

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

**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 63 OF 2019**

**BETWEEN** : **ABHINESH SINGH** and **JYOTI SINGH** both of Nacovi, Nadi,  
**PLAINTIFFS**

**AND** : **RAJESH SINGH** of Nacovi, Nadi,.  
**FIRST DEFENDANT**

**AND** : **THE DIRECTOR OF LANDS** of Government Buildings, Suva.  
**FIRST NOMINAL DEFENDANT**

**AND** : **THE REGISTRAR OF TITLES** of Suvavou House, Suva.  
**SECOND NOMINAL DEFENDANT**

**AND** : **THE ATTORNEY GENERALS OFFICE** of Government Buildings,  
Suva.  
**THIRD NOMINAL DEFENDANT**

**Appearances :** **Mr. Krishan Siwan for the plaintiffs**  
**Mr Roopesh Singh for the first defendant**

**Hearing :** **Wednesday, 10<sup>th</sup> June, 2020.**

**Decision :** **Friday, 21<sup>st</sup> August, 2020.**

**D E C I S I O N**

**[A] INTRODUCTION**

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

- (A) The plaintiffs' application filed on 02-03-2020 for interlocutory judgment for specific performance since there being no defence filed. The application is made

by interlocutory summons pursuant to Order 19, rule 3 of the High Court rules 1988 and the inherent jurisdiction of the court.

- (B) The first defendant's application filed on 22-04-2020 pursuant to Order 18, rule 18 and Order 3, rule 4 of the High Court Rules, 1988 seeking dismissal of the plaintiffs' action, alternatively, seeking an extension of time to file the Statement of defence.

(02) I would propose to deal with the striking out application first.

**[B] BACKGROUND**

(01) The Statement of Claim which is as follows sets out sufficiently the facts surrounding this case from the plaintiffs' point of view as well as the prayers sought by the plaintiffs.

1. *The plaintiffs at all material times had an interest and resided in land comprised in Crown Lease No. 844744 on Lot 4 DP 9753 Nacobi (Part of) formerly Lot 71 ND 3904 L/D 4/10/5779 having an area of 1075m<sup>2</sup> (Hereinafter referred to as "the Subject Property")*
2. *The first defendant at all material times is the last registered proprietor of the subject property since 31<sup>st</sup> May, 2017.*
3. *The rest of the defendants in this matter are only the nominal defendants in this matter.*
4. *The plaintiffs had been residing in the subject property over 16 years after the first defendant entered into a Sales and Purchase Agreement dated 10<sup>th</sup> January, 2003. (Hereinafter referred to as "the Initial Agreement")*
5. *The Initial Agreement was with one Rodney Eichenberger. (Hereinafter referred to as "the Initial Purchaser")*
6. *That the Initial Purchaser had executed a Power of Attorney No. 57337 registered on the 14<sup>th</sup> January, 2016 in favour of the plaintiffs to deal with the subject property in respect of the Initial Agreement.*
7. *That upon consent of all the parties, a nomination agreement was executed by all the parties dated 13<sup>th</sup> March, 2019 by virtue of which, the plaintiffs were being accepted as the incoming purchaser whereas the initial purchaser exited the initial agreement. (Hereinafter referred to as "the Nomination Agreement")*
8. *That apart from the Agreements referred to hereinabove, the first defendant had also executed the transfer document on the 5<sup>th</sup> day of September, 2018 which was*

*stamped by the Commissioner of Stamp Duties which was being granted consent by the first nominal defendant on the 5<sup>th</sup> day of September, 2018.*

9. *That the consideration sum of the initial agreement was fully paid to the first defendant by virtue of deposit as per clause 5(i) of the initial agreement wherein, \$500.00 as paid to the first defendant on the date of execution of the agreement on the 10<sup>th</sup> day of January, 2003.*
10. *The remainder of the consideration sum was also complied with as duly executed promissory note was executed as follows:*

(a)	Deposit	-	\$ 500.00
(b)	Promissory note dated 08 <sup>th</sup> May, 2003	-	\$5,000.00
(c)	Promissory note dated 20 <sup>th</sup> June, 2003	-	\$6,000.00
(d)	Promissory note dated 01 <sup>st</sup> July, 2003	-	<u>\$6,500.00</u>
TOTAL			<u>\$18,000.00</u>

