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

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 50 OF 2017

BETWEEN : **MEREULA CIRIMAITOGA** of Waimalika, Nadi.

PLAINTIFF

AND : **SARWAN KUMAR GOUNDAR** of Kulukulu, Sigatoka.

DEFENDANT

Appearances : **(Ms) Ita Dolo Sauduadua for the plaintiff**
(Ms) Nayna Kasturi for the defendant

Hearing : **Tuesday, 23rd September, 2020 at 10.30am.**

Decision : **Friday, 04th December, 2020 at 9.00am**

DECISION

[A] INTRODUCTION

(01) There are two (02) applications before me. They are:

(A) The defendant's application filed on 12-12-2019 pursuant to Order 25, rule 9 of the High Court Rules, 1988 seeking dismissal of the plaintiff's action for want of prosecution.

(B) The defendant's application filed on 12-12-2019 pursuant to Order 18, rule 18(1)(a) of the High Court Rules, 1988 to strike out the plaintiff's claim for failure to disclose a reasonable cause of action.

(02) Both applications are opposed.

[B] THE AFFIDAVITS FILED

(1) The affidavit of Mr Sarwan Kumar Goundar, the defendant, in support, sworn on 11-12-2019.

(2) The affidavit of (Ms) Mereula Cirimaitoga, the plaintiff, in opposition, sworn on 18-02-2020.

[C] BACKGROUND

(01) On or about 19th July, 2011 the parties entered into a sale and purchase agreement for the purchase of the Native Land known as Legalega M/L 140 NLTB 7/10/4523 situated in Waimalika, Nadi in the island of Viti Levu being approximately half acre for the consideration of $65,000.00.

(02) The sale and purchase agreement was subject to undertakings made by both parties in order to effect settlement and conveyance of the property as follows:

(a) Plaintiff to pay the deposit of $25,000.00 by initial deposit of $13,000.00 and the balance of $12,000.00 within 12 months;

(b) Defendant to vacate on payment of deposit in full;

(c) Plaintiff to assume responsibility for the Defendants FDB payments on occupation of the property;

(d) Defendant entitled to reimbursement of all expenses for all Court Action regarding the disputed property;

(e) A defaulting party may take legal action;

(f) Legal costs of the Sale and Purchase Agreement to be borne by the Plaintiff;

(g) Defendant to pay all electricity and water rates as up until the date of settlement;

(h) Defendant to take all reasonable care to prevent deterioration and damage to all improvements of the property;

(i) Defendant to deliver vacant possession of the property and confirm authority to sell property once he has cleared his Fiji Development Bank loan;

(j) Defendant to survey the property and provide a valuation for sale;

(k) *Plaintiff to accept agricultural zoning of the property;*

(l) *Both parties to instruct one Solicitor Mr Joela Baledrokadroka and keep costs reasonable.*

(03) The plaintiff claims that she made payments as follows:

(a)	*Fiji Development Bank*	-	*$22,114.00*
(b)	*iTLTB*	-	*$ 4,468.45*
(c)	*Advances*	-	*$ 7,000.00*
(d)	*Deposit*	-	*$25,000.00*

(04) The plaintiff alleges that the defendant has failed to:

(a) *Deliver vacant possession as his family members continue to occupy the property;*

(b) *Maintain the property and prevent deterioration and damage;*

(c) *Survey the property;*

(d) *Provide the valuation report to the Plaintiff;*

(e) *Obtain the necessary consent from iTLTB;*

(f) *Take the necessary steps to transfer the Property to the Plaintiff.*

(05) Further, the plaintiff alleges;

The Defendant has refused to perform the Agreement and has failed to refund to the Plaintiff all monies paid under the Agreement in the sum of $58,582.45 as follows:

(a) *Deposit amount to $25,000.00*

(b) *Fiji Development Bank payment amounting to $22,114.00*

(c) *iTLTB payments in the sum of $4,468.45*

(d) *Advances amounting to $7,000.00.*

The Defendant did not perform his duties pursuant to the Agreement by not obtaining the iTLTB consent resulting in the Plaintiff ceasing all payments.

[D] THE CHRONOLOGY OF EVENTS

* On 16th March, 2017, the plaintiff instituted the action in the High Court.

* On 10th April, 2017, the defendant filed his Statement of Defence & Counter-claim.

* On 27th April 2017, the plaintiff filed an injunction application by way of an Ex-Parte Notice of Motion and Affidavit in Support of Mereula Cirimaitoga.

