

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 177 of 2016

**BETWEEN :** **NEW INDIA ASSURANCE COMPANY LIMITED** a duly incorporated company having a registration in Fiji and with its principal Fiji office at Harifam Centre, Suva.

PLAINTIFF

**AND :** **WILLIAMS AND GOSLING LIMITED** a limited liability company having its registered office at 82 Harris Road, Walu Bay, Suva.

DEFENDANT

**BEFORE:** Master Vishwa Datt Sharma

**COUNSELS:** Mr. O'Driscoll of the Plaintiff  
Mr. Nilesh Prasad for the Defendant

**Date of Ruling:** 30<sup>th</sup> July, 2018 @ 9am

**RULING**

*[Summons by the Defendant seeking an order to strike out the Plaintiff's Writ of Summons and the Statement of Claim pursuant to Order 18 Rule 18; Order 32 and Order 59 Rule 2 of the High Court Rules, 1988 and the amendments thereto, Section 4 of the Limitation Act Cap 35 and/or under the Inherent Jurisdiction of the High Court]*

## APPLICATION

1. This is the **Defendant's Strike Out Summons** seeking for the following orders:
  - (a) *That the Writ of Summons together with the Statement of Claim dated and filed on 22<sup>nd</sup> July 2016 herein be struck out in its entirety on the ground that the alleged cause of action did not arise within 6 years before the commencement of this action and is barred by section 4 of the Limitation Act, Cap 35;*
  - (b) *That for the reason in para 1, it discloses no reasonable cause of action and/or it may prejudice or embarrass the fair trial of the action and/or it is otherwise an abuse of the process of the court;*
  - (c) *That the Plaintiff pay costs of this application; and*
  - (d) *That any other orders that this Court deems just and expedient.*
2. The application was made pursuant to *Order 18 Rule 18; Order 32 and Order 59 Rule 2 of the High Court Rules, 1988 and the amendments thereto, Section 4 of the Limitation Act Cap 35 and/or under the Inherent Jurisdiction of the High Court.*
3. The Plaintiff opposed the Defendant's Striking out application and opted not to file and serve any Affidavit Response.
4. The application was heard in terms of the affidavit evidence filed coupled with the written and oral submissions made in this proceedings.

## BACKGROUND

5. *The Plaintiff was on risk for insurance for Narsey's Plastics Industries Ltd. The Defendant was the local agent in Fiji for DHL Global Forwarding (Fiji) Ltd and was responsible for removing containers from the Wharf to the Defendant's warehouse for de-vanning and subsequent delivery. The insured, Narsey's Plastics Industries Ltd had shipped consignments through the courier DHL Global Forwarding (Fiji) Ltd which were taken into the Defendant's care from the Wharf at Walu Bay, Suva and stored at its warehouse in Walu Bay, Suva pending the final delivery to the insured. The Defendant was at all material times acting as the bailee while holding and/handling the insured's consignment in its care. The Defendant's warehouse was insured through QBE Insurance (Fiji) Limited. On 4<sup>th</sup> January, 2010, the insured's consignment was kept at the Defendant's warehouse awaiting final delivery to the insured when a fire ensued, completely destroying the warehouse and its contents including the insured's consignment. The Defendant breached its duty of care for the insured's consignment when the same was destroyed in the fire and should have had sufficient insurance cover to alleviate any damage at its warehouse at the time of the incident. The Destruction of the consignment resulted in a substantial loss to the insured relating to the consignment. The total loss suffered was at \$119,098-30 and under its Policy of insurance with the Plaintiff it had an excess of \$250 leading to the Plaintiff paying the claim in the sum of \$118,848-30, paid on 27<sup>th</sup> October, 2010. The Plaintiff pleads that the cause of action arises from the pay-out made by it on 27<sup>th</sup> October 2010 as it took several months to conduct investigations and assessment for the amount that should be paid to the insured due to information regarding the claim being collated by the Plaintiff and its assessors. Having been paid the insured subrogated its rights of recovery to the Plaintiff and it as exercised that right in pursuing the payment of the amount paid to*



*its insured plus costs of assessments by way of requests and demands made to the Defendant. The total expenditure the plaintiff incurred in covering the insured's losses and the incidental investigations is \$121,330-32 and this is the sum now claimed as due from the Defendant as bailee and the party responsible for the safe storage of the items lost by the insured. The Plaintiff also pleads that the Defendant owed a duty of care to those entities whose items were kept at its warehouse in Walu Bay, Suva. The Plaintiff claims interests on any judgment sum that may be awarded under the Act.*

6. The Defendant has filed his **Statement of Defence** and in summary substantially denies the claim and stated as follows-

- That its container Freight Station Depot at Leonidas Street, Walu Bay, Suva was destroyed by a fire on 04<sup>th</sup> January 2010, it does not admit the contents of paragraph 6 of the claim;
- That the cause of the fire was an electrical fault that the consignment was destroyed without any negligence or default or want of care on the part of the Defendant;
- The alleged cause of action did not arise within 6 years before the commencement of this action and is barred by section 4 of the Limitation Act, Cap 35;
- In respect of paragraph 14 of the claim it says that it does not plead a cause of action that the Defendant needs to answer and is embarrassing and offends the High Court Rules and denied the contents of paragraph 15 of the claim.

