholding tax and commission. In respect of the third cause of action, the Defendant contended that the Plaintiff is not entitled to institute a separate civil proceedings to recover the cost for the proceeding which he instituted in Lautoka High Court.

11. The plaintiff stated in their reply to the statement of defence, that this action was not instituted based on the agreements they had with the Defendants. The Plaintiff's claim is founded on tort and not on the contract which they had with the Defendant.

Defendant's Submissions,

12. The Defendant's application for strike out is founded on three main grounds, that are

    i. The plaintiff did not plead any duty of care owed by the Defendant to the Plaintiff,
    ii. The Defendant does not owe the Plaintiff any form of duty of care,
    iii. The Plaintiff has no cause of action to recover the cost of litigation and settlements in a separate action,

13. The learned counsel for the Defendant submitted that the Defendant acted according to the agreements they had with the Plaintiff and the Defendant owed no duty of care to the Plaintiff in respect of deposit money or the conduct of the stakeholder. He further reiterated that the Defendant's relationship with the stakeholder even does not fall under the proximity test of duty of care.

Plaintiff's Submissions.

14. The learned counsel for the Plaintiff contended that the Defendant owed a duty of care to the Plaintiff as they introduced and nominated the stakeholder. Furthermore the learned counsel submitted that the Defendant had a special relationship with the stakeholder and the Plaintiff has evidence to prove that special relationship created a duty of care owed by the Defendant to the Plaintiff. Concluding her submissions, the learned counsel for the Plaintiff urged that the issues pleaded by the Plaintiff in their pleadings require a proper trial as it involves with triable issues of fact and legal questions of importance.

C. THE LAW ON STRIKING OUT.

15. Having briefly outlined the background of this proceedings, I now turn to discuss the applicable laws on the issue of striking out pleadings and indorsements under Order 18 rule 18 of the High Court rules.

16. Order 18 rule 18 (1) (a) and (d) states that

"the court at any stage of the proceedings order to be struck out or amend any pleading or the indorsement, on the ground that –

a. It discloses no reasonable cause of action or defence as the case may be,

b. ……..

c. ……..

d. It is otherwise an abuse of the process of the court,

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

17. Moreover, Order 18 rule 18 (2) provides the scope of the hearing of applications made under O 18 r 18 (1) (a) where it states that

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

18. **Justice Byrne** held in ***Timber Resource Management Limited v The Minister for Information, The Minister for Agriculture, Fisheries and Forests, The Attorney General of Fiji and others (HBC 0212 of 2000)*** that

"Time and again the court have stated that the jurisdiction to strike out proceedings under Order 18 rule 18 should be very sparingly exercised and only in exceptional cases where legal questions of importance and difficulty are raised – per Marsack J.A. in Attorney General v Shiu Prasad Halka (1972) 18 FLR 210 at page 215

In Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd (1899) 1 Q.B.86 at page 96 Lindley M.R. said "the ...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" shows the summary procedure…. Is only intended to be had recourse to in plain and obvious cases".

19. Master Tuilevuka (as he then was) having observed Justice Kirby's findings in ***Len Lindon v the Commonwealth of Australia*** (No 2) S. 96/005 held in ***Sugar Festival Committee 2010 v Fiji Times Ltd (2012) FJHC 1404;HBC78.2010 (1 November 2012)*** that

"Court rarely strike out a proceedings on 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 possibly succeed will the court 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 court will not strike out the claim. His Lordship Mr. Justice Kirby in Len Lindon v The Commonwealth of Australia (No 2) S.96/05 summarised the applicable principles as follows:-

i. 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 O26 r 18 or in inherent jurisdiction of the court, is rarely and sparingly provided.

ii. 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….

iii. 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,

iv. Summary relief of the kind provided for by O26 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 litigation rather than one determined on imagined or assumed facts,

v. If, notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it had 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,

vi. *The guiding principles 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."*

20. The scope of the hearing of applications in this nature under o 18 r 18 (1) (a) and (d) was discussed ***in Khan v Begum (2004) FJHC 430; HBC0153.2003L (30 June 2004)*** where **Justice Connors** held that

"it is said that the fact the court has this inherent jurisdiction is one of the characteristics which distinguishes the court from other institutions of the government. It is a jurisdiction, to be exercised summarily and as I have said, is in addition to the jurisdiction conferred by the rules. It is not in issue that if a party relies solely upon Order 18 rule 18 there no evidence may be considered by the court in making its determination but that limitation does not apply where the applicant relies upon the inherent jurisdiction of the court".

D. THE LAW ON THE ISSUES OF REASONABLE CAUSE OF ACTION AND ABUSE OF COURT PROCESS

21. I now turn to review the laws pertaining to the issues of reasonable cause of action and abuse of court process.

22. **Justice Jitoko** in ***"Prasad v Home Finance Company Ltd [2003] FJHC 322; HBC0116D.2002S (23 January 2003***)" extensively discussed the issue of reasonable cause of action where his lordship held that

"what constitutes a reasonable cause of action or defence does not mean that the Court should delve into whether the claim or defence is likely to succeed. As Lord Pearson stated in Drummond Jackson v. British Medical Association [1970] 1 WLR 688, [1970] 1 ALL ER 1094 CA at P.1101: No exact paraphrase can be given, but I think a reasonable cause of action means a cause of action with some chance of success, when (as required by r.19 (2)) only the allegations in the pleading are considered……..