* On 2nd May 2017, the plaintiff was granted the injunctive orders.

* On 4th May 2017, the plaintiff filed the Reply to the Statement of Defence & Counter Claim.

* On 10th May 2017, the plaintiff filed Summons for Directions.

* On 19th May 2017, the injunction Order was extended.

* On 29th May 2017, the plaintiff filed the Affidavit Verifying Plaintiff's List of documents.

* On 15th June 2017, the defendant filed the Affidavit Verifying Defendant's List of documents.

* On 3rd July 2017, the plaintiff filed Supplementary List of Documents.

* On 30th October 2017, the plaintiff filed the Pre-Trial Conference Minutes.

* On 3rd November 2017, the plaintiff filed the Copy Pleadings and Summons to enter matter for trial.

* On 29th May 2019, the defendant filed an application to dissolve the injunction by way of Notice of Motion and Affidavit in Support.

* On 26th June 2019, the plaintiff filed the Affidavit in Opposition to the dissolution of the injunction application.

* On 23rd July 2019, the defendant filed an Affidavit in Reply.

* On 30th August 2019, the injunction order granted on 2nd May 2017 was dissolved by the Court.

* On 12th December 2019, the defendant filed its Summons to Show Cause and an Affidavit in Support of Sarwan Kumar Goundar.

* On 21st February 2020, the plaintiff filed her Affidavit in Opposition. The defendant has not filed an Affidavit in Reply.

* The defendant's application for Summons to Show Cause was set for hearing on 23rd September 2020.

[E] ISSUES

(06) The issues to be decided by the Court are as follows;

(1) Whether the plaintiff's statement of claim discloses a reasonable cause of action against the defendant.

(2) Whether the plaintiff's statement of claim should be struck out for want of prosecution.

[F] THE LAW – Striking out a pleading for failure to disclose a reasonable cause of action

(07) Against the said factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing **"striking-out"**. Rather than refer in detail to various authorities, I propose to set out hereunder important citations, which I take to be the principles in play.

(08) Provisions relating to striking out are contained in **Order 18, rule 18 of the High Court Rules, 1988.** Order 18, rule 18 of the High Court Rule reads;

> *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.

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

Footnote 18/19/3 of the 1988 Supreme Court Practice reads;

"It is only plain and obvious cases that recourse should be had to the summary process under this rule, per Lindley MR. in Hubbuck v Wilkinson(1899) 1 Q.B. 86, p91 Mayor, etc., of the City of London v Homer (1914) 111 L.T. 512, CA). See also Kemsley v Foot and Ors (1952) 2KB. 34; (1951) 1 ALL ER. 331, CA. affirmed (195), AC. 345, H.L .The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable " (Att – Gen of Duchy of Lancaster v L. & N.W. Ry Co (1892)3 Ch 274, CA). The summary remedy under this rule is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process or the case unarguable (see per Danckwerts and Salmon L.JJ in Nagle v Feliden(1966) 2. Q.B 633, pp 648, 651, applied in Drummond Jackson v British Medical Association(1970)1 WLR 688 (1970) 1 ALL ER 1094, (CA) .

Footnote 18/19/4 of the 1988 Supreme Court Practice reads;

"On an application to strike out the statement of claim and to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues are in dispute (Wenlock v Moloney) [1965] 1. WLR 1238; [1965] 2 ALL ER 87, CA).

It has been said that the Court will not permit a plaintiff to be "driven from the judgment seat" except where the cause of action is obviously bad and almost incontestably bad (per Fletcher Moulton L.J. in Dyson v Att. – Gen [1911] 1 KB 410 p. 419)."

(10) In the case of **Electricity Corporation Ltd v Geotherm Energy Ltd**[1] it was held;

*"The jurisdiction to strike out a pleading for failure to disclose a cause of action is to be sparingly exercised and only in a clear case where the Court is satisfied that it has **all the requisite material to reach a definite and certain conclusion**; the Plaintiff's case must be so clearly untenable that it*

[1] **[1992] 2 NZLR 641,**

could not possibly success and the Court would approach the application, assuming that all the allegations in the statement of claim were factually correct"

(11) In the case of **National MBF Finance (Fiji) Ltd v Buli**[2] it was held:

"The law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the Court".