11. *That in accordance to the agreements, the plaintiffs further paid a sum of \$2,000.00 as the expenses for subdivision of Lot 4 on the 19<sup>th</sup> day of March, 2018 which was duly accepted by the first defendant.*
12. *That after subdivision of the subject property, a new lease was registered on the 31<sup>st</sup> day of May, 2017 as per Annexure AS-02 which shows that in Lot 4, there is an existing house which was built by the plaintiffs in the year 2003.*
13. *That after the New Lease was issued on the first defendants name, the first defendant has failed to attend to lodge capital gains certificate application at the Fiji Revenue and Customs Service and failed to attend to settlement in the matter despite consent being granted by the first nominal defendant and transfer being duly executed by the parties.*
14. *The first defendant was to attend to the following as per the initial agreement as follows:*

PARTICULARS

- (a) *As per Clause 9 of the initial agreement, the first defendant was required, after the grant of consent, to subdivide the property and transfer the subject property in favour of the plaintiffs free of encumbrance and execute and perform all acts, deed and things necessary to vest the said land unto the plaintiffs name.*
- (b) *As per Special Condition in Clause 19 of the initial agreement, the first defendant was required after the grant of consent, to complete the transaction and to complete all documents necessary in the usual conveyancing practice of Solicitors in Fiji.*

15. *The first defendant on the 12<sup>th</sup> October, 2018 through its Solicitors, had issued a Demand Notice to the plaintiff to pay the sum of \$12,000.00 as per the Agreement which the first defendant purportedly state that it has not been paid despite full payments made accordingly.*
16. *The plaintiffs on the 09<sup>th</sup> November, 2018 through its Solicitors, had advised the first defendants' Solicitors denying the allegations of owing money whilst confirming that the same has been paid already.*
17. *The first defendant on the 22<sup>nd</sup> of November, 2018 issued a Notice to Vacate on the grounds that balance payments are due.*
18. *The plaintiff on the 27<sup>th</sup> November, 2018 through its Solicitors had issued a Notice to settle the transaction in 14 days which the first defendant has not attended to date.*
19. *That the first defendant has failed to/neglected to abide by the terms and conditions of the initial agreement by virtue of which, the first defendant is in breach of the agreement.*

#### PARTICULARS

- (a) *The first defendant has failed to attend to lodge the application for Capital Gains Certificate and at the Fiji Revenue and Customs Service despite the consent being granted by the first nominal defendant on the 5<sup>th</sup> September, 2018.*
  - (b) *The first defendant has failed to attend to settlement in the matter despite subdivision being completed in the transaction.*
  - (c) *The first defendant has failed to attend to execute all the relevant and necessary documents in favour of the plaintiffs to ensure that the Initial Agreement and the Nomination Agreement is being complied with.*
  - (d) *The first defendant has failed to attend to settlement despite executing Transfer on the 5<sup>th</sup> September, 2018.*
20. *That due to the first defendants acts/omission and/or failure to attend to the contents as per paragraph 19 hereinabove, the plaintiffs suffer loss and damages.*

#### PARTICULARS

- (a) *Failing to obtain the subject property under their name despite transfer duly executed.*

- (b) *Failing to obtain the subject property under their name despite nomination agreement in place.*
  - (c) *Failing to obtain the subject property under their name despite consent already being granted by the first nominal defendant.*
  - (d) *That the plaintiffs have built a house in 2003 worth approximately 150,000.00 yet not having the property under its name.*
  - (e) *Legal and other expenses of the plaintiffs on following up with the first defendant and/or its Solicitors to settle this transaction.*
21. *That the plaintiffs are seeking Orders for Specific Performance of the Initial and Nomination Agreement.*

(02) The plaintiffs' claim from the defendants;

- (a) *An **INJUNCTION** restraining the defendants whether by themselves or by their servants and or agents or by whosoever from selling, partitioning, disposing, assigning, mortgaging, charging or in any way dealing with all that piece and parcel of land comprised in Crown Lease No. 844744 on Lot 4 DP 9753 Nacobi (Part of) formerly Lot 71 ND 3904 L/D 4/10/5779 containing an area of 1075m<sup>2</sup> situated at Nacovi, Nadi until final determination of proceedings herein.*
- (b) *An **INJUNCTION** restraining the defendants whether by themselves, their agents, servants or otherwise howsoever from interfering with the plaintiff, its agent's and caretaker's right of use and enjoyment of the plaintiff's portion of all that part and parcel of land comprised in Crown Lease No. 844744 on Lot 4 DP9753 Nacobi (part of) formerly Lot 71 ND 3904 L/D /10/5779 containing an area of 1075m<sup>2</sup> situated at Nacovi, Nadi until final determination of proceedings herein.*
- (c) *An **ORDER** for Specific Performance against the first defendant requiring the first defendant to convey the land comprised in Crown Lease No. 844844 on Lot 4 DP 9753 Nacobi (part of) formerly Lot 71 ND 3904 L/D 4/10/5779 containing an area of 1075m<sup>2</sup> situated at Nacovi, Nadi upon which is constructed the dwelling house of the plaintiffs by:*
  - (i) *Preparing and lodging an application for Capital Gains Certificate over the instrument of transfer with Fiji Revenue and Customs Services in within 14 days from the date of the Order of the Honourable Court.*
  - (ii) *Take all steps necessary to transfer Crown Lease No. 844744 on Lot 4 DP 9753 Nacobi (part of) formerly Lot 71 ND 3904 L/D/ 4/10/5779*