The Courts view and many decisions on this matter is clear: As long as the statement of claim or the particulars (Davey v. Bentinct: (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 it out. (Supreme Court Practice 1985 Vol. 1 p.306)…….

It is therefore very clear that in both the exercise of its powers under O.18 r.18 and under its inherent jurisdiction, a Court may only strike out a Statement of Claim and dismiss the action if in the words of Lord Blackburn, in Metropolitan Bank v. Pooley (1885) 10 App. (As 210 at p.221, if and when required by the very essence of justice to be done".

23. Justice Pathik discussed the issue of "abuse of process" in ***Taniela Bolea v Fiji Daily Post Company Limited (HBC 0058 of 2003)*** where he held that

"In considering this application I have borne in the following passage from "Halsbury's Laws of England 4th Ed vol.37 para.434 on "abuse of process" which I consider pertinent;"

"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 indorsement does not offend any of the other specified grounds for striking out, the facts may show that is constitutes an abuse of process of the court, and on this ground the court may be justified in striking out the whole pleadings or indorsement 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".

24. The authorities discussed above have repeatedly affirmed that the discretion of striking out pleadings should be exercised sparingly. The court is required to consider the right of the litigant to access to the proper and complete judicial process while keeping in mind the fact that to prevent the Defendant to get unnecessarily involve in an action which is plainly and obviously has no cause of action or abuse of process of the court.

E. ANALYSIS,

25. Bearing in mind the factual background of this application and the laws pertaining to the issue of striking out, I now turn to analyse the arguments and submissions adduced by the parties with the relevant legal principles and provisions.

26. The first and second cause of actions of the Plaintiff is founded on tortious negligence of the Defendant. The plaintiff specifically submitted that their claim is derived from the alleged duty of care owed by the Defendant to the Plaintiff in respect of the conduct of the stakeholder. The Plaintiff contended that defendant owed such duty of care due to the special relationship the defendant had with the stakeholder who was also introduced and nominated by the Defendant.

27. Meanwhile, the Defendant vehemently denies the existence of such special relationship and such duty of care to the Plaintiff. The main contention of the Defendant is that they acted according to the terms of the agreements and has no obligation or duty to influence or control the conduct of the stakeholder. The Defendant further contended that the stakeholder is not an agent of them and is an independent actor in the agreement.

28. Accordingly, I find two main issues are arising from the arguments of the parties.

    i. Whether the Plaintiff has a cause of action against the Defendant in tort,

ii. Whether the Defendant owed a duty of care to the plaintiff due to their alleged special relationship with the stakeholder.

29. Turning to the first issue mentioned above, I could find an array of judicial decisions which have extensively discussed the existence of duty of care in tort with derives from contractual obligation in contract.

30. **Lord Denning MR** held in ***Esso Petroleum Co Ltd v Mardon (1976) 2 All E.R. 15*** that

"in arguing this point, counsel for Esso took his stand in this way. He submitted that, when the negotiations between two parties resulted in a contract between them, their rights and duties were governed by the law of contract and not by the law of tort. There was, therefore, no place in their relationship for Hedley Byrne, which was solely a case of liability in tort. He relied particularly on "Clark v Kirby Smith" where Plowman J held that the liability of a solicitor for negligence was a liability in contract and not in tort……

But I venture to suggest that those cases are in conflict with other decisions of high authority which were not cited in them. These decisions show that, in the case of a professional man, the duty to use reasonable care arises not only in contract, but is also imposed by the law apart from contract, and therefore actionable in tort. ……

A professional man may give advice under a contract for reward; or without a contract, in pursuant of a voluntary assumption of responsibility, gratuitously without reward. In either case he is under one and the same duty to use reasonable care; see Cassidy v Ministry of Health (1955) 1 All E.R. 574). In the one case it is by reason of a term implied by law. In the other, it is by reason of a duty imposed by law. For a breach of that duty, he is liable in damages; and those damages should be and are, the same, whether he is sued in contract or in tort".

31. **Oliver J** in ***Midland Bank Trust Co Ltd and Another v Hett, Stubbs & Kemp (1978) 3 All E.R. 571)*** held that

"Despite the opening words referred to above, Lord Denning MR made it perfectly clear as his references to Booram v Brown, 3 Q.B.511 show, that he regarded the duties in

contract and tort as interchangeable and co – existing. It is clear, I think, that Ormad L.J and Shaw L.J. were of the same view, for they both emphasized that the critical factor was the nature of the relationship not the matter of its origin".

32. In view of the abovementioned judicial precedence, the critical factor in determining the duty in contract and duty in tort is the nature of relationship and not the nature of its origin. In order to determine the nature of relationship and the degree of their dependency in such relationship obviously requires a proper and full hearing rather than a summary determination in this nature. That undoubtedly involves with adducing evidence and great amount of factual and legal deliberation.