(12) In **Tawake v Barton Ltd**[3]; **HBC 231 of 2008**[4]; 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."***

(13) His Lordship Mr Justice Kirby in **Len Lindon –v- The Commonwealth of Australia**[5] summarised the applicable principles as follows:-

a) *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.*

b) *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*

[2] [2000] FJCA 28; ABU0057U.98S (6 JULY 2000),
[3] [2010] FJHC 14
[4] 28 January 2010
[5] (No. 2) S. 96/005

reasonable cause of action ... or is advancing a claim that is clearly frivolous or vexatious...

c) *An opinion of the Court that a case appears weak and such that 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 arguments and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.*

d) *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 in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.*

e) *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.*

f) *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.*

(14) In **Paulo Malo Radrodro v Sione Hatu Tiakia & others**[6], 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.***

[6] HBC 204 of 2005

b) *Frivolous and vexatious is said to mean cases which are obviously frivolous or vexatious or obviously unsustainable – Lindley Li 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"***

g) *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.***

h) *Frivolous and vexatious is said to mean cases which are obviously frivolous or vexatious or obviously unsustainable – Lindley Li in* ***Attorney General of Duchy of Lancaster v L.N.W Ry/1892] 3 Ch 274 at 277.***

i) *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.***

j) *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.*

k) *"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.*

l) *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"*

[G] THE LAW – Striking out an action for want of prosecution

(15) It is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing the striking out for want of prosecution.

(16) Rather than refer in detail to the various authorities, I propose to set out very important citations, which I take to be the principles in play.

(17) Provisions relating to striking out for want of prosecution are contained in Order 25, rule 9 of the High Court Rules, 1988.

I shall quote **Order 25, rule 9,** which provides;

> *"If no step has been taken in any cause or matter for six months then any party on application or the court of its own motion may list the cause or matter for the parties to show cause why it should not be struck out for want of prosecution or as an abuse of process of the court.*

Upon hearing the application the court may either dismiss the cause or matter on such terms as maybe just or deal with the application as if it were a summons for directions".

(18) Order 25, rule 9 expressly gives power to the court on its own motion to list any cause or matter, where no step has been taken for at least six (06) months.

(19) The Court is allowed to strike out an action on the failure of taking of steps for six (06) months on two grounds. The first ground is for **want of prosecution** and the second is an **abuse of process of the Court.**

(20) The principles for striking out for **want of prosecution (first ground)** are well settled. Lord "Diplock" in **"Birkett v James[7]"** succinctly stated the principles at page 318 as follows:

"The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as it is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."

(21) The test in **"Brikett vs James"** *(supra)* has two limbs. The first limb is **"intentional and contumelious default".** The second limb is **"inexcusable or inordinate delay and prejudice."**

(22) In **Pratap v Christian Mission Fellowship[8], and Abdul Kadeer Kuddus Hussein v Pacific Forum Line[9],** the Court of Appeal discussed the principles expounded in **Brikett v James** (supra).

The Fiji Court of Appeal in **"Pratap v Christian Mission Fellowship"** (supra) held;

*"The correct approach to be taken by the Courts in Fiji to an application to strike out proceedings for want of prosecution has been considered by this Court on several occasions. Most recently, in **Abdul Kadeer Kuddus Hussein v Pacific Forum Line –ABU0024/2000 – (FCA B/V/ 03/382)** the court, readopted the principles expounded in*

[7] (1987), AC 297,
[8] (2006) FJCA 41
[9] ABU 0024/2000

Birkett v James [1978] A.C. 297; [1977] 2 All ER 801 *and explained that:*

The power should be exercised only where the court is satisfied either (i) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (ii) (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers, and (b) that such delay would give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party."

(23) The question that arises for consideration is what constitutes **"intentional and contumelious default"** (First Limb). The term **"Contumely"** is defined as follows by the Court of Appeal in **Chandar Deo v Ramendra Sharma and Anor**[10],

"1. Insolent reproach or abuse, insulting or contemptuous language or treatment; despite; scornful rudeness; now esp. such as tends to dishonor or humiliate.

2. Disgrace; reproach."

(24) In **Culbert v Stephen Wetwell Co. Ltd**[11], Lord Justice Parker succinctly stated,

"There is however, in my view another aspect of this matter. An action may also be struck out for contumelious conduct, or abuse of the process of the Court or because a fair trial in action is no longer possible. Conduct is in the ordinary way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the court. In my view however a series of separate inordinate and inexcusable delays in complete disregard of the Rules of the Court and with full awareness of the consequences can also properly be regarded as contumelious conduct or, if not that, to an abuse of the process of the court. Both this and the question of fair trial are matters in which the court itself is concerned and do not depend on the defendant raising the question of prejudice."