*containing an area of 1075m2 situated at Nacovi, Nadi in within 14 days from the date of the Order of the honourable court.*

(iii) *Attend to the Settlement of Sale and Purchase Agreement dated 10<sup>th</sup> January, 2003 and Nomination Agreement dated 13<sup>th</sup> March, 2019 forthwith.*

(iv) *In the event the first defendant does not comply with the Orders (i), (ii) and (iii) hereinabove, the Deputy Registrar of the High Court do execute all the necessary and relevant documents and such papers in favour of the plaintiffs on behalf of the first defendant in 14 days' time thereof.*

(d) *General damages.*

(e) *Costs of the action on a Solicitor/Client indemnity basis.*

(f) *Interest on costs.*

(g) *Such further and other relief and or remedy that this honourable court deems just and expedient.*

#### [C] **THE LAW**

(1) Against this 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.

(2) 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.*

- (3) 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).”*

- (4) In the case of Electricity Corporation Ltd v Geotherm Energy Ltd<sup>1</sup> 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 could not possibly succeed and the Court would approach the*

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<sup>1</sup> [1992] 2 NZLR 641,

*application, assuming that all the allegations in the statement of claim were factually correct”*

- (5) In the case of **National MBF Finance (Fiji) Ltd v Buli**<sup>2</sup> 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”.*

- (6) In **Tawake v Barton Ltd**<sup>3</sup>; **HBC 231 of 2008**<sup>4</sup>, 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.”*

- (7) His Lordship Mr Justice Kirby in **Len Lindon –v- The Commonwealth of Australia**<sup>5</sup> 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*

<sup>2</sup> [2000] FJCA 28; ABU0057U.98S (6 JULY 2000),

<sup>3</sup> [2010] FJHC 14

<sup>4</sup> (28 January 2010)

<sup>5</sup> (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.*

(8) In **Paulo Malo Radrodro v Sione Hatu Tiakia & others**<sup>6</sup>, 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.*
- b) *Frivolous and vexatious is said to mean cases which are*

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<sup>6</sup> HBS 204 of 2005

*obviously frivolous or vexatious or obviously unsustainable – Lindley LJ 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 Mah 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 Q.B 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 LJ 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”*

(9) In Halsbury’s Laws of England<sup>7</sup>, 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 vexatious 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*

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<sup>7</sup> Vol 37, page 322

*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.”*

- (10) The phrase “**abuse of process**” is summarised in **Walton v Gardiner**<sup>8</sup> 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.”*

- (11) In **Stephenson –v- Garret**<sup>9</sup> it was held:

*“It is an abuse of process of law for a suitor to litigate again over an identical question which has already been decided against him even though the matter is not strictly res judicata.”*

#### **[D] ANALYSIS AND DETERMINATION**

- (1) Let me now turn to the application bearing in my mind the above mentioned legal principles and the factual background uppermost in my mind.
- (2) Before I pass to consideration of submissions, let me record that counsel for the plaintiffs and the first defendant in their written submissions have done a fairly exhaustive study of judicial decisions and other authorities which they considered to be applicable.

I interpose to mention that I have given my mind to the oral submissions made by counsel, helpful written submissions and the judicial authorities referred to therein.