#### The Law and Practice

7. 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).*

#### Issues for Determination

8. Following are the **issues** which require determination by this honourable court:-

- (a) Whether the Plaintiff's Writ of Summons and the Statement of Claim discloses any reasonable cause of action?
- (b) Whether the alleged cause of action did not arise within 6 years before the commencement of this action and statute barred by section 4 of the Limitation Act, Cap. 35?
- (c) Whether the Plaintiff's Writ of Summons and Statement of Claim is an abuse of the process of the Court?

### ANALYSIS and DETERMINATION

*Whether the Plaintiff's Writ of Summons and Statement of Claim discloses any reasonable cause of action and the alleged cause of action did not arise within 6 years before the commencement of this action and statute barred by section 4 of the Limitation Act, Cap. 35?*

9. 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)...."*

10. 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".*

11. It is for the Plaintiff to establish that they have a **Cause of Action** in this case in terms of the facts and the Pleadings filed herein and whether the alleged cause of action did arise within 6 years before the commencement of this action and is not **statute barred by section 4 of the Limitation Act, Cap. 35?**
12. The **Plaintiff pleads** within their Statement of Claim that the **Cause of Action** arises from the payout made by it on 27<sup>th</sup> October, 2010 as it took several months to conduct the investigations and assessment for the amount that should be paid to the insured due to the information regarding the claim being collated by the Plaintiff and its assessors.



13. On the other hand, the **Defendant** must establish that the Plaintiff does not have a Cause of Action in this case.
14. The **Defendant** pleaded that the Plaintiff's claim does not plead a **cause of action** that the **Defendant needs to answer** and is embarrassing and offends the High Court Rules. This alone suggests that the Defendant's contention is otherwise and that is why he needs to answer to this and therefore tantamount to a triable issue.
15. The Striking out application of the **Defendant** is a summary proceeding and is only appropriate to cases which are **plain and obvious**.
16. Bearing in mind the **facts** of this case and the **nature of the pleadings** filed by the parties to the proceedings, this case cannot be classed as '**plain and obvious**' in nature.
17. Therefore, it is too early at this stage of the proceedings to make a concrete decision whether there is an existence of a **reasonable cause of action** within the claim.
- Whether the claim is otherwise an abuse of the process of the Court and it may prejudice, embarrass or delay the fair trial of the action?**
18. It is well settled that this Court has inherent jurisdiction to strike out the claim or pleadings for **abuse of Court process** and 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).*

19. In Halsbury's Laws of England Vol 37 page 322 the phrase "abuse of process" is described as follows:

*"An abuse of 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 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 an 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."*

20. The phrase "abuse of process" is summarized in Walton v Gardiner (1993) 177 CLR 378 as follows:
- "Abuse of process includes instituting or maintaining proceedings that will clearly fail proceedings unjustifiably oppressive or vexatious in relation to the defendant, and generally any process that gives rise to unfairness"*
21. The Plaintiff has commenced this proceedings claiming *the total expenditure the plaintiff incurred in covering the insured's losses and the incidental investigations is \$121,330-32 and this is the sum now claimed as due from the Defendant as bailee and the party responsible for the safe storage of the items lost by the insured. The Plaintiff also pleads that the Defendant owed a duty of care to those entities whose items were kept at its warehouse in Walu Bay, Suva. Further, the Plaintiff claims interests on any judgment sum that may be awarded under the Act.*
22. The Plaintiff's claim at this stage of the proceedings will not in anyway *prejudice, embarrass or delay the fair trial of the action?* The reason being that the pleadings have been closed and the parties need to expedite with the next cause of action and enter the action for trial and final determination by court.
23. In Tawake v Barton Ltd [2010] FJHC 14; HBC 231 of 2008 (28 January 2010), Master Tuilevuka (as he was then) summarised the law in this area as follows:
- "The jurisdiction to strike out proceedings under Order 18 Rule 18 is guardedly exercised in exceptional cases only where, on the pleaded facts, the plaintiff could not succeed as a matter of law. It is not exercised where legal questions of importance are raised and where the cause of action must be so clearly untenable that they cannot possibly succeed (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 -v- Prince Gardner [1998] 1 NZLR 262 at 267."*
24. Having perused and analyzed the issues raised by the Defendant couple with the principles dealing with the present application to **Strike out the Plaintiff's Writ of Summons and the Statement of Claim**, this court does possess all the requisite material and evidence to reach a definite and certain conclusion.



25. The nature of the substantive claim is such that summary intervention seeking striking out is not the answer rather the matter needs to go for trial in light of the dispute and the tribal issues to be determined on evidence at the trial accordingly. Both parties will have a day in court to represent their respective cases for court's final determination.
26. Further, question of any costs at this stage of hearing will be reserved and may be sought for at the end of the disposition of the substantive matter accordingly.
27. Accordingly, I make the following orders-

**FINAL ORDERS**

- (i) That the Defendant's Summons seeking the Striking Out of the Plaintiff's Writ of Summons and the Statement of Claim hereby fails and is dismissed.
- (ii) That the Plaintiffs Writ of Summons and the Statement of Claim remains intact.
- (iii) Question of costs reserved until the final disposition of the substantive matter.
- (iv) Orders accordingly.

Dated at Suva this 30<sup>th</sup> day of July, 2018



Master  
MR VISHWA DATT SHARMA

cc: O'Driscoll & Co, Suva  
Mitchell Keil Lawyers, Suva