(25) **Lord Justice Nourse in Choraria [Girdharimal] v Sethia (Nirmarl Kumar)**[12] said;

"*However great does not amount to an abuse of process, delay which involves complete, total or wholesale disregard, put it how you will, of*

[10] Civil Appeal No. ABU 0041/2006
[11] (1994) PIQR 5
[12] Supreme Court Case No. 96/1704/B, C.A. 15.1.98

the rules of the court with full awareness of the consequences is capable of amounting to such an abuse, so that, if it is fair to do so, the action will be struck out or dismissed on that ground."

(26) It has been further stated by ***Nourse J:***

> *"That is the principle on which the court must now act. Whether it is identified as being comprehended within the first limb of* ***Birkett v James*** *or as one having an independent existence appears to be a point of no importance. I have already said that it is clear that the relevant ground of decision in* ***Culbert*** *was based on the first limb of* ***Birkett v James****. In other words, it was there effectively held that the plaintiff's conduct had been intentional and contumelious.*
>
> *In my view that conclusion was well justified on the facts of the case, which demonstrated not only the plaintiff's complete disregard of the rules but also his full awareness of the consequences. He had, at the least, been reckless as to the consequences of his conduct and, on general principles that was enough to establish that the defaults had been intentional and contumelious.*

(27) Therefore, the failure to comply with peremptory orders and/or flagrant disregard of the High Court Rules amounts to contumaciousness.

(28) The next question is what constitutes **"inexcusable or inordinate delay and prejudice".**

In **Owen Clive Potter v Turtle Airways Ltd**[13], the Court of Appeal held,

> *"(Inordinate).....means so long that proper justice may not be able to be done between the parties. When it is analyzed, it seems to mean that the delay has made it more likely than not that the hearing and/or the result will be so unfair vis a vis the Defendant as to indicate that the court was unable to carry out its duty to do justice between the parties."*
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> *And at page 4, their Lordships stated:*
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> *"Inexcusable means that there is some blame, some wrongful conduct, some conduct deserving of opprobrium as well as passage of time. It simply allows the Judge to put into the scales the Plaintiff's conduct or reasons for not proceeding, as well as the lapse of time and the prejudice that would result to him from denying him opportunity from pursuing his action or perhaps any action against the Defendant."*

[13] Civil Appeal No. 49/1992

In **Tabeta v Hetherington**[14] the court observed;

> *"Inordinate delay means a delay which is materially longer than the time which is usually regarded by the courts and the profession as an acceptable period."*

(29) The Court of Appeal, in **"New India Assurance Company Ltd v Rajesh K Singh and Anor**[15], defined the term "prejudice" as follows;

> *"Prejudice can be of two kinds. It can be either specific that is arising from particular event that may or may not occur during the relevant period or general, and prejudice that is implied from the extent of delay."*

(30) Lord "Woolf" in **"Grovit and Others v Doctor and Others**[16] has discussed the principles for striking out for **"Abuse of process" (Second ground in Order 25, rule 9) as follows,**

> *"This conduct on the part of the appellant constituted an abuse of process. The Court exists to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to abuse of process. When this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in **Birkett v James** [1978] A.C.297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings where there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings".*

(31) The Court of Appeal in **Thomas (Fiji) Ltd – v- Frederick Wimheldon Thomas & Anor, Civil Appeal No. ABU 0052/2006** affirmed the principle of **Grovit – v- Doctor** as ground for striking out a claim, in addition to, and independent of principles set out in **Brikett v James** (see paragraph 16 of the judgment). Their Lordship held:-

> *"It may be helpful to add a rider. During the course of his careful and comprehensive ruling the judge placed considerable emphasis on the*

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[14] (1983) The Times, 15-12-1983
[15] Civil Appeal No. ABU 0031/1996
[16] (1997) 01 WLR 640, 1997 (2) ALL ER, 417

*judgment of the House of Lords in **Grovit and Ors v Doctor** [1997] 2 ALL ER 417. That was an important decision and the judge was perfectly right to take it into account. It should however be noted that Felix Grovit's action was struck out not because the tests for striking out established in **Brikett v James** [1972] 2 ALL ER 801; [1978] AC 297 had been satisfied, but because the court found that he had commenced and continued the proceedings without any intention of bringing them to a conclusion. In those circumstances the court was entitled to strike out the action as being an abuse of the process of the Court. The relevance of the delay was the evidence that it furnished of the plaintiff's intention to abuse the process of the Court."*