- (3) The first defendant in this application is relying on **Order 18, Rule 18 of the High Court Rules of Fiji, 1988** and the **inherent jurisdiction of the court**. Order 18, rule 18 states that:

*“18 (1)The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action or anything in any pleading or in the endorsement, on the ground that-*

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<sup>8</sup> (1993) 177 CLR 378

<sup>9</sup> [1898] 1 Q.B. 677

- (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 that the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be..."*

- (4) The first defendant's primary argument runs essentially as follows;
  - (A) The subject matter of the agreement was non-existent in 2003.
  - (B) The land was sold without a proper subdivision.
  - (C) At the time of taking possession of the subject land, there was no consent from the Director of Lands and the land was not subdivided.
  - (D) There was performance of the purported sale and purchase agreement without prior consent of the Director of Lands.
- (5) In reply, Counsel for the plaintiffs submitted;
  - (A) As per clause (9) of the initial agreement, the first defendant was to subdivide the subject property.
  - (B) The plaintiffs obtained the consent of the Director of Lands in 2018.
  - (C) A point of law has to be determined in trial.
  - (D) The plaintiffs have pleaded a reasonable cause of action.
- (6) As noted above, the Courts rarely will 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 where the cause of action is so clearly untenable that it cannot possibly succeed will the courts act to strike out a claim.
- (7) 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"<sup>10</sup> as being a convenient summary of the correct approach to the application before the court. It was held;

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<sup>10</sup> (1978) 2 N.Z.L.R 289

*“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)

- (8) 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 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<sup>11</sup>.

**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.**

- (9) 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<sup>12</sup> 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*

<sup>11</sup> (1986) 1 All ER 129 per Lord Templeman and Lord Mackay.

<sup>12</sup> [1995] (1) NZLR 558 at 566.

*demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further.*

(Emphasis added)

- (10) One word more, as I indicated earlier, the first 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<sup>13</sup>, Hon. Justice John Connors said;

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

- (11) 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.

(12) **Plaintiffs' 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 –

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<sup>13</sup> (2004) FJHC 430

*".... 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.)"*

(13) **What is a "Cause of Action"?**

The High Court in **Dean v Shah**<sup>14</sup> defined a cause of action in the following way –

*"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"*

(14) The High Court in **Dominion Insurance Ltd v Pacific Building Solutions**<sup>15</sup> 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)."*

- (15) 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 Plaintiffs 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.**
- (16) With that in my mind, let me now move to consider the first defendant's application for 'striking-out'.
- (17) On 10-01-2003, the first defendant entered into an agreement for the sale and purchase of the land with one "**Rodney Eichenberger**".
- (18) That by virtue of a Power of Attorney 57337 registered on the 14-01-2016, Rodney Eichenberger of United States of America had granted powers to the plaintiffs to deal with the subject property for the issuance of his lease in his name. (*Annexure AS-4 referred to in the affidavit of Abhinesh Singh sworn on 06.03.2019 filed in support of ex parte notice of motion for injunction. )*

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<sup>14</sup> [2012] FJHC 1344

<sup>15</sup> [2015] FJHC 633



- (19) Rodney Eichenberger was the initial purchaser however, the plaintiffs, the first defendant and Rodney Eichenberger entered into a “Nomination Agreement” wherein, the plaintiffs were nominated as the incoming purchaser and Rodney was nominated as the outgoing purchaser. The same was executed by all the parties including the first defendant. (*Annexure AS-5*)

#### **The subject matter**

- (20) In terms of the sale and purchase agreement dated 10-01-2003, the first defendant is alleged to have sold **1200m<sup>2</sup>** of the land contained in Crown Lease No. 69229 to Rodney Eichenberger of United States of America. (*Annexure AS-3*)
- (21) The vendor, the first defendant is the registered proprietor of all that piece and parcel of land described in the Crown Lease 69229 LD Ref: 4/10/1019, being Lot 71 containing an area of **2.3320 hectares** situated at Nacovi, Nadi.
- (22) In the statement of claim the plaintiffs seek an Order for Specific Performance against the first defendant requiring the first defendant to convey the land comprised in Crown Lease No. 844744 on Lot 4 DP 9753 Nacobi (part of) formerly Lot 71 ND 3904 L/D 4/10/5779 containing an area of 1075m<sup>2</sup> situated at Nacovi, Nadi.
- (23) The property subjected to the plaintiffs’ claim for specific performance, i.e, State Lease No. 844744, Lot 4, DP 9753 Nacobi (part of) **did not exist** at the time the sale and purchase agreement was entered into on 10-01-2003. Accordingly, the sale and purchase agreement executed between Rodney Eichenberger and the first defendant was void for uncertainty of the subject matter. The State Lease No. 84474 was registered on 31-05-2017. It did not exist until 31.05.2017. Besides, the land subjected in the sale and purchase agreement is in extent of **1200m<sup>2</sup>**. The extent of the land in State Lease No. 84474 is **1075m<sup>2</sup>**. The subsequent identification of the land and issuance of the lease cannot be linked to the agreement entered into between Rodney Eichenberger and the first defendant.

