

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

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 56 OF 2014

BETWEEN : **PANACHE INVESTMENT LIMITED AND/OR ITS**
SUBSIDIARY COMPANY a limited liability company
having its registered office at c\ - Nandha & Company,
Chartered Accountants, Nadi.

Plaintiff

AND : **THE NEW INDIA ASSURANCE COMPANY LIMITED**
155 Vitogo Parade, Lautoka.

Defendant

Appearances

Mr E Maopa for the plaintiff

Mr Krishna for the defendant

Date of Hearing: 20 October 2014

Date of Ruling: 23 Jan 2015

INTERLOCUTORY RULING

Introduction

[1] This ruling concerns with an application to strike out writ of summons against defendant, New India Assurance Company Limited.

[2] By the summons ('the application') filed without a supporting affidavit on 21 July 2014, the defendant seeks to strike out the plaintiff's writ of summons as it does not comply with the Rules of Pleading against the Defendant and costs of the application against the Plaintiff. The application is made on the ground that the heading of the writ of summons herein fails to identify the true and proper litigant to the claim.

[3] This application is made pursuant to High Court Rules, 1988 (HCR) and Order 18 of the High Court Rules and the inherent jurisdiction of the court.

[4] The plaintiff opposes this application.

[5] At hearing both parties tendered written submissions.

The Law

[6] The relevant rule on striking out pleadings and indorsements is O. 18, r.18 of HCR. That rule provides:

'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;

(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).

(3) This rule shall so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.'

Discussion

- [7] The defendant filed the application to strike out the writ. The application states that this application is made pursuant to High Court Rules, 1988 and O. 18 of HCR and the inherent jurisdiction of the court. It appears that the defendant relies on the entire High Court Rules. The defendant did not even specify which paragraph of r.18 they rely under. The defendant does not rely on any affidavit. Presumably, since the defendant does not rely on evidence, it seems that the defendant relies on r.18 (1) (a) that, the claim discloses no reasonable cause of action against the defendant, because evidence will not be admissible on an application under paragraph (1) (a).
- [8] If the statement of claim fails to disclose reasonable cause of action, the court will order it to be struck out or amended, if it is capable of amendment. No evidence, including affidavit evidence, is admissible on an application on this ground. Since it is only the pleading itself which is examined, the court is required to assume that the facts pleaded are true and undisputed.
- [9] There is difficulty in fixing a precise meaning to the term “cause of action”, since every cause of action must be assumed reasonable, see **Republic of Peru v Peruvian Guano Co** (1887) 36 Ch D 489 at 495, per Chitty J, but the term has been defined as meaning a cause of action with some chance of success when only the allegations in the pleading are considered, see **Drummond-Jackson v British Medical Association** [1970] 1 All ER 1094, [1970]1 WLR 688, CA, per Lord Pearson.
- [10] The statement of claim states that, the plaintiff is a limited liability company having a subsidiary company named Genexis Shipping Corporation Limited at Lautoka. The plaintiff owned a marine vessel named ‘Hunter 1’ insured under the cover of Marine Hull Policy in the sum of \$200,000.00 being Policy No. 2103/100056459 with the defendant. The policy period was for the period from 01/03/2011 to 01/03/2012. In January 2012 the ‘Hunter 1’ was inundated and

submerged at her usual berth place in Lautoka due to the rough sea conditions and heavy rain. The defendant was notified of the incident regarding Hunter 1 to pursue insurance enquiry. The defendant replied and making references to the unpaid renewal premium on 30/11/2011 that the policy stands cancelled ab initio and that they were not at risk in respect of the said policy, see paras 1-7 of the statement of claim.

[11] For the current purpose, I will assume the above facts are true and undisputed. The plaintiff alleges that the policy was current at the time of the incident. Thus, a cause of action is disclosed against the defendant.

[12] I now turn to the defendant's submission on indorsement. Mr Krishna, counsel for the defendant submits that, the statement of claim subsequently fails as well for the following reasons:

1. ..'AND/OR ITS SUBSIDIARY COMPANY'... as indorsed on the writ of summons is not a name of a company, nor is it an existent entity and as such it amounts to an abuse of process of the court and such the claim is maintainable.
2. The plaintiff as indorsed cannot confer locus to sue as an '**... AND/OR ITS SUBSIDIARY COMPANY**'
3. The plaintiff is suing in an artificial capacity as indorsed on the writ of summons and as such is not maintainable and should be struck out.
4. The plaintiff has failed to comply with the mandatory requirement set out in O.18, r.5(4) of the Rules wherein the name firm **MUST** be indorsed on the writ and because of that failure the writ is doomed for failure and ought to be struck out.
5. There are different capacities as indorsed on the writ of summons.
6. It is improper and unnecessarily prejudicing the defendant.
7. 'Panache Investments Limited...' from the plaintiff's own statement of claim, a reasonable and safe inference can be drawn that the plaintiff

does not own the subject property (vessel) and as such is not the contracting party and as such there is no reasonable cause action.”

[13] O.6, r.3 of HCR deals with indorsement as to capacity, which reads:

‘3. Before a writ is issued it must be endorsed-

*(a) **Where the plaintiff sues in a representative capacity, with a statement of the capacity in which he sues;***

(b) Where a defendant is sued in a representative capacity, with a statement of the capacity in which he sued’ (Emphasis provided).

[14] In the caption of the writ of summons and the statement of claim the plaintiff is described as **PANACHE INVESTMENT LIMITED AND/OR ITS SUBSIDIARY COMPANY** a limited liability company having its registered office at c\ - Nandha & Company, Chartered Accountants, Nadi. The statement of claim further explains the plaintiff that, at all material times the plaintiff is a limited company having a subsidiary company named Genexis Shipping Corporation Limited at Lautoka. The plaintiff has been sufficiently identified. There cannot be any prejudice to the defendant by identification of the plaintiff. The plaintiff as contracting party sues on its own behalf. Hence indorsement as to capacity is not necessary.

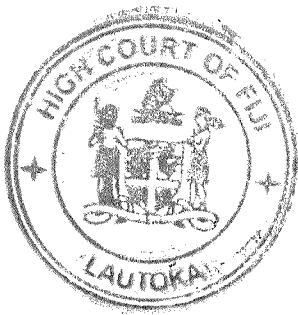
[15] The plaintiff has filed the writ through its solicitor. The writ has been signed and served by plaintiff’s solicitor. The writ carries firm name and business address of the plaintiff’s solicitor. So, formal requirements relating to pleadings envisaged under O.18, r.5 are complied with.

[16] Returning to the submission advanced by the defendant that Panache Investments Limited (plaintiff) cannot own the subject property-the vessel. This point cannot be decided at this stage. I have already assumed the allegations in the pleadings are true and undisputed. Evidence will be needed to decide this point and the defendant may raise this as preliminary issue at trial.

[17] I would, for all these reasons, dismiss and strike out the defendant's application to strike out the plaintiff's writ of summons. The plaintiff as winning party is entitled to costs of these proceedings. The plaintiff has filed written submissions and made few appearances to defend the striking out application. I, taking all into my account, summarily assess the costs at \$750.00.

Final Result

1. The striking out application dated 22 July 2014 and filed by the defendant is dismissed and struck out.
2. The defendant will pay summarily assessed cost of \$750.00 to the plaintiff.
3. The matter is now adjourned before Master for mention only at 8.30am on 27 January 2015.
4. Orders accordingly.



M H Mohamed Ajmeer

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M H Mohamed Ajmeer
Puisne Judge
[Sitting as Master of the High Court]

At Lautoka

23 January 2015