(32) **It seems to me perfectly plain that under "Grovit and Others v Doctor and Others" *(supra)* there is no need to show prejudice any more for it says that maintaining proceedings without a serious intention to progress them may amount to "abuse of process" which justifies for want of prosecution without having to show prejudice.**

[H] CONSIDERATION AND THE DETERMINATION

Application to strike out the plaintiff's pleadings on the ground that it discloses no reasonable cause of action

(33) As noted above the court's will rarely strike out a proceeding. It is only in exceptional cases where, on the pleaded facts, the plaintiff could not succeed as a matter of law or the cause of action is so clearly untenable that it cannot possibly succeed will the courts act to strike out a claim.

(34) In this regard, I am inclined to be guided by the decision of the New Zealand Court of Appeal in **"Lucas & Sons (Nelson Mail) v O. Brien**[17] as being a convenient summary of the correct approach to the application before the court. It was held;

*"The Court must exercise .....jurisdiction to strike out pleadings sparingly and with great care to ensure that a Plaintiff was not improperly deprived of the opportunity for a trial of his case. **However, that did not mean that the jurisdiction was reserved for the plain and obvious case; it could be exercised even when extensive argument was necessary to demonstrate that the Plaintiff's case was so clearly untenable that it could not possibly succeed."***

(Emphasis added)

(35) Where, a claim to strike out depends upon the decision of one or more difficult points of law, the court should normally refuse to entertain such a claim to strike out. But, if in a

[17] **(1978) 2 N.Z.L.R 289**

particular case the court is satisfied that the decision of the point of law at that stage will either avoid the necessity for trial altogether or render the trial substantially easier and cheaper ; the court can properly determine such difficult point of law on the striking-out application. In considering whether or not to decide the difficult question of law, the court can and should take into account whether the point of law is of such a kind that it can properly be determined on the bare facts pleaded or whether it would not be better determined at the trial in light of the actual facts of the case; **See; *Williams & Humber Ltd v H Trade markers (jersey) Ltd***[18] .

Returning back to the instant case, in my view, the facts pleaded in the Statement of Claim are appropriate to determine a question of law.

(36) A striking-out application proceeds on the assumption that the facts pleaded in the Statement of Claim are true. That is so even although they are not or may not be admitted. However, it is permissible to refer to Affidavit evidence where the evidence is undisputed and is not inconsistent with the pleadings.

Attorney-General v McVeagh[19] The Court said:

> ***The Court is entitled to receive Affidavit evidence on a striking-out application, and will do so in a proper case.*** *It will not attempt to resolve genuinely disputed issues of fact and therefore will generally limit evidence to that which is undisputed. Normally it will not consider evidence inconsistent with the pleading, for a striking-out application is dealt with on the footing that the pleaded facts can be proved; see* ***Electricity Corporation Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641, 645-646, Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries [1993] 2 NZLR 53*** *at pp 62-63, per Cooke P. But there may be a case where an essential factual allegation is so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further.*
>
> (Emphasis added)

(37) One word more, as I indicated earlier, the defendant's application is made under Order 18, Rule 18 of the High Court Rules, 1988 **and under the inherent jurisdiction of the Court.** Therefore, it is permissible to refer to Affidavit evidence.

In **Khan v Begum**[20], Hon. Justice John Connors said;

> *Quite part from the jurisdiction conferred by the Rules to strike out frivolous and vexatious pleadings and action where the cause of*

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[18] (1986) 1 All ER 129 per Lord Templeman and Lord Mackay.
[19] [1995] (1) NZLR 558 at 566.
[20] (2004) FJHC 430

action is not revealed, the court also has a separate inherent jurisdiction, which is, relied on to control proceedings and to prevent an abuse of its process. Under the inherent jurisdiction, the court can, as it can under the provisions of the Rules, stay or dismissed proceedings which are an abuse of process as being frivolous or vexatious or which fail to show a reasonable cause of action.

It is said that the fact the court has this inherent jurisdiction is one of the characteristics which distinguishes the court from the 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 then 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.

(Emphasis added)

Therefore, it is permissible to refer to Affidavit evidence, in addition to the facts pleaded in the Statement of Claim.

(38) The issues for consideration by the Court are the same whether pursuant to the Rules or in reliance of the inherent jurisdiction. They might summarise as to whether there is a reasonable cause of action.