#### **The subdivision**

- (24) As stated above, in terms of the sale and purchase agreement dated 10-01-2003, the first defendant is alleged to have sold 1200m<sup>2</sup> of the land contained in Crown Lease No. 69229 to Rodney Eichenberger. This is a portion of a larger land. The larger land is in extent of 2.330 hectares.
- (25) Admittedly, the land is subjected to the provisions in the Subdivision of Lands Act, [Cap 140]. In terms of the provisions in the Subdivision of Lands Act, prior approval of the Director of Town and Country Planning is necessary to effect a transfer of a subdivided portion of a larger land. By virtue of Section 4 of the Subdivision of Lands Act, no subdivision may take place without the prior approval of the Director of Town and Country Planning. The subdivision of the property comprised in Crown Lease No-69229 could not be made without such prior consent. It does not come within any of the

exceptions. As such the written agreement, since it included such a term, was made in contravention of the Act, and was illegal. Application must be made in writing to the Director first, by person seeking to subdivide the land.

- (26) There had been a written agreement to sell a lot to Rodney Eichenberger in extent of 1200m<sup>2</sup> out of a larger land contained in Crown Lease No. 69229. The agreement could have no legal effect without the prior consent of the Director of Lands to such subdivision. There was no prior consent. The agreement has been performed. The plaintiffs took possession of the land and erected a dwelling-house on the land. There was full payment of the purchase price.
- (27) Section 3 is the interpretation Section where the word “subdivide” is interpreted in the Subdivision of Lands Act [Cap 140].

In that Section it is stated;

*“subdivide” means dividing a parcel of land for sale, conveyance, transfer, lease, sublease, mortgage, agreement, partition or other dealing or by procuring the issue of a certificate of title under the Land Transfer Act in respect of any portion of land, or by parting with the possession of any part thereof or by depositing a plan of subdivision with the Registrar of Titles under the last-mentioned Act; and the corresponding noun shall be construed accordingly.*

Section (4) reads thus;

*Restriction on subdivision of land*

*4. Notwithstanding the provisions of any other law for the time being in force no land to which this Act applies shall be subdivided without the prior approval of the Director to be obtained in the manner hereinafter prescribed:*

*Provided that it shall be lawful to subdivide such land without such approval.*

- (a) *no part of the land is situated in any town or within three miles of the boundaries of a town; and*
- (b) *and is subdivided in such a manner that no lot is less than five acres in area.*

- (28) It is clear that the requirements to have the approval of the Director in terms of Section (4) of the subdivision of the Land Act had not been obtained prior to the contract for the sale of land being entered into. The formation of the contract is illegal.
- (29) Therefore, the agreement dated 10-01-2003 was unenforceable due to the breach of statutory requirement. That means that the plaintiffs are never in a position to enforce the contract dated 10-01-2003. They never had a registrable interest. It also means that there

is no basis for the grant of specific performance or the award of damages. **The plaintiffs cannot sue upon the contract dated 10-01-2003 because it is void and unenforceable.**

- (30) In those circumstances, it is difficult to see how there could be a enforceable claim by the plaintiffs.

**The consent of the Director of Lands**

- (31) By an agreement dated 10-01-2003, the first defendant agreed to sell to the plaintiffs who agreed to purchase 1200m<sup>2</sup> of the land contained in the Crown Lease No. 69229. The extent of the land described in the Crown Lease No. 69229 is 2.3320 hectares.
- (32) In paragraph eight (08) of the Statement of Claim, the plaintiffs plead

*That apart from the Agreements referred to hereinabove, the first defendant had also executed the transfer document on the 5<sup>th</sup> day of September, 2018 which was stamped by the Commissioner of Stamp Duties which was being granted consent by the first nominal defendant on the 5<sup>th</sup> day of September, 2018.*

- (33) In paragraphs (9) and (10) of the Statement of Claim, the plaintiffs plead;

*(9) That the consideration sum of the initial agreement was fully paid to the first defendant by virtue of deposit as per clause (5) (i) of the initial agreement wherein, \$500.00 as paid to the first defendant on the date of execution of the agreement on the 10<sup>th</sup> day of January, 2003.*

*(10) The remainder of the consideration sum was also complied with as duly executed promissory note was executed as follows:*