33. I now draw my attention to the second issue that is whether the Defendant owed any form of duty of care to the Plaintiff due to their special relationship with the stakeholder.

34. The learned counsel for the Defendant vehemently denied the existence of such special relationship and contended that the stakeholder was not an agent of the defendant and acted independently on its own in the performance of these agreements.

35. In ***Sorrel and Another v Finch*** ***(1976) 2 All E.R. 376) Lord Edmund – Davies*** observed and discussed the responsibility of the stakeholder and the vendor, where he held that;

"Lord Denning MR (1971) 2 All E.R. 615) held that only when the estate agent duly authorized to do so, received a deposit as an agent for the vendor" is the latter liable, if he received it as a "stakeholder" he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor, not as agent for the purchaser. He holds it as trustee for both to await the event; see Skinner v Trustee of the Property of Reed". Until the event is know, it is his duty to keep it in his own hands; or put it on deposit at the bank…. If the purchaser should become entitled to the return of his deposit; he must sue the estate agent or solicitor for it. He cannot sue the vendor, because he has never received it or become entitled to receive it".

36. It was held in ***Hastingwood Property Ltd v Saundres; Bearman Anselm (1990) 3 All ER 107*** that

"in my judgment Pennycuick V-C's description of the stakeholder as principal is more accurate than Pollock CB's description of him as agent for both parties and emphasizes the fact the he is not accountable to either party for his use of the deposit during the period while it is uncertain which of the parties will become entitled to it".

37. Sorrel and Another (Supra) and Hastingwood Property Ltd (supra) held that the stakeholder is an independent entity and he does not act as an agent of either party to the contract. Nevertheless, I am mindful of the fact that the Plaintiff's claim is not based on the obligation or the role of the stakeholder, it is founded on the duty of care owed by the Defendant to the Plaintiff in respect of the conduct of the stakeholder. In view of these facts, the Defendant owed a duty of care in respect of the conduct of an independent third person. In this regard, **Lord Goff of Chieveley** observed in ***Smith and others v Littlewoods Organisation Ltd*** **(Chief Constable, Fife Constabulary, third party) (1987) 1 All E.R. 711** that

"there was no general duty at common law to prevent persons from harming others by their deliberate wrongdoing, however foreseeable such harm might be if a Defendant did not take step to prevent it. Accordingly, liability in negligence for such harm caused by third parties could only be made out in special circumstances, namely a) where a special relationship existed between the plaintiff and the defendant, b) where a source of danger was negligently created by the defendant and it was reasonably foreseeable that third parties might interfere and cause damage by sparking off the danger and c) where the defendant had knowledge or means of knowledge that a third party had created or was creating a risk of danger on his property and he failed to take reasonable steps to abate it".

I am mindful of the fact that Lord Goff made above mentioned observations in respect of a personal injury matter; however, the principles enunciated in this observation is apparently relevant to the issues under review in this instance case as well.

38. In respect of the third cause of action, the Plaintiff withdrew their claim pleaded in paragraph 41 (a) of the Statement of claim that was to recover the legal cost of High Court Proceedings in Lautoka High Court. However, the Plaintiff informed the court that

they would proceed with the remaining part of their claim in the third cause of action. The third cause of action is based on the Deed of Settlement which the parties executed in order to cancel the agreements. This is undoubtedly involve with triable issues and should not be strike out at this stage of the proceedings.

F. CONCLUSION

39. The forgoing reasons discussed above, affirmed that the critical factor in determining the duty in contract or duty in tort is the nature of relationship and not the nature of its origin. An array of judicial precedence have affirmed that duties in contract and duties in tort are interchangeable and co- existing. In view of these findings, I am satisfied that the Plaintiff could institute a claim founded on tortious negligence against the Defendant under the circumstances pleaded in the Statement of Claim.

40. The Plaintiff specifically pleaded in their statement of claim that the Defendant nominated the stakeholder pursuant to the agreements and always had special relationship with the stakeholder. The Plaintiff further stated that the Defendant owed a duty of care to the Plaintiff in respect of the conduct of the stakeholder due to the special relationship they had with the stakeholder. Indeed the Plaintiff is not required to provide evidence in their pleadings. I am satisfied that the facts pleaded in the statement of claim sufficiently disclose a reasonable cause of action. Hence, I do not find the existence of any exceptional ground where the pleaded facts in the pleadings of the Plaintiff is insufficient or untenable to constitute a reasonable cause of action against the Defendant. Accordingly, there is no reason to determine that the Plaintiff has abused the court process by instituting this action.

41. In Conclusion, I make following orders that;

    i. The Defendant's summons for strike out the Statement of claim of the Plaintiff made pursuant to Order 18 rule 18 (1) (a) (d) of the High Court rules is therefore refused and dismissed.

ii. The Plaintiff is granted a cost of $ 750 assessed summarily

Dated at **Suva** this **13th day** of **December, 2013**.

…….

R.D.R. Thushara Rajasinghe

Acting Master of High Court, Suva