(39) **Plaintiff must plead a reasonable cause of action**

In relation to the ground of "no reasonable cause of action", paragraph 18/19//10 of the White Book states –

".... A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v British Medical Association [1970] WLR 688; [1970] 1 All ER 1094, CA."

(40) **What is a "Cause of action"?**

The High Court in **Dean v Shah**[21] defined a cause of action in the following way –

[21] [2012] FJHC 1344

> *"A cause of action is said to be a set of facts that gives rise to an enforceable claim by a Plaintiff. In* ***Read v Brown 22 QBD 128*** *Esther M.R. States that a cause of action comprises every fact which if traversed the Plaintiff must prove in order to obtain Judgement. Lord Diplock in* ***Letang v Cooper (1965) 1 QB 232 at 242-243*** *states that a cause of action:*
>
> *".... Is simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person"*

(41) The High Court in **Dominion Insurance Ltd v Pacific Building Solutions**[22] defined a cause of action to mean –

> *".... Any facts or series of facts which are complete in themselves to found a claim for relief. (Obi Okoye, Essays on Civil Proceedings, page 224 Art 110, cited in* ***Shell Petroleum Development Company Nigeria Ltd & Anr v X.M. Federal Limited & Anr S.C. 95/2003).***"

(42) It is apparent from the authorities that the term "cause of action" means allegations of material facts which, if proved, will provide a complete foundation for a recognised type of claim. It is submitted that there are, therefore, two aspects to consider: **first, does the law recognise the plaintiff's claim as one as an enforceable one, and if so, secondly do the material facts alleged if proved, give rise to a right to a remedy.**

(43) Orders were sought striking out the statement of claim in its entirety on the ground that it "does not establish a reasonable cause of action".

(44) To succeed in an application to strike out, the defendant must establish that;

(A) the plaintiff could not succeed as a matter of law

or

(B) the cause of action is clearly untenable that it cannot possibly succeed.

(45) Counsel for the defendant submitted that the plaintiff's cause of action has no chance of success. She says that the plaintiff's claim for decree of specific performance of the sale and purchase agreement dated 19-07-2011 cannot possibly succeed on the following grounds;

(A) The sale and purchase agreement is illegal because the plaintiff has not

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[22] **[2015] FJHC 633**

obtained the necessary prior written consent of the iTLTB which was necessary by virtue of Section 12 of the Native Land Trust Act.

(B) There is a delay of 5 years and 8 months to file an application for specific performance.

(46) On a perusal of the plaintiff's writ of summons and the statement of claim filed on 16-03-2017, it is quite clear to me that, the plaintiff is seeking amongst other things an order for specific performance of the sale and purchase agreement dated 19-07-2011 or in the alternative judgment in the sum of $58,582.45 i.e., all the payments made pursuant to the contract. I stress the words *"or in the alternative judgment in the sum of $58,582.45"*

The plaintiff claims that she made the following payments pursuant to clause (2) and (3) of the contract;

(a)	*Mortgage repayment to the Fiji Development Bank*	-	*$22,114.00*
(b)	*iTLTB payments*	-	*$ 4,468.45*
(c)	*Advances*	-	*$ 7,000.00*
(d)	*Deposit (towards the purchase price)*	-	*$25,000.00*

(47) I did not hear a word from Counsel for the defendant regarding the plaintiff's alternative claim for the return of all the payments made under the contract. Counsel for the defendant was silent on the plaintiff's alternative claim for the return of $58,582.45, i.e., all the payments made pursuant to the contract. Counsel for the defendant did not address the court on the plaintiff's right to the return of the deposit $25,000.00 and the sum of $33,582.45 (totalling $ 58,582.45) paid to the defendant pursuant to the contract.

(48) The plaintiff in the case before me has paid a sum of FJ$ 58,582.45 to the defendant pursuant to clause (2) and (3) of the contract. It is money paid on a consideration which has wholly failed because the contract which constituted the transaction is void as being illegal from the start. The plaintiff's alternative claim was to recover the money she had paid as money received by the defendant to the use of the plaintiff, being money paid on a consideration which has wholly failed. **There is a total failure of consideration because no lease document was delivered to the plaintiff.** Therefore, the doctrine of 'total failure of consideration' applies. The application of an old established principle of common law does enable a man who has paid money and received nothing for it to recover the money so expended.