<i>(a)</i>	<i>Deposit</i>	<i>-</i>	<i>\$500.00</i>
<i>(b)</i>	<i>Promissory Note dated 08<sup>th</sup> May, 2003 -</i>		<i>\$5,000.00</i>
<i>(c)</i>	<i>Promissory Note dated 20<sup>th</sup> June, 2003 -</i>		<i>\$6,000.00</i>
<i>(d)</i>	<i>Promissory Note dated 01<sup>st</sup> July, 2003 -</i>		<i>\$6,500.00</i>
	<b><i>TOTAL</i></b>		<b><i><u>\$18,000.00</u></i></b>

- (34) In paragraph (12) of the Statement of Claim, the plaintiffs plead;

*That after subdivision of the subject property, a new lease was registered on the 21<sup>st</sup> day of May, 2017 as per annexure AS-02 which shows that in Lot 4, there is an existing house which was built by the plaintiffs in the year 2003.*

- (35) It is critical to note, paragraph (4) of the Statement of Claim. The plaintiffs plead;

*The plaintiffs had been residing in the subject property over 16 years after the first defendant entered into a Sale and Purchase Agreement dated 10<sup>th</sup> January, 2003.*

- (36) Section 13 (1) of the **State Lands Act, 1945** in so far as is relevant to this case, provides:

*Whenever in any lease under this Act there has been inserted the following clause: “This lease is a protected lease under the provisions of the Crown Lands Act. (Hereinafter called Protected Lease) – It shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease or any part thereof whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had obtained ....*

*“Any sale, transfer, sublease, assignment, mortgage, or other alienation or dealing effected without such consent shall be null and void”.*

- (37) In my judgment, the making of payments pursuant to the sale and purchase agreement and the acceptance of those payments by the first defendant constituted a dealing with the land by sale and required prior written consent of the Director of Lands.
- (38) The consent that is required under Section 13 (1) of the State Lands Act is a condition precedent to performance of the agreement rather than a condition precedent to formation of the agreement.
- (39) In my judgment, the payment by installments of a sum of \$18,000.00 without written consent of the Director of Lands having been first obtained constitutes sufficient performance of the agreement without prior written consent to render the agreement dated 10-01-2003 unlawful and void *ab initio*. The plaintiffs have been making payments pursuant to the agreement and an equitable interest had passed to the plaintiffs.
- (40) The fact that an agreement comes into existence prior to consent being obtained is not of itself a breach of Section 13(1) of the State Lands Act. It is not the agreement itself that requires prior written consent of the Director of Lands, but rather the performance of the agreement that requires prior written consent.
- (41) The plaintiffs took possession of the subject property in 2003 pursuant to the sale and purchase agreement. The plaintiffs have erected a dwelling-house on the land before the Director of Lands written consent has been obtained. No prior written consent of the Director of Lands as head lessor was obtained for the entry into possession and erection of the dwelling-house on the land. This clearly shows that the plaintiffs had assumed ‘proprietary privileges’ and had exercised the ‘powers of a purchaser’ without obtaining the prior written consent of the Director of Lands. Under the State Lands act, the required consent is a condition precedent to formation and performance of a contract to purchase. What that means is that the Director of Lands consent must be obtained before either party has incurred any obligations or acquired rights of any description in respect of a sale and purchase of land. **As far as I can gather**, the plaintiffs’ occupation on the land since 2003 is illegal and it continued to be illegal although the Director of Lands has granted its consent on the **transfer documents** on the 05.09.2018, about 15 years after

the date of execution of the agreement. Another factor that must be considered is that the Director of Lands has not consented to the instrument between the parties to date. **It appears to me that** that as regards the agreement of 10-01-2003, the plaintiff's occupation was illegal, and that state of affairs was not terminated. To be more precise, once the plaintiff's occupation was illegal it continued to be illegal although the transfer documents were consented to by the Director of Lands about 15 years after the date of execution of the agreement.

- (42) Generally, a purchaser of land who purchases land under a binding and unconditional contract of sale, has an equitable interest in the land. The extent of that equitable interest is commensurate with the purchaser's ability to obtain specific performance. Of course, a legal estate will later vest in the purchaser upon payment in full of the purchase money and execution of a formal transfer document. The view is that a purchaser's equitable interest is commensurate only with his ability to obtain specific performance.
- (43) In **Legione v Hateley**<sup>16</sup> for example, Mason and Dean JJ in their joint judgment sated at page 446;

*"In this Court it has been said that the purchaser's equitable interest under a contract of sale is commensurate only with her ability to obtain specific performance (Brown v Heffer [1967] HCA 40; (1967) 116 CLR 344, at p.349).*

- (44) In **Stern v McArthur**<sup>17</sup>, Deane and Dawson JJ in their joint judgment stated at para 2:

*"As Dean J pointed out in Kern Corporation v Walter Reid Trading Pty Ltd [1987] HCA 20; (1987) 163 CLR 164, at p.191, it is not really possible with accuracy to go further than to say that the purchaser acquires an equitable interest in the land sold and to that extent the beneficial interest of the vendor in the land is diminished. The extent of the purchaser's interest is to be measured by the protection which equity will afford to the purchaser. That is really what is meant when it is said that the purchaser's interest exists only so long as the contract is specifically enforceable by him. Specific performance in this context does not mean specific performance in the strict or technical sense of requiring the contract to be performed in accordance with its terms. Rather it encompasses all of those remedies available to the purchaser in equity to protect the interest which he has acquired under the contract. In appropriate cases it will include other remedies, such as relief by way of injunction, as well as specific performance in the strict sense."*

- (45) Similarly, the New Zealand position is explained in **Sale of Land (2000) 2<sup>nd</sup> ed by DW McMorland** at page 299:

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<sup>16</sup> [1983] HCA 11; (1993) 152 CLR 406

<sup>17</sup> [1998] HCA 51; (1988) 165 CLR 489

*“In broad terms, the passing of the equitable estate to the purchaser depends upon the availability, at least at a theoretical level and without consideration of any defence which might be available to the vendor, of specific performance, or possibly of an injunction. There must be a contract, either directly for the sale of the land or for an option to purchase, such that the purchaser can take all of the necessary steps to obtain specific performance of that contract, the vendor cannot legally prevent those steps being taken, and the circumstances are such that, if the purchaser did take those steps, specific performance would not be unavailable for jurisdictional as opposed to discretionary reasons. It is the ultimate ability in equity to compel the vendor to transfer the estate or interest which gives the purchaser the equitable estate or interest.”*

- (46) Of course, as I have said, specific performance can only be obtained if a vendor and a purchaser have entered into a **binding contract**. Usually, one of the many factors to be considered is whether damages are inadequate in lieu of specific performance. If not, then the court may order specific performance. Part-performance is usually also relevant.
- (47) In Re CM Group Pty Ltd’s Caveat<sup>18</sup>, it was held that property did not pass in equity until the required municipal council approval was obtained. In Brown v Heffer<sup>19</sup>, an interest in equity did not pass because the required consent of the Minister had not been obtained.
- (48) As far as I can gather, the plaintiffs’ entry upon the land in 2003 and the erection of the dwelling house on the land is illegal because they had not obtained the necessary prior written consent of the Director of Lands which was necessary by virtue of Section 13 of the State Lands Act. It seems to me that the giving of the consent to the transfer document about 15 years after the date of execution of the agreement does not have a kind of **retroactive effect** making the instrument effective as from its date. The contract did not create an equitable interest in the land.
- (49) The full payment of the purchase price, the entry into possession and erecting a dwelling house on the land before the Director of Lands written consent has been obtained constitutes performance of the agreement for sale and did involve ‘alienating or dealing with the land’.
- (50) In this case the consent of the Director had been obtained but not at the time the sale and purchase agreement was executed but on the 05-09-2018 which is approximately 15 years from the date when the agreement was executed by the parties.

If a transaction involving ‘alienating or dealing with the land’ under the State Lands Act does not have the Director of Lands consent as required by Section 13 of the State Lands Act at the time the transaction is entered into, the transaction is null and void and cannot be restored to validity by obtaining of consent ‘*ex post facto*’.

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<sup>18</sup> [1986] 1 Qd R 381

<sup>19</sup> (1967) 110 CLR 344

- (51) The transaction was prohibited by statute. As a result, the agreement which constitutes the transaction was illegal. As I said, the full payment of the purchase price, the entry into possession and erecting a dwelling house on the land before the Director of Lands written consent has been obtained, constitutes performance of the agreement for sale and did involve ‘alienating or dealing with the land’. The plaintiffs seek to enforce a contract which is expressly forbidden by Section 13 of the State Lands Act. Since the contract is prohibited by statute, the court is bound not to render assistance in enforcing an illegal contract. The Court cannot render assistance in enforcing an illegal contract. Of course, agreements between parties are not treated as scraps of paper, and relief is given when they are breached. Equally, it is not the function of the court to be a rubber stamp. It is important to remember that a contract might in certain circumstances bind the parties, but it cannot bind the court.