(49) **The plaintiff's claim for repayment is not based on the contract which is void as being illegal from the start, but on the fact that the defendant had received the money and has in the events which have supervened (illegality) no right to keep it. The payment was conditional. The deposit money is paid for a consideration which is to be performed after the payment. The condition of retaining money is eventual performance of the consideration.**

(50) **The consideration was not performed (*viz*, no lease document was delivered to the plaintiff) and the consideration totally failed because the contract is void as being illegal from the start. When the condition and consideration fails, the defendant's right to retain the money also simultaneously fails.**

(51) **It is the failure of consideration (*viz*, no lease document was delivered to the plaintiff) and not the illegality of the contract which enables money ($25,000.00) paid as deposit (towards the purchase price of $ 65,000.00) and the sum of $ 33, 582.45 paid pursuant to the contract to be recovered.**

(52) Lord Mansfield rationalized the action for money had and received in ***Moses v Macferlan***[23] as follows:

> *"It lies for money paid by mistake; or **upon a consideration which happens to fail**; or for money got through imposition (express, or implied); or extortion; or oppression; or an undue advantage taken of the Plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word the gist of this kind of action is, that the Defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."*
>
> (Emphasis added)

(53) **The gist of the plaintiff's alternative claim before me is for money had and received. The action for money had and received is an action outside the contract. The action for money had and received is not based on the contract. The action is not dependent on the illegal contract but solely on the unjustifiable detention by the defendant of claimant's money. There is no *turpis causa* in the matter. The restitution is regarded as a separate principle of law independent of contract. Restitution is the response to unjust enrichment, and unjust enrichment is the event which triggers the response. A remedy in unjust enrichment is not claim of damages. Nor is it a contractual remedy.**

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[23] **(1760) 2 Burr 1005, 1 Wrn Bl 219, 12 Digest 539, 4478 at page 1012**

See; (1) ***Restitution, Present and Future, Essays in Honour of Gareth Jones*** (1998), Misnomer, p1, **Professor Birks.**

(2) **Andrew Burrows,** ***The Law of Restitution, 2nd Edition*** (2002)

(3) **Jacques Du Plessis,** ***"Towards a Rational Structure of Liability for Unjust Enrichment: Thoughts from two mixed Jurisdictions"*** 122 South African Law Journal 143.

(4) The work by Sir William Evans entitled " **An Essay on the Action for Money Had and Received**". It was published in 1802 and dedicated to Sir Edward Law (later Lord Ellenborough). It is reprinted in (1998) RLR3. In its opening paragraphs, Sir William Evans identified the subject-matter of his study as "*the action for money had and received, as enforcing an obligation to refund money which ought not to be retained.*" Sir Evans quoted as "proper introduction" to the subject the famous passage from the judgment of Lord Mansfield CJ in **Moses v Macferlan (1760) 2 BUR 1005** (at p 102);

> *"This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies for money which, ex aequo et bono, the Defendant ought to refund; it does not lie for money paid by the Plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play: because in all these cases, the Defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or* ***upon a consideration which happens to fail****; or for money got through imposition, (express or implied) or extortion; or oppression; or an undue advantage taken of the Plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.* ***In one word, the gist of this kind of action is, that the Defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity, to refund the money.****"*
>
> (Emphasis added)

(54) I take comfort in the oft-quoted words of Lord Roche from the decision of '**Fibrosa Spolka Akevina v. Fairbairn Lawson Combe Barbour Ltd**'[24]**;**

> *"It is, I think, a well settled rule of English law that, subject always to special provisions in a contract, payments on account of a purchase price*

[24] **(1943) AC 32**

are recoverable if the consideration for which that price is being paid wholly fails: see: Ockenden v. Henley EB & E 485, 492. Looking at the terms of the contract in the case now under consideration, I cannot doubt that the sum sued for was of this provisional nature. It was part of a lump sum price, and when it was paid it was no more than payment on account of the price. Its payment had advantages for the (defendant company) in affording some security that the (Plaintiff) would implement their contract and take up (the transfer) and pay the balance of the price, and it may be that it had other advantages ..... but if no .....document of title were delivered to (the plaintiff)...(or, as in this case, the contract is declared illegal ab initio) then, in my opinion, the consideration for the price including the payment on account, wholly failed and the payments so made is recoverable.

(55) In the face of the dicta of **Lord Roche in Fibrosa Spolka Akevina v. Fairbairn Lawson Combe Barbour Ltd' (1943) AC 32 and Lord Mansfield CJ in Moses v Macferlan (1760) 2 BUR 1005,** it seems to me that the plaintiff's alternative claim for the return $ 58, 582.45 as money paid upon a consideration which had wholly failed has some chance of success. The law recognize the plaintiff's claim as one as an enforceable one. And if the material facts alleged in the statement of claim are proved, they give rise to right to a remedy. I am satisfied that no rule of law, and no considerations of public policy, compel the Court to dismiss the plaintiff's alternative claim and to do so would be, in my opinion, a manifest injustice.

(56) Accordingly, the application to strike out the plaintiff's pleading for failure to disclose a reasonable cause of action is declined. The defendant also relies on the other two (02) limbs of Orders 18, rule 18 as grounds for the plaintiff's claim to be struck out or dismissed, namely;

(i) It is scandalous, frivolous or vexatious

AND

(ii) It is otherwise an abuse of the process of the Court.

Affidavit is filed by the defendant, in support. The Court however, having found that the plaintiff's alternative claim disclosed a reasonable cause of action, does not deem it necessary to proceed to consider their merits or otherwise.

Application to strike out the plaintiff's case for want of prosecution

(57) In respect of the application to strike out the action for want of prosecution, the defendant asserted that;

- *The plaintiff has done absolutely nothing since after filing of the Summons to enter matter for trial on 3rd November, 2017.*

- *It is clear that the plaintiff has shown no interest in pursuing its claim and has not diligently prosecuted this matter and no attempts whatsoever has been made by the plaintiff to push the matter to trial.*

- *That this action was set down for hearing initially on the 17th and 18th day of July, 2018 but did not proceed due to the plaintiff being sick resulting the trial date being vacated.*

- *The next trial date was the 6th and 7th of December, 2018 but was vacated on this Court's own volition.*

- *The matter was then assigned trial dates on the 22nd and 23rd of May, 2019 but this was vacated due to the plaintiff's counsel being taken ill in the early hours of the 22nd of May, 2019 resulting in the vacation of the trial.*

- *That since the vacation of the hearing date on 22nd May 2019, it is now over six (6) months and the plaintiff has not made any attempt to obtain a hearing date.*

(58) Counsel for the defendant submitted that since the vacation of the trial date on 22-05-2019, it is now over six months and the plaintiff has not taken steps to obtain a trial date.

I cannot accept the defendant's submission that the plaintiff did not take steps to obtain a trial date since the vacation of the trial date on 22-05-2019.

The examination of the record shows that;

- On 17th July, 2018 the matter was for trial however the trial did not proceed as the plaintiff was ill. Matter was then adjourned to 6th and 7th of December, 2018 for trial.

- Prior to 6th and 7th December 2018 trial date, a NOAH was issued on 14th August, 2018 which was returnable on 17th August, 2018.

- On 17th August, 2018 the matter was called before the Court and accordingly the trial date for 6th and 7th December 2018 was vacated due to the Attorney General's Conference. The trial was then adjourned to 22nd and 23rd May, 2019.

- On 22nd May 2019, the matter was for trial, however Counsel for the plaintiff was indispose and the trial was vacated. Matter was then adjourned to 29th May 2019 to fix a trial date.

- On 29th May 2019, the defendant informed the Court that they will be filing an application to dissolve the plaintiff's interim injunction. Matter was then adjourned

to 5th June 2019 for the defendant to file the application to dissolve the interim injunction.

- On 5th June, 2019 directions were given for plaintiff to file her affidavit in opposition to the dissolving of the interim injunction and defendant was to reply thereafter. The injunction hearing was fixed for 20th August, 2019.

- On 20th August, 2019 the matter was heard and the ruling was delivered on 30th August, 2019.

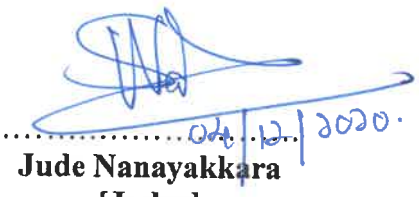
- On 30th August, 2019 the plaintiff's interim injunction was dissolved and **the court held that the plaintiff is free to continue with her action under the Writ,** however there were no further dates given by the Court to fix the substantive matter for trial.

(59) Therefore, it would be wrong for the defendant, on this application, to say that no steps have been taken by the plaintiff for six months. It is wrong to start the calculation of six months from 22-05-2019. The six months start to run from 30-08-2019.

ORDERS

(1) The defendant's applications are declined with costs in cause.

(2) However, I will make an order for a speedy trial.



Jude Nanayakkara
[Judge]

High Court – Lautoka
Friday, 04th December 2020