Scrutton, L.J., clearly indicated in Mahmoud v. Ispahani<sup>20</sup>, what the position is in relation to an illegal contract when his Lordship said:-

*“I think the law is laid down in **Cape v Rowlands** (2 M. & W. 157), where Parke, B., delivering the judgment of the Court said: ‘It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition: Lord Holt, **Bartlett v Vinor** (Carth. 252). And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract? If the contract is prohibited by statute, the Court is bound not to render assistance in enforcing an illegal contract....*  
.....

*And in my view, if an act is prohibited by statute for the public benefit, the Court must enforce the prohibition, even though the person breaking the law relies upon his own illegality. I say nothing about the cases to which Parke B., refer in **Cope v. Rowlands** (2 M. & W. 157, 158), where the statutory prohibition is for the benefit of a particular person, and not for the benefit of the public. It may be that different rules apply to such a case, but in this case it is clear that the prohibition is for the benefit of the public.”*

- (52) Thus, the plaintiffs claim is unenforceable. The object of Order 18, rule 18 of the High Court Rules, 1988 is to ensure that defendant shall not be troubled by claims against them which are bound to fail having regard to the uncontested facts. Therefore, the plaintiffs

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<sup>20</sup> (1921) 2 K.B. at p.728

claim will be struck out as being frivolous, vexatious and an abuse of process of the Court.

I am comforted by the rule of law enunciated in the English Court of Appeal case of **Riches v. Director of Public Prosecutions**<sup>21</sup>.

Notwithstanding the very high standard and precautionary test that the authorities imposed on applications such as this and in applying these authorities to the facts and submissions in this matter, I am of the opinion that the application should be granted.

The plaintiffs claim is not recognised by law and therefore unenforceable. The plaintiffs claim is bound to fail having regard to the uncontested facts. I am of the opinion that the proceedings are vexatious and are an abuse of process of the Court.

- (53) For the reasons which I have endeavoured to explain, I venture to say beyond peradventure that the plaintiffs' statement of claim does not raise debatable questions of facts. Therefore, it is competent for the Court to dismiss the action on the ground that it discloses no reasonable cause of action against the defendant. Fundamentally, courts are required to determine cases on merits rather than dismissing them summarily on procedural grounds.

It is a fundamental principle of any civilized legal system that all parties in a case are entitled to the opportunity to have their case dealt with at a hearing at which they or their representative are present and heard.

At this juncture, I bear in mind the "caution approach" that the court is required to exercise when considering an application of this type.

I remind myself of the principles stated clearly in the following judicial decisions.

**In Dev. v. Victorian Railways Commissioners**<sup>22</sup>; Dixon J said:

*"A case must be very clear indeed to justify the summary intervention of the court ... once it appears that there is a real question to be determined whether of fact or of law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process."*

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<sup>21</sup> [1973] 2 All ER 935

<sup>22</sup> (1949) HCA 1; (1949) 78CLR 62, 91



In Agar v. Hyde<sup>23</sup> the High Court of Australia observed that:

*"It is of course well accepted that a court should not decide the issues raised in those proceedings in a summary way except in the clearest of cases. Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way and after taking advantage of the usual interlocutory processes."*

I am of course mindful that a case must be very clear indeed to justify summary intervention of the Court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional circumstances.

I have no doubt personally and I am clearly of the opinion that this is a case for the summary intervention of the Court. The decision of the point of law at this stage will certainly avoid the necessity for trial against the defendant. This action against the defendant must be dismissed.

In the circumstances, I certainly agree with the sentiments which are expressed inferentially in the defendant's submissions. I must confess that I am not in the least impressed by the proposition advanced by the plaintiffs.

- (54) To sum up, in view of the foregoing analysis, I venture to say beyond peradventure that the plaintiffs had failed to disclose a reasonable cause of action against the defendant and in the result the plaintiffs' case is clearly untenable.

I could see nothing to change my opinion even on the basis of exhaustive work contained in "Commentary on Litigation" by "Cokes", and "A practical approach to Civil Procedure", by "Stuart Sime", Thirteenth Edition.

Accordingly, there is no alternate but to dismiss the plaintiffs' action and the Statement of Claim to protect the defendant from being further troubled, to save the plaintiffs' 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 merits.

I cannot see any other just way to finish the matter than to follow the law.

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<sup>23</sup> (2000) 201 CLR 552 at 575

**[E]     ORDERS**

1.     The plaintiffs' writ of summons and statement of claim filed against the defendant is struck out.
2.     There will be no order as to costs.



**At Lautoka  
Friday, 21<sup>st</sup> August, 2020**

  
.....21/08/2020  
**Jude Nanayakkara**  
**